The American Bar Association
Standing Committee on Governmental Affairs
and the
ABA Center for Continuing Legal Education
Present

Understanding the Real Life Issues
Underlying Tort Reform Proposals
CDs, DVDs, ONLINE COURSES, PODCASTS, and COURSE MATERIALS
ABA-CLE self-study products are offered in a variety of formats. To take advantage of our full range of options, visit the ABA Web Store at www.abacelcatalog.org.

The materials contained herein represent the opinions of the authors and editors and should not be construed to be the action of the American Bar Association Governmental Affairs Office or the Center for Continuing Legal Education unless adopted pursuant to the bylaws of the Association.

Nothing contained in this book is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This book and any forms and agreements herein are intended for educational and informational purposes only.

© 2011 American Bar Association. All rights reserved.

This publication accompanies the audio program entitled “Understanding the Real Life Issues Underlying Tort Reform Proposals” broadcast on May 16, 2011 (Event code: CET1RTR).
Table of Contents

1. Do Caps on Contingent Fees in Medical Malpractice Cases Work? (Presentation Slides)  
   Steven B. Lesser

2. Caps on Damages (Presentation Slides)

3. Preemption (Presentation Slides)

4. H.R. 5 Presentation Outline

5. ABA Tort Trial & Insurance Practice Section Report on Contingent Fees in Medical Malpractice Litigation (September 20, 2004)

6. Statute of Limitations and Damages  
   Standing Committee on Medical Professional Liability—Resolution Adopted by the House of Delegates of the American Bar Association, February 1978


9. Damages, Guidelines and Health Courts  
   Recommendation—Adopted by the ABA House of Delegates, February 13, 2006

10. State Preemption  
    Recommendation—Adopted by the ABA House of Delegates, August 9-10, 2010

11. Guidelines  
    Recommendation—ABA Standing Committee on Medical Professional Liability, Health Law Section, Torts Trial and Insurance Practice Section Report to the House of Delegates, February 2011

12. Contingent Fees (Presentation Slides)  
    Keith A. Hebeisen and Steven B. Lesser

13. Joint and Several Liability (Presentation Slides)  
    Keith A. Hebeisen
Discuss This Course Online

Visit [http://www.americanbar.org/groups/cle/course_content/cle_discussion_boards.html](http://www.americanbar.org/groups/cle/course_content/cle_discussion_boards.html) to access the discussion board for this program.

Discussion boards are organized by the date of the original program, which you can locate on the preceding page of these materials.
Do Caps On Contingent Fees In Medical Malpractice Cases Work?

Steven B. Lesser Esq.
Becker & Poliakoff, P.A.
Ft. Lauderdale, Florida
slesser@becker-poliakoff.com

Task Force On The Contingent Fee

American Bar Association
Tort Trial & Insurance Practice Section

Objective:
Whether excessive medical malpractice litigation exists as well as excessive contingent fees

Report Issued on September 20, 2004
Task Force Members

- Steven B. Lesser (Chair), Shareholder, Becker & Poliakoff, P.A., Ft. Lauderdale, Fla
- Edward R. Blumberg, President, Deutsch & Blumberg, P.A., Miami, Fla
- Janice P. Brown, Principal, Brown Law Group, San Diego, Ca
- Thomas A. Demetrio, Shareholder, Corboy & Demetrio, P.C., Chicago, Il
- Lewis H. Goldfarb, Lew Goldfarb Associates, LLC, New York, NY
- Kim D. Hogrefe, Attorney Managing Director, Chubb & Son, Warren, NJ
- Perry K. Huntington, Attorney and Senior Vice President, AIG Technical Services, Inc., New York, NY
- Robert Johnson, Senior Counsel, McDonald’s Corporation, Chicago, Illinois
- Daniel M. Klein, LLP, Atlanta, Ga
- Marc S. Moller, Partner, Kreindler & Kreindler, LLP, New York, NY
- Professor Charles M. Silver, University of Texas Law School, Austin, Tx
- Professor Patrick E. Longan, Mercer Law School, Macon, Ga (Reporter)
- Professor D. Christopher Wells, Mercer Law School, Macon, Ga (Reporter)

Presentations

- Academics
- Legislators
- General Counsel of Medical Associations
- Medical Malpractice Plaintiff and Defense Lawyers
HR 5 Raises Similar Issues

- Section 5
- Limits contingent fees based on recovery
- Court is permitted to “authorize or approve a fee that is less than the maximum permitted under this section”.

Conclusion of the Task Force

- Limitations on Contingent Fees Is a Bad Idea
The Real Story

- Effort by medical profession to limit liability
- Facts show that there has never been a malpractice explosion
- Study shows 2% of people injured by medical error ever file a claim
- Why the hype????

Stirring Up Mischief

- Sandra Mortham, Executive VP and CEO of the Florida Medical Association quoted as saying:
  - “The contingent fees limited by a proposed Florida Constitutional Amendment should be enough for the greedy Trial Lawyers”
- Before a Legislative Panel: “I do not feel that I have the information to say whether or not there are frivolous lawsuits in the state of Florida”
Urban Legend Debunked!

- No Data To Support that Pursuing Non-Meritorious Cases = Big Pay-Off To Lawyers
- Financial Investment Alone Is A Deterrent
- Medical Malpractice Case Worth $250K “Untakeable”

Limiting Contingent Fees Has No Impact On Health Care of Patients

- Premium Increases Not Due to Lawsuits
- Improved Medical Technology
- Higher Patient Expectations
- Longer Human Lifespan
- Congressional Budget Office Study Shows Caps Do Little to Reduce Defensive Medicine
- More Tests=Increased Risk To Patients
What About the Rights of Patients?

- Right to Counsel of Choice
- Caps Squeeze Lawyers Out of Malpractice Litigation
- Leaves Victims Without Representation
- Florida Supreme Court Justice Pariente: “the ceiling on contingency fee percentages would discourage the participation of knowledgeable and experienced counsel”

The One Way Street- Unfair

- No Limit on Defense Lawyer Fees
- No Limit on Number of Lawyers to Defend
- “Not allowed to use a lawyer whose market valuation is equivalent to those who might represent the defense.”
HR5 “Look Back” Is Risky Business

- Power to adjust fee based upon “justice and equity” is too broad.
- Risk Undertaken at the Outset of the Case May Change (Some better or worse)
- Changes in the Law
- Further Disincentive for Counsel To Take a Malpractice Case-Money at Risk!

Conclusion/Reality Check

- No Data to Justify Caps
- Ethical Requirements Deter Legal System Abuse
- Financial Risks Serve To Deter Non-Meritorious Cases
- Constitutional Right to Counsel and Access to the Courts Must Prevail Over Other Concerns
Caps on Damages

H.R. 5, § 4: limits noneconomic damages to $250,000 to “regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same injury.”

Noneconomic Damages

women, children, the elderly, and minorities
Cap on Punitive Damages

H.R. 5, §6(b)(2): punitive damages to “$250,000 or as much as two times the amount of economic damages awarded, whichever is greater.”

U.S. Supreme Court: an appropriate punitive damage award reflects “the enormity of the offense.”


American Bar Association Policies

• “No dollar limit on recoverable damages should be enacted which can operate to deny a plaintiff in a medical malpractice action full compensation.” (Adopted Feb. 1978).
• “The regulation of medical professional liability is a matter for state consideration; and federal involvement in that area is inappropriate.” (Adopted Feb. 1986).
American Bar Association Policies

• “There should be no ceiling on pain and suffering damages, but instead trial and appellate courts should make greater use of the power of remittitur or additur with reference to verdicts which are either so excessive or inadequate as to be clearly disproportionate to community expectations by setting aside such verdicts unless the affected parties agree to the modification.” (Feb. 1987)

ABA Position in Court

• More than three decades of collected research demonstrates that damage caps “discourage lawyers from taking meritorious cases where economic damages are low, and thus, undermine the ability of a significant number of injured persons to seek redress in the courts.”
Direct State Constitutional Restrictions on Damage Caps

- Five states prohibit limits on compensation in civil cases: Arizona, Arkansas, Kentucky, Pennsylvania, and Wyoming.
- Two states prohibit limits in civil cases arising from wrongful death: Ohio and Utah

Other State Grounds Invalidating Damage Caps

- Lebron v. Gottlieb Memorial Hospital, 930 N.E.2d 895 (Ill. 2010)
- Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218 (Ga. 2010)
Other State Grounds Invalidating Damage Caps

Ferdon v. Wisconsin
Patients Comp. Fund, 701 N.W.2d 440 (Wis. 2005)

Knowles v.
United States, 544 N.W.2d 183 (S.D. 1996)

Lucas v. United States,
757 S.W.2d 687, 690-92 (Tex. 1988), superceded
by Tex. Const. Art. III, Sec. 66

Federal Constitutional Precedents
Implicated by Damage Caps


“the jury are judges of the damages.”
Preemption

- Occurs when federal law displaces contrary state law and grows out of the operation of the Supremacy Clause.
- Assertion of preemption must be pursuant to an enumerated power or necessary and propert to accomplish that power.

American Bar Association Policies

- “The regulation of medical professional liability is a matter for state consideration; and federal involvement in that area is inappropriate.” (Adopted Feb. 1986).
- The “American Bar Association urges Congress, when making any decision on whether to preempt state tort law, to take into account the historic responsibility States have exercised over the health and safety of their populace and to balance the competing concerns relating to preemption.” (Adopted Aug. 2010).
Preemption Provisions of H.R. 5


If no damage caps exist under state law, they are supplanted by the provisions of H.R. 5. A savings clause permits a state that has a different specific damage limitation number to continue to impose that number, rather than the $250,000 noneconomic damage cap contained in H.R. 5.

Other Preemption Provisions

• Overrides state regulation of contingency fees, periodic payments, and statute of limitations without any savings provision.
• Exempted from preemption are state laws that “impose[ ] greater procedural or substantive protections for health care providers and health care organizations from liability, loss, or damages than those provided by this Act.” Sec. 10(b).
Practical Issues

Three states cap all compensatory damages in medical malpractice suits, not just noneconomic damages:

Practical Issues 2

• Hawaii’s cap covers only “physical pain and suffering”
Practical Issues 3

Statute of limitations. Many states have multiple limitations provisions taking into account whether a plaintiff is under five, under the age of minority, or an adult. Tolling provisions recognize the impossibility of bringing actions within certain time periods, such when in a coma.

Section 3 establishes its own set of limitations periods and exceptions. Some are more generous than some state statutes, and some less. State courts will be challenged to mix and match these different limitations periods, likely having to combine some state limits with the federal limits to arrive at a wholly new set of applicable time periods. H.R. 5’s preemption provision adopts the most restrictive date, state or federal as the law.

Medical Malpractice is a Traditional Area of State Regulation

• “general health care regulation . . . historically has been a matter of local concern.” N.Y. St. Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 661 (1995)
• In the McCarran-Ferguson Act, Congress declared that ‘the continued regulation and taxation by the several States of the business of insurance is in the public interest.” 15 U.S.C. § 1011.
H.R. 5 Preempts State Law More Protective of Patients’ Rights

H.R. 5 exempts from its preemptive effect state law more protective of health care providers, but not state law more protective of patients. Thus, if a state has a patient’s bill of rights that imposes liability for its abridgement, those provisions may be rendered null.

Few states limit damages for nursing home or pharmaceutical companies as H.R. 5 does. Thus, California, held up as the model for the damage cap, would be forced to apply the cap to nursing homes and pharmaceutical cases for the first time, if enacted.
I. Preemption of State Law Generally

Preemption is the legal doctrine whereby federal law displaces contrary state law and grows out of the operation of the Supremacy Clause. U.S. Const. art. VI, cl. 2. Through preemption, “state laws that interfere with, or are contrary to, federal law” are invalid. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985) (internal quotation marks omitted). Claims that a state regulation or action is preempted “simply assert[] that a federal statute has taken away local authority to regulate a certain activity.” *Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006). Preemption exists as a result of three different situations: “by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (internal citations omitted). The Supreme Court has repeated stated that the purpose of Congress is the “ultimate touchstone in every pre-emption case.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). At the same time, there exists a presumption against preemption, meaning that the courts will assume that “that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009).

II. Preemption Provisions of H.R. 5

Section 10 of H.R. 5, though entitled “State Flexibility and Protection of State Rights,” preempts contrary state law. Thus, if no damage caps exist under state law, they are supplanted by the provisions of H.R. 5. A savings clause permits a state that has a different specific damage limitation number to continue to impose that number, rather than the $250,000 noneconomic damage cap contained in H.R. 5. This provision is problematic in a number of states, where compensatory damages are capped in toto, such as Virginia and Indiana, or where the damage cap is limited to “physical pain and suffering,” such as Hawaii. It may force those states to institute new procedures so the jury must specify the amount of the compensatory verdict that is allocated to a new definition of noneconomic damages. Take Indiana as an example. It imposes an overall limitation in medical malpractice cases of $1.25 million. That amount can be made up of any combination of economic and noneconomic damages. If H.R. 5 were enacted, it is unclear how the noneconomic damage cap would fit within Indiana’s existing cap. Would it allocate only $250,000 of the $1.25 million to noneconomic damages, creating an economic damage cap of $1 million, or would the $250,000 limit be separate from and in addition to the preexisting cap? The interplay of state with federal law is particularly problematic when H.R. 5 supposedly declares that economic damages should be fully compensated and “unlimited.”

The preemption provision also overrides state regulation of contingency fees, periodic payments, and statute of limitations without any savings provision.
Exempted from preemption, however, are state laws that “imposes greater procedural or substantive protections for health care providers and health care organizations from liability, loss, or damages than those provided by this Act.” Sec. 10(b).

III. Policy Issues

A. Medical Malpractice is a Traditional Area of State Regulation

The tort law involving medical malpractice is a traditional area of state regulation. Moreover, medical malpractice liability insurance is both priced and regulated on a statewide basis. H.R. 5 changes state law regarding medical malpractice without creating a federal cause of action. While the Supremacy Clause requires state courts to entertain federal causes of action and enforce the federal rights of individuals, it does not authorize Congress to override state law with its own substantive or procedural rules of decision in cases based solely on state law. The cap forces a state court judge to change a verdict, not because the evidence does not support the verdict, but because Congress has imposed an inflexible and arbitrary limit on the verdict. Yet, the Supreme Court has made clear that a state court is not “to be treated as a Federal court deriving its authority not from the State creating it, but from the United States.” Howlett v. Rose, 496 U.S. 356, 370 n.17 (1990).

B. H.R. 5 Preempts State Law More Protective of Patients’ Rights

Although H.R. 5 exempts from its preemptive effect state law more protective of health care providers, it does not include the same solicitousness for state law more protective of patients. Few states limit damages for nursing home or pharmaceutical companies, yet H.R. 5 imposes caps on those damages. Thus, California, which is held up by the Judiciary Committee’s report as a model for the damage cap, would be forced to apply the cap to nursing homes and pharmaceutical cases for the first time, if enacted.

Fitting H.R. 5’s statute of limitations provisions into existing state law will challenge the courts. Many states have multiple limitations provisions that take into account a plaintiff’s status as being under the age of five, under the age of minority, and as an adult. Tolling provisions recognize the impossibility of bringing actions within certain time periods. Section 3 establishes its own set of limitations periods with exceptions. Some are more generous than some state statutes, and some are less generous. State courts will be challenged to mix and match these different limitations periods, likely having to combine some state limits with the federal limits to arrive at a wholly new set of applicable time periods.
American Bar Association
Tort Trial & Insurance Practice Section

Report on Contingent Fees
In Medical Malpractice Litigation

September 20, 2004

Prepared by the Task Force on Contingent Fees

James K. Carroll
Partner, Fowler, Rodriguez, Chalos, Flint, Gray, McCoy, O'Connor, Sullivan & Carroll, LLP
New Orleans, Louisiana
(Tort Trial & Insurance Practice Section Chair, 2004-05)

Linda A. Klein
Partner, Gambrell & Stolz, LLP
Atlanta, Georgia
(Tort Trial & Insurance Practice Section Chair, 2003-04)

Steven B. Lesser
Shareholder, Becker & Poliakoff, P.A.
Ft. Lauderdale, Florida
(Task Force on Contingent Fees Chair)
Tort Trial & Insurance Practice Section

Task Force on Contingent Fees

Steven B. Lesser (chair), Shareholder, Becker & Poliakoff, P.A., Ft. Lauderdale, Florida
Edward R. Blumberg, President, Deutsch & Blumberg, P.A., Miami, Florida
Janice P. Brown, Principal, Brown Law Group, San Diego, California
Michael V. Ciresi, Partner and Chairman, Kaplan, Miller & Ciresi, LLP, Minneapolis, Minnesota
Thomas A. Demetrio, Shareholder, Corboy & Demetrio, P.C., Chicago, Illinois
Lewis H. Goldfarb, Partner, Hogan & Hartson, LLP, New York, New York
Kim D. Hogrefe, Attorney and Managing Director, Chubb & Son, Warren, New Jersey
Michael S. Hull, General Counsel, Texas Alliance for Patient Access; Partner, Hull Henricks & MacRae, LLP, Austin, Texas
Perry K. Huntington, Attorney and Senior Vice President, AIG Technical Services, Inc., New York, New York
Robert Johnson, Senior Counsel, McDonald’s Corporation, Chicago, Illinois
Daniel M. Klein, Partner, Buckley & Klein, LLP. Atlanta, Georgia
Marc S. Moller, Partner, Kreindler & Kreindler, LLP, New York, New York
Professor Charles M. Silver, University of Texas Law School, Austin, Texas
Professor Patrick E. Longan, Mercer Law School, Macon, Georgia (reporter)
Professor D. Christopher Wells, Mercer Law School, Macon, Georgia (reporter)

* Task Force members Messrs. Ciresi, Goldfarb and Hull did not participate in drafting or voting on this Report. All other voting members actively participated in drafting and voted to approve this Report, except Mr. Hogrefe, who abstained from voting.
Table of Contents

Summary ............................................................................. 3

I. Introduction ............................................................................. 5

II. Conclusions ............................................................................ 11

III. Background and Scope of Task Force Study ...................... 12
    A. Creation of Task Force ..................................................... 12
    B. Meetings ........................................................................ 13
    C. The Tort Context: Medical Malpractice ....................... 15
    D. Seeking the Facts ......................................................... 16

IV. Physician Claims of Fact .................................... 17
    A. “Contingent fees have caused an explosion in medical malpractice
       litigation, and much of it is frivolous.” ................................. 17
    B. “Even meritorious medical malpractice lawsuits often involve
       unreasonable fees paid to the lawyers.” ............................... 21
       1. The Question of Risk .................................................. 22
       2. The Question of Fixed Contingency Rates ....................... 25
    C. “Lawyer contingency fees are a significant factor causing a rise in
       medical liability premiums.” ............................................. 28

V. Plaintiffs’ Lawyer Claims of Fact: ............................ 30
    A. “Lawyers bring only meritorious actions because prosecuting medical
       malpractice actions is very costly, and lawyers who prosecute non-
       meritorious or frivolous cases will soon bankrupt themselves. . . . . 30
    B. “Limits on contingent fees would significantly impede access to
       justice for medical malpractice victims.” .............................. 32
    C. “Malpractice litigation benefits society by tending to improve the
       quality of health care.” .................................................. 34
VI. Proposals Regarding Attorneys’ Contingent Fees .................. 37

A. Medical Association Proposals ...................................... 37
   1. The Florida Proposal .............................................. 37
   2. The Common Good or “Early Offer” Proposal ............... 40

B. Task Force Proposals .................................................. 43

   1. Bar-supported Public Information Services ................. 43
   2. Standardized Disclosure ......................................... 43
   3. Improved enforcement of procedural and ethical rules .... 44
   4. Alternative Dispute Resolution .................................. 44

Endnotes ................................................................. 46
Summary

Attorney contingent fees have become the focus of efforts by medical professionals and allied organizations to address medical liability problems. These efforts, mounted in legislatures, courtrooms and the media, seek to impose limits on the fees lawyers may charge clients in successful medical malpractice claims and actions. They are premised on the beliefs that there is excessive medical malpractice litigation (and resulting awards and contingent fees) and that such limits will ultimately reduce the costs of medical practice.

In fact, medical malpractice litigation is relatively uncommon, when compared to other tort litigation or to the potential number of medical liability claims. Only about one out of fifty valid medical malpractice events in this country is ever made the subject of a claim for injury. As a practical matter, physicians are seldom exposed to claims arising from professional negligence.

Medical malpractice victims have a right in an equitable system of justice to seek redress for their injuries, and a reasonable contingent fee is essential to preserve that right. Because medical malpractice claims are highly complex and expensive to pursue, competent counsel often decline to accept legitimate cases because of the high cost of pursuing a claim. Against this backdrop, limiting contingent fees by the formulae recently proposed in Florida and elsewhere will make it more difficult for medical malpractice victims to obtain justice in the legal system. Consequently, limiting contingent fees will serve only to reduce further the incidence of meritorious medical malpractice claims, to the benefit of those who actually commit medical malpractice.

In any case, lawyers' fees must be reasonable for clients. Although contingent fees rates in medical malpractice actions are not fixed, they often cluster around traditional percentages. To prevent unreasonable fee agreements, clients would be well served by additional protective measures, some of which are already in practice in states such as Florida, to educate them about fee and dispute resolution alternatives and to foster bargaining symmetry. Furthermore, courts and
bar associations should increase their fees vigilance and step up enforcement of the procedural and ethical rules designed to protect clients and the judicial system from professional defalcations.
I. Introduction

Attorney contingent fees have again become the focus of efforts by medical professionals and allied organizations to reduce the costs of medical liability. These efforts, mounted in legislatures, courtrooms and the media, and orchestrated principally by state medical associations, seek to impose limits on the fees lawyers may charge clients in successful medical malpractice claims and actions. They are premised on the belief that such limits will ultimately reduce costs associated with medical negligence claims. Although honorable, well-meaning persons are heard on both sides of the issue, they disagree vociferously on many of the assertions, assumptions and conclusions that fuel these efforts:

Depending on one’s perspective, there is too much medical malpractice litigation or not enough; contingent fee arrangements can create an obscene form of bounty hunting or are absolutely necessary to ensure justice; physicians should not be second-guessed by those too dumb to avoid jury service or the jury system works just fine; and legislators who enact tort reform are protecting fat-cat doctors or have prudently restrained a tort system run amok. 2

In response to earlier cries for relief from claims, lawsuits, judgments and insurance premiums, some states have already imposed limitations on contingent fees as one component of more general tort reform efforts. Most of those have adopted so-called “sliding scales” of limitations on contingent fees. Such limits apply the largest contingency percentage to an initial portion of a recovery and increasingly smaller percentages to additional increments of recovery. 3 A few jurisdictions establish a maximum percentage applicable to the entire recovery. 4

Although mindful of the broader issues that constitute tort system critiques and reform proposals, and cognizant of the relationship between fees and general tort litigation practice, the Task Force seeks in this report to segregate and address only issues pertinent to contingent fees in medical malpractice actions. Nonetheless, because contingent fees dwell within the tort litigation system, it is necessary to examine their use within the context of that system.

It must be emphasized at the outset that this contingent fee debate concerns only the reasonable terms of contingent fee agreements and their possible influence on medical liability cases. No one, not even the most ardent proponents of contingent fee limitations, seriously challenges the fundamental social utility of contingent fees in our legal system: “Contingency fees are vital to the vindication of important legal rights in that they enable accident victims and other injured
persons to have access to both legal counsel and the courts which would not be otherwise feasible." Others agree:

[The contingent fee] allows victims who cannot afford hourly rates to still hire top quality counsel. It should also encourage lawyers to take on risky cases that otherwise would not be worth pursuing. Finally, in a typical case it places attorneys incentives in line with their clients[ incentives] the more recovery for the client, the greater the fee.

The principal proponent of the “early offer” proposal also agrees:

Common Good does support attorney contingent fees generally. They serve an important function of providing lawyers to injured persons who would otherwise not be able to afford one. Nonetheless, contingent fees do raise some troubling issues, including their reasonableness . . . In general contingent fees have no problems . . . In fact, I prefer contingent fees myself. I like to bet on myself in any case. The core question is how to regulate contingent fees so as to protect clients and not to cast the profession into disrepute. I can think of no category of case other than . . . domestic relations and criminal defense in which their use is inappropriate.

There is also general recognition that contingent fees, though usually associated with plaintiffs' tort litigation, are enjoying increasingly broad application. Contingent fees are appropriate in a variety of cases and not limited to use by plaintiffs' lawyers:

Contingent fees are no longer, if ever they were, limited to personal injury cases. Nor are contingent fees limited to suits involving tortious conduct.

Contingent fees are now commonly offered to plaintiff-clients in collections, civil rights, securities and anti-trust class actions, real estate tax appeals and even patent litigation. Nor is this compensation arrangement limited to plaintiffs. In this Committee's recent Formal Opinion 93-373, the Committee considered the ethical issues raised by the increasingly employed so-called "reverse contingent fees," in which defendants hire lawyers who will be compensated by an agreed upon percentage of the amount the client saves. The Committee concluded that as long as the fee arrangement reached between the lawyer and client realistically estimates the exposure of the defendant client, such a fee is consistent with the Model Rules.
Moreover, contingent fees are not limited to litigation practice. Fees in the mergers and acquisitions arena are often either partially or totally dependent on the consummation of a takeover or successful resistance of such a takeover. Additionally, fees on public offerings are often tied to whether the stocks or bonds come to market and to the amount generated in the offering. Banks are also hiring lawyers to handle loan transactions in which the fee for the bank's lawyers is dependent in whole or part on the consummation of the loan.

ABA Formal Opinion 94-389 (December 5, 1994).

The debate is, then, only about whether contingent fee limitations or alternative lawyer compensation regimes might better serve the public than the current regimes. That debate and this report do not challenge the application of contingent fees generally or address the many other kinds of legal representation in which contingent fees are often charged. As noted, this report focuses only on the use of contingent fees in the context of medical malpractice claims.

On one side of the issue, physicians and their professional organizations characterize the contingent fee as a loose cannon and lawyers who employ them as often no better than mercenary brigands. They charge that contingent fee arrangements induce lawyers and their clients to bring unnecessary, often frivolous lawsuits, and that these lawsuits have caused medical liability insurance costs to spiral out of control, imposing unbearable burdens on health care systems. Physicians seek to tether the cannon tightly to a regulatory deck, even though, or perhaps because, the proposed contingent fee limitations would likely leave the patients they injure without effective recourse or remedy. Their animus to contingent fees arises in part from differences in professional cultures. Physicians prohibit contingent fees in medical practice, equating their use to an unethical guarantee of success. And because medical costs and physicians fees are usually paid by health insurance, managed care programs, state and federal tax-supported programs, or the patients themselves, physicians have no need for or appreciation of contingent fees. Their patients have access to medical care, and they are typically assured of payment no matter the outcome.

Medical professionals acknowledge the existence of medical error, but they assert that the justice system distorts medical practice by encouraging unnecessary medical procedures and forcing physicians to practice so-called "defensive medicine." Further, they see little reason for medically injured patients to share large percentages of settlements and judgments with lawyers. As noted, they complain that unnecessary procedures and excessive judgments and fees have caused medical insurance costs to rise astronomically, along with the premiums
that support those payouts. They believe that growing insurance costs have, in turn, caused physicians to leave practice and communities to go without important medical specialists.

Leading the defense of contingent fees are plaintiffs’ trial lawyers, who deal personally with victims of medical malpractice. They argue that injured patients who seek redress for their injuries must pay for justice themselves because no insurance plan pays the necessary medical experts, investigation costs and lawyer required to prosecute a medical malpractice action. Plaintiffs’ lawyers claim that these costs as extraordinary, that claims take years to resolve, that no interest is recovered on the cost outlay and that the typical malpractice victim lacks adequate resources to fund them. For these reasons, they assert, the contingent fee regime is essential. Further, they emphasize that lawyers are paid a percentage of the recovery only after they assist their clients to recover a settlement or judgment; they receive nothing if they fail.

Because they risk their own time, effort, fees and reputation on their ability to judge to good case from the bad, contingent fee lawyers ask that society trust their expertise and good faith to sift the meritorious from the non-meritorious claims, to bring only good claims. They claim that the costs of medical malpractice claims investigation and litigation are so high that bringing weak or frivolous cases would entail certain bankruptcy. Further, they claim that because expenses are so high, they preclude bringing cases of manifest malpractice for which the injuries are not grievous; many victims are therefore left without effective redress for their injuries.

Plaintiffs’ lawyers also argue that negligent physicians should bear the same responsibility as anyone else in American society for negligently causing injury — that physicians are not a special class deserving of immunity. Lawyers assert that without the contingent fee, malpractice victims would have nowhere to turn for relief, that because our legal system provides no alternative avenue for remedy for a medical malpractice victim, the contingent fee in medical malpractice cases is all that stands between a negligent physician and effective immunity from legal liability.

Plaintiffs’ lawyers make a further claim, that the medical profession’s recent efforts to limit contingent fees would have virtually the same effect as prohibiting them. The special requirements of bringing and proving a medical malpractice case entail such costs that lawyers could not afford to bring such actions under proposed fee limits. To limit fees in the ways proposed, they say,
would also bar the courthouse door and provide effective immunity for negligent medical professionals.

Finally, lawyers argue that limiting contingent fees will not reduce medical liability insurance costs. Plaintiffs' lawyers believe that those costs have risen for other reasons and the real motivation for physicians in seeking new contingency fee limits is simply to reduce their exposure to tort liability.

Unfortunately, much of this battle has been fought through the media, with both sides hoping to enlist public support for their cause, casting the public as the real victims of the other profession's predations. The media for their part tend to sensationalize the issues, often parroting propaganda rather than providing systematic assessment of the various opinions and factual claims. To further polarize the professions and make suing for peace unlikely, matters have increasingly become grist for state and national politics. Among the first casualties of the debate has been truth. To paraphrase one scholar, who is both a physician and a lawyer, the underlying misunderstanding between the two professions, and indeed in the public mind, is fueled by "anecdote and urban legend."  

Editorial writers, policy analysts, and legislators typically [pick one side of the debate], pair it with a few highly salient (and invariably unrepresentative) anecdotes, and then offer their preferred policy initiative as the solution du jour. Lobbyists for physicians and trial lawyers will then descend on the legislature and vigorously advocate their respective positions.

The Task Force believes that both the medical profession and the plaintiffs' lawyers describe legitimate grievances and make justifiable claims to improved systems, both legal and medical. But because the debates rely heavily on misinformation and misunderstanding, the proposed solutions especially the limitations on contingent fees would only sacrifice justice at the altar of expedience.

This report examines contingent fees relating to medical malpractice relying upon verifiable fact as opposed to anecdote and exaggeration. By doing so, the objective of this Task Force is to improve the parties' and the public's understanding of the nexus, if any, between contingent fees and any perceived national crisis created by medical malpractice litigation. Toward this end, the Task Force also proposes solutions designed to keep the focus on the public whom both sides serve, namely patients and clients. Although wholesale, radical changes
might be warranted to address medical liability and health industry problems, this Task Force was not charged with the task of recommending improvements in the health industry. Our charge is to study the interaction of contingent fees and medical malpractice litigation and determine whether changes in current rules and practices might serve the interests of the public and of individual victims of medical malpractice.
II. Conclusions

A. Limitations on fees by the formulae recently proposed in Florida and elsewhere risk compromising access to justice by medical malpractice victims. Without the prospect of reasonable fees, competent counsel would be unwilling to assume the high cost burden associated with typically complex medical malpractice actions.

B. The right of people who have suffered injury as a result of medical malpractice to seek redress for their injuries in the courts must be ensured. A fair and reasonable contingent fee is essential to preserve that right.

C. A small percentage of true medical malpractice events in the United States ever becomes the subject of a claim. Practically speaking, most physicians have only marginal exposure to medical malpractice claims.

D. Limiting fees by the formulae recently proposed in Florida and elsewhere by physicians' associations would reduce the incidence of meritorious medical malpractice actions and further reduce legal exposure for those who commit medical malpractice.

E. Contingent fees rates in medical malpractice actions are not fixed but often cluster around traditional percentages. To prevent unreasonable fee agreements and to foster more efficient claim resolution, clients would be well served by additional measures, some of which are already in practice in states such as Florida, to educate and protect them and to promote bargaining symmetry in lawyer-client fee agreements.
III. Background and Scope of Task Force Study

A. Creation of Task Force

Recognizing that the debate over contingent fees in medical malpractice litigation was heating up once again, in fall 2003, Linda Klein, then Chair of the Tort Trial & Insurance Practice Section (TIPS) of the American Bar Association, empanelled the Contingent Fee Task Force (the Task Force or CFTF) to study the impact of contingent fees on the American judicial system generally. Providing impetus for the study was the current effort of various state medical associations and of Common Good, among other organizations, to introduce by legislation or by ethical rule severe limits on contingent fees.

TIPS appointed to the Task Force attorneys engaged in private practice, corporate in-house counsel, insurance company representatives and academics. To maintain objectivity, TIPS appointed as Task Force chair Steven B. Lesser, a construction lawyer with no significant ties to contingent fee practice and as reporters Chris Wells and Patrick Longan of the Mercer Law School faculty, neither of whom had taken prior positions on contingent fee practice.

TIPS asked the Task Force to meet with interested persons and organizations and from those meetings to make findings of fact about contingent fee practice. It requested the Task Force to publish its findings in a form that could serve as a resource for all persons and organizations that might consider proposals to regulate contingent fees. If appropriate, the Task Force would also suggest improvements in contingent fee practice.

Early on, the Task Force concluded that contingent fee practice issues including the nature of fee agreements, the existence of identifiable or controlling clients and the judicial supervision of fee awards vary from practice area to practice area. Accordingly, the Task Force focused its efforts on three differing areas: medical malpractice, securities class actions, and general tort litigation, including employment and housing discrimination and mass torts. This report addresses only the first of those areas, the effect of contingent fee practices on medical malpractice actions. The Task Force welcomes comments on its findings and conclusions and invites readers to address comments to reporters Chris Wells and Patrick Longan.
B. Meetings

To date the Task Force has met formally six times. At five of these meetings one or more invited guests 18 made presentations and answered members questions on the subject of contingent fees in medical malpractice actions. The Task Force maintained minutes of each meeting. 19

1. October 2003, Savannah, Georgia (Organizational meeting):

   **Overview of Utah Effort to Limit Contingent Fees**
   By Robert Peck, Center for Constitutional Litigation

2. December 2003, Columbia University, New York City:

   **Contingent Fees in Securities Class Actions**
   Professors Jill Fisch (Fordham Law School)
   Professor John Coffee (Columbia Law School)
   John J. Degnan (Vice Chairman and Chief Administrative Officer of The Chubb Corporation)

   **Contingent Fees in Medical Malpractice Actions**
   Professor William Sage (Columbia Law School)
   Professor David Hyman (University of Maryland College of Law)
3. February 6, 2004, San Antonio, Texas:

**Texas Contingent Fee Rule History**
Hon. Nathan Hecht (Associate Justice, Texas Supreme Court)

**Contingent Fee Empirical Studies**
Professor Bert Kritzer (University of Wisconsin)

**State Experiences with Medical Malpractice Litigation and Reform Efforts**
Linda McMullen (General Counsel, Mississippi Medical Association)
Michael Hull (General Counsel, Texas Alliance for Patient Access (TAPA))

4. April 30, 2004, Napa Valley, California

**The Common Good Proposal to Limit Contingent Fees**
Philip Howard (founder, Common Good)

5. June 23, 2004, Boca Raton, Florida:

**The Florida Experience with Medical Malpractice Litigation Reform**
Walter G. "Skip" Campbell, Jr. (Florida State Senator)
Jeffrey D. Kottkamp (Florida State Representative)
Arthur M. Simon (former Florida State Representative and former counsel to health care industry)

In addition to the information provided by the invited guests, the Task Force has studied other reports, law review articles, proposed legislation and other materials in preparation for this report.
C. The Tort Context: Medical Malpractice

According to expert presentations to the Task Force and independent studies, one of every 25 or 30 persons who enter a hospital will fall victim to medical error that causes injury or death. In percentage terms, between 3 and 4 percent of hospitalizations result in a significant "adverse event," a health care injury that is not an ordinary concomitant of treatment. At least one-quarter of these hospital deaths and injuries are preventable, as the product of negligence by physicians or other health care workers. In short, about 1% of hospitalizations result in an occurrence of actual medical malpractice. Reducing this percentage could save lives and prevent injury for many thousands.

Depending on how conservative a definition of "negligence" is adopted, somewhere between 100,000 to 200,000 persons die each year as a result of these iatrogenic (induced by physician or hospital) causes. That puts medical mistakes somewhere between the third and the eighth leading cause of death in the U.S., ahead of car accidents, breast cancer and AIDS, a total that equates to about two 747 crashes every three days. Medical mistakes also seriously injure another 1,000,000 people each year. These and other data suggest that there are real problems in the quality of health care delivery. According to experts, the problems can affect everyone, everywhere, poor, middle-class and wealthy alike. Even physicians and their families are not immune. One study found that over a third of physicians report errors in their or their families' health care, half of them described as serious errors.

Medical experts informed the Task Force that other evidence of this health care quality deficit is also found in assessments of actual treatment procedures against Medicare procedural standards. For example, in treating six common medical conditions, there is general agreement that 22 clinical processes should always be followed. Experts cited a comprehensive study that found that of that number an average of only 73% (range: 11-100%) were followed. Furthermore, there is no correlation between the quality of health care and the amount of money spent. Regions that spend more money or have more medical disciplines do not receive better health care.
D. Seeking the Facts

Those wishing to impose new limitations on contingent fees premise their efforts on several key assertions of fact. Similarly, defenders of the contingent fee status quo offer up their own facts in rebuttal. The Task Force has identified the principal assertions by both sides and has tested them for accuracy. Not all relate directly to contingent fees, but all share responsibility for describing a context – real or imagined – in which contingent fees, and any proposal to limit them, must be assessed.

Physician Claims of Fact:

- Contingent fees have caused an explosion in medical malpractice litigation, and much of it is frivolous.
- Even meritorious lawsuits involve excessive, ethically “unreasonable” fees paid to lawyers.
- Lawyer contingency fees are a significant factor causing a rise in medical liability premiums.

Plaintiffs’ Lawyer Claims of Fact:

- Lawyers bring only meritorious actions because prosecuting medical malpractice actions is very costly, and lawyers who prosecute non-meritorious or frivolous cases will soon bankrupt themselves.
- Limits on contingent fees would significantly impede access to justice for medical malpractice victims.
- Malpractice litigation benefits society by bringing medical error to light and by providing a deterrent effect.

Let’s examine each of these claims in turn.
IV. Physician Claims of Fact

A. "Contingent fees have caused an explosion in medical malpractice litigation, and much of it is frivolous."

Given the high number of iatrogenic injuries and the potential number of resulting lawsuits, one would predict that medical malpractice lawsuits are common. This would be especially true if injured patients and lawyers were as aggressive as they are often portrayed. But although the medical profession and much of the public apparently holds this truth as self-evident, the Task Force found little objective support for it. Studies show that there are relatively few medical malpractice lawsuits, whether compared to other types of litigation or compared to the potential medical malpractice claims.

Nor are lawsuits in general on the rise. To the contrary, recent national studies of state court data show that tort filings are declining. These conclusions find support also in individual state studies. In a study of the Georgia civil court systems, the authors noted that there have not been any increases in the number of tort filings between 1994 and 1997. When adjusted for population changes, the rate of tort filings actually declined slightly.

[T]here is no evidence that there was or is an explosion in the number of tort claims filed in Georgia courts. The combination of data pertaining to plaintiffs' success rates, median compensatory damage awards, and frequency and size of punitive damage awards belie the popular image of a system beset with runaway juries.

The same study also found that of all lawsuits filed in Georgia, less than seven percent were personal injury actions, of that small number only about five percent were medical malpractice actions. Putting those two numbers together reveals the medical malpractice litigation comprised less that 0.4% of all civil lawsuits in Georgia during the mid-90s. In a Texas study, data from the decade earlier supported similar conclusions, that there was no empirical support for claims of increased lawsuit frequency or exaggerated verdicts.

Such findings are confirmed even by Common Good:

We [Common Good] do not believe in the 'litigation explosion.' My focus is on people's predictability instead of people's perception of liability.
The facts are that more often than not doctors prevail in litigation, even ones who have done something wrong. That is inconsistent with people's perceptions. 33

Somewhere between one in eight and one in ten detected cases of hospital injuries results in a malpractice claim. 34 More remarkable, according to the presentations of experts before the Task Force, is that only about one in fifty actual malpractice incidents results in a claim. 35 In percentage terms, victims bring claims in only about two percent of the cases where medical malpractice occurs. 36 The remaining 49 of the 50 cases of actual medical malpractice either go undetected by the victim or, even if detected, do not result in a legal claim. Detected cases that do not result in legal claims are often those where the potential damages do not justify the high cost of investigation and litigation. 37

It is also widely believed that plaintiffs nearly always win, and that they win through large negotiated settlements or by huge judgments. Claims of high average awards – $1 million or more – tend to focus on large initial jury verdicts and ignore unsuccessful actions, bench verdicts, pre-trial settlements and other resolutions. 38 It is also difficult to determine whether appeals of high verdicts result in reductions or lead to settlements at lower figures.

Information provided the Task Force indicated that in medical malpractice actions taken to trial defendants usually win. This is confirmed by federal government statistics that indicate medical malpractice defendants win about three out of four cases at trial. 39 That compares to data which show that typical tort defendants prevail about half the time. The disparity does not necessarily suggest that the unsuccessful cases should not have been brought, but rather that juries are often reluctant to find against defendant physicians or in scientifically complicated cases, as are most medical malpractice cases. 40 But even if all the lost cases were the result of attorney or expert misjudgment about the existence of actual negligence, according to the Harvard study, "for every doctor or hospital against whom an invalid claim is filed, there are seven valid claims that go unfiled." 41

Nor does this mean that doctors have a high chance of being sued in the absence of negligence. The vast majority of medical events do not involve negligence. Therefore, one could expect that even small degrees of error in judgment about the existence of negligence would produce numbers of false positives greater than true positives. 42

The public often has the impression that anyone, assisted by any lawyer, can bring a medical malpractice claim without substantial foundation – a frivolous
lawsuit. That fact is that all jurisdictions impose requirements on the lawyer to investigate and verify a factual basis for a lawsuit. Some states, such as Florida, go further and impose special requirements for filing a medical malpractice action, such as having another physician swear under oath that the facts demonstrate malpractice. 43 Those procedural safeguards, combined with the practical fact that medical malpractice cases are costly to investigate and difficult to win, ensure that few if any frivolous cases are brought: “Florida’s procedural requirements, added in 1985, 1986, 1988 and 2003 virtually preclude frivolous suits.” 44

According to some analysts, the assertion that contingent fees spawn vexing and frivolous lawsuits not only lacks empirical foundation but has the logic exactly wrong: Contingent fees work in just the opposite way. They shift the risk of failure to the attorney from the client (who would bear the risk of failure if an hourly fee were charged.) Contingent fee attorneys, better positioned through experience and education to assess cases on their merits, will serve both the clients’ and their own interests to reject weak and frivolous cases. 45 Economic modeling has shown that hourly fees are more likely to engender frivolous suits. 46

Legislative hearings in Florida failed to document the existence of “frivolous lawsuits” in medical malpractice:

[Senator Campbell’s] Senate committee took a great deal of testimony from all interested parties. He noted that the catchphrase such as "frivolous lawsuits" were common as a justification for pursuing legislative action. To determine the extent of the problem, his committee put witnesses under oath. After that, no one-physician or other person—could cite a single example of a frivolous lawsuit. In fact, one [witness] admitted that "there are no frivolous lawsuits in medical malpractice." 47

The Florida Medical Association, sponsor of the proposed Florida constitutional amendment to restrict contingent fees in medical malpractice cases was unable to document the existence of frivolous lawsuits:

When questions about frivolous lawsuits arose, Sandra Mortham, the chief executive of the Florida Medical Association, told the [legislative] panel, "I don't feel that I have the information to say whether or not there are frivolous lawsuits in the state of Florida.” 48

The Task Force concludes that the claims that describe an “explosion of medical malpractice litigation” – frivolous or not – fail for want of empirical or logical support. 49 Having found no evidence of a medical malpractice litigation
explosion, the Task Force concludes that contingent fees have not caused such an explosion. Logic suggests that contingent fees actually prevent frivolous suits. Further, there is no reason to believe that keeping the current contingent fee regime will cause a future litigation explosion or impetus for bringing frivolous suits.

That is not to say, however, that limitations on contingent fees would have no effect on the number or quality of medical malpractice actions that are filed. As shown in the discussion below, imposing such limitations will likely preclude many medical malpractice actions from being filed because the prospective damages and resulting attorneys' fees will not justify the expected time and expense associated with the litigation. Only those most grievously injured by the grossest medical negligence would likely be able to bring an effective action.
B. "Even meritorious medical malpractice lawsuits often involve unreasonable fees paid to the lawyers."

Everyone who reads the local newspaper probably remembers a story about a lawyer whose fees were reported as high, perhaps even greater than the amount of the recovery left to a client. Publicized examples seem to occur most often in class actions and mass torts, but the occasional example occurs also in medical malpractice litigation. Some of that reportage is likely accurate. Nonetheless, some fails to examine the history of such cases through post trial or post-settlement to determine how much the lawyers really charged. In any event, such reportage raises in the minds of many whether the lawyers have charged an unreasonable fee.

State rules of professional ethics prohibit lawyers from charging "unreasonable" fees by imposing "appropriate and reasonable" criteria:

In addition to the requirement that a fee be appropriate, Model Rule [of Professional Conduct] 1.5 requires that the fee, whether based on an hourly rate, a contingent percentage or some other basis, "shall be reasonable." Similarly, DR 2-106 prohibits a "clearly excessive fee," which is in turn defined as a "fee ... in excess of a reasonable fee."

In deciding whether a contingent fee arrangement is reasonable the lawyer must consider the following factors set forth in Model Rule 1.5(a):

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client;
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services.

We stress that the lawyer should take all these factors into account in evaluating every case. See ABA Formal Opinion 329 (1972).52

Although contingent fees, as all lawyer fees, must be appropriate and reasonable, and studies show that most contingent fees approximate hourly fees. 53 Nonetheless, critics assert, lawyers often ignore the requirements.54 They level two related charges: (1) that lawyers often charge a fee in excess of the level of
risk inherent in the case; and (2) that lawyers fix contingent fee percentages (by custom if not collusion) and do not allow clients to bargain about fees or to explore fee alternatives.

1. The Question of Risk

The core rationale for contingent fees is the risk borne by lawyers who take cases for which they advance costs and invest their own time and skill. As noted in the Introduction, the current dispute concerns the wisdom of imposing further limitations on how much a lawyer can charge a client on a contingent fee basis. Although the proposed fee limitations vary, and can include a sliding scale formula based upon the amount of recovery, none of these mechanisms addresses the important social utility of contingency fees.

As a justification for imposing low ceilings on contingent fees, proponents of limitations often refer to "riskless" or "low-risk" cases, proposing that such cases compel lawyers to charge reduced contingency percentages to meet the "reasonableness" standard. That argument requires looking carefully at what kinds of risk are inherent in tort suits, specifically medical malpractice actions, and what factors contribute to judgments about the "reasonableness" of contingent fees.

The primary risk inherent in bringing a lawsuit is of course the possibility that the suit will be unsuccessful and that neither the client nor the lawyer will be compensated. In medical malpractice cases, when compared to tort cases in general, this risk is extraordinarily high. As noted, Bureau of Justice statistics show that while plaintiffs prevail in over half of all tort cases, they prevail in only a little over a quarter of medical malpractice actions. According to a recently published Rand study, the percentage is only about 22% in California. In a contingent fee case, a defense verdict means that the plaintiff walks away without a recovery and the plaintiff's lawyer with no fee for professional services, for investigation costs, for experts witness fees, etc. Although the out-of-pocket costs of the action can be charged back to the client, the clients' financial conditions usually preclude that. Indeed, in recognition of this fact, the ethical rules now allow contingent fee agreements to make repayment of expenses also contingent upon the successful outcome of the case.

The net result in such cases for the lawyers is that they are compensated neither for their professional time and services nor for the other costs associated with the action that they incurred on behalf of the client. Because these costs are especially high in a malpractice action, and because the likelihood of prevailing is
especially low, the typical malpractice action will involve a significant level of risk.

To be sure, some plaintiff claims can appear from the outset to be quite likely to prevail, and others less so. Lawyer experience and expertise allow at least gross judgments of this sort and, consequently allow for the possibility of negotiating contingent fee percentages accordingly. Even so, litigation outcomes are never certain, thus there is always the risk of misjudgment.

Other risk factors can transform cases of even “clear” liability into cases of effective non-liability or greatly reduced recovery. Presentations before the Task Force identified at least four: cross-claims or similar “finger-pointing” between multiple defendants, which can delay discovery and settlement; defendants and insurers can become insolvent, which can eliminate the chance of full, or any, recovery; developments in a case, including death of the victim, which can lower predicted damages; other reasons, from uncertainty about applicable law to docket delays to appeals from plaintiffs’ verdicts, where the time value money increases the risk successful settlement, litigation or other vehicle for recovery. There are undoubtedly other examples.

Under the Model Rules of Professional Conduct, even in a so-called “riskless” case -- one where liability is apparent and recovery certain -- a contingent fee can still be appropriate because it will require lawyer expertise and time or genuine risk suddenly arises. In the words of the ABA Standing Committee on Ethics:

[T]he Committee is of the view that the argument may rest on a faulty notion as to the number of cases regarding which at the onset of the engagement the lawyer can say with certainty that the client will recover. Defendants often vigorously defend and even win cases where liability seems certain. Additionally, a previously undiscovered fact or an unexpected change in the law can suddenly transform a case that seemed a sure winner at the outset of representation into a certain loser. See, e.g., Central Bank of Denver v. First Interstate Bank of Denver, 114 S.Ct. 1439 (1994) (where the Supreme Court held that a private plaintiff may not maintain an aiding and abetting suit under § 10(b) of the Securities Act of 1934, overruling every circuit court which for decades had allowed such suits).

Moreover, even in cases where there is no risk of non-recovery, and the lawyer and client are certain that liability is clear and will be conceded, a fee arrangement contingent on the amount recovered may nonetheless be
reasonable. As the increasing popularity of reverse contingent fees demonstrates, for almost all cases there is a range of possible recoveries. Since the amount of the recovery will be largely determined by the lawyer's knowledge, skill, experience and time expended, both the defendant and the plaintiff may best be served by a contingency fee arrangement that ties the lawyer's fee to the amount recovered.\textsuperscript{59}

Proponents of contingent fee limitations argue that early settlement will reduce much of the risk inherent in litigation, which then justifies severe limitations where such early settlements occur. Setting fixed limits on such early settlements may fail to account for much of the value added by the professional services in such cases:

Also, an early settlement offer is often prompted by the defendant's recognition of the ability of the plaintiff's lawyer fairly and accurately to value the case and to proceed effectively through trial and appeals if necessary. There is no ethical reason why the lawyer is not entitled to an appropriate consideration for this value that his engagement has brought to the case, even though it results in an early resolution.

Given the foregoing, the Committee concludes that as a general proposition contingent fees are appropriate and ethical in situations where liability is certain and some recovery is likely.\textsuperscript{60}

Thus, even where liability is "certain," the contingency is the amount of recovery. The value the lawyer brings to the case, which justifies a contingent fee, is the ability to affect that amount and to improve the recovery the client receives.

The Task Force agrees with early settlement proponents that time can be the enemy of both parties. A principal goal of dispute resolution should be adopting methods for efficient resolution. But the early settlement proposal is not a panacea. It features a serious weakness. By offering low marginal contingent fees where no settlement ensues, it could create an incentive for clients to settle early – not discouraged by their lawyers – without sufficient attention to the facts or value of the case that would be brought to light by more thorough, and expensive, negotiation and research.

Experts appearing before the Task Force, including Philip Howard, founder of Common Good, agreed that the premise of early-settlement-offer proposals (that there are cases involving minimal risk of non-recovery, and minimal attorney time, labor and skill\textsuperscript{61}) does not usually apply to medical malpractice litigation. The
costs of presenting a credible medical malpractice claim to a defendant and insurer are simply too high. Their credibility and the statutory litigation procedures require more than minimal attorney time, labor and skill. Lawyers must assume that every case will go to trial, and prepare accordingly, even though they know that very few will actually be tried. Failing to prepare for trial will cost lawyers credibility and potentially cost their clients in settlement. 62

Given the foregoing, the Committee concludes that as a general proposition contingent fees are appropriate and ethical in medical malpractice cases even where liability is reasonably certain and some recovery is likely. The Task Force agrees that contingent fees ought to vary with the risk assumed by the lawyer: usually the lower the risk assumed, the lower the contingent fee percentage. The Task Force concludes that, as a general matter, there is no such thing as a riskless case, and that lawyers and clients lack sufficient prescience to predict the quantum of risk cases with accuracy and consistency. In medical malpractice, low risk cases are rare events, but even in cases leading to quick settlement, the negotiations and drafting involved might be worth more than the 10% fee contained in the most common limitations proposals. 63 In any event, designing a limited contingent fee compensation regime around the notion of medical malpractice cases devoid of significant risk is unwarranted and unwise.

2. The Question of Fixed Contingency Rates

There is genuine debate as to whether lawyer contingent fees are “fixed” by convention 64 or “conscious parallelism” so as to preclude the real possibility of client fee negotiation and choice. Of course, consciously fixing contingent fee rates or colluding with others to standardize a fee violates professional ethics, whether one lawyer applies the same percentage in all his or her cases or multiple lawyers apply varying but standardized fees to categories of their cases. 65 But critics do not charge lawyers with collusive price-fixing.

This assertion of price fixing, however conscious or unconscious it might be, is probably the most difficult of the factual assertions to assess. On the one hand, Professor Lester Brickman has argued for a decade or more, in several cogent articles, that lawyers fix fees. 66 Drawing his conclusions largely from circumstantial evidence, he builds a case for the existence of price fixing by custom, if not by active collusion. Brickman asserts that empirical and historical observations, such as the following, suggest uniform fee pricing:

the absence of price advertising; the enormity 67 of the increases in effective hourly rates over the past forty years . . .; the historical
derivation of the standard one third (or higher) contingent fee; the absence of economic justification for uniform pricing . . . ; inelasticity in the pricing of tort claiming services . . . [and] payment of referral fees . . . . 68

Although data do support the claim that a one-third fee is commonly used, at least as a starting point for fee arrangement discussions, the Task Force was unable to find unequivocal empirical data to support the critics' allegations of fee fixing. The two leading scholars of contingent fee practices dispute the real-world data. One leading scholar doing empirical studies of lawyer fee practices, Professor Bert Kritzer, disputes the allegations of price fixing and has found that contingent fee percentages vary, but that 33% is most common, applied in about half the cases he studied. 69 Professor Brickman disputes Kritzer's data, methods and conclusions and relies heavily on the absence of competitive fee information in lawyer advertisements and other observations. He concluded from that absence that no competition existed, but he apparently did so without asking the lawyers — including those who advertised — what their fees were. 70 It also seems obvious that lawyers' omission of specified fees could just as well suggest willingness to negotiate. The Kritzer-Brickman debate continues, and until additional studies are completed focusing especially on medical malpractice actions, it is difficult for the Task Force to conclude where the truth lies with the ultimate question of whether and how clients negotiate fees in such cases.

Brickman and others asserting fee fixing also point out that the real world of lawyer-client relationships includes factors that "inhibit the emergence of a price competitive market":

asymmetrical knowledge with respect to the value of claims; the lack of sophistication of most purchasers of tort claiming services; the utility of uniform pricing in misleading consumers as to the risk being assumed by the lawyer; and the signaling functions of uniform pricing including the branding of price cutters as slackers or as inferior in quality. 71

The Task Force agrees that asymmetrical knowledge and sophistication about the realities of tort litigation create serious potential for lawyer overreaching. It is also quite possible that price (fee) cutting by lawyers might be interpreted by clients as indicating that the lawyers are inferior or will cut corners while handling the case. If these assertions are true, the question arises how national and state bar organizations should respond to correct the asymmetries. In Section VI below, the Task Force offers some suggestions, focusing around improved client information and education. It does not believe that applying artificial and ultimately arbitrary
caps on fees provides an answer that both protects clients against lawyer overreaching and against reducing the already minimal exposure of medical professionals to legal liability for their negligence.

Professor Brickman observes and experts agree that fee negotiation and competition occur in airline crash litigation. In such cases, contingent fee percentages fall in the 14-17% range, as opposed to twice that in typical tort litigation. That is not because there is no risk in airline crash cases, but rather because liability is more certain and perhaps the value of the case more apparent to both lawyers and clients. This observation supports the conclusion that increased client information and sophistication can have a beneficial effect on contingent fees.

Professor Brickman also identifies professional rules and other structures that effectively preclude free markets for fees from developing:

I attribute the persistence of uniform pricing to market failures . . . actions of the bar designed to prevent a competitive market from emerging . . . includ[ing] the maintenance of barriers to entry into the tort claiming market, prohibitions against the outright purchase of tort claims and adoption of rules of ethics effectively prohibiting price competition including prohibitions against providing financial assistance to clients and brokerage of lawyers' services for profit.

It is true that the Bar regulates entry into the profession and monitors the unauthorized practice of law. It is also true that lawyers’ ethical rules preclude brokerage and purchasing others’ claims. Eliminating such restraints on lawyer behavior would be a radical departure from well-established norms of professional behavior. Eliminating barriers to entry and similar restrictions in, say, the medical profession or prescription drugs might also produce more active markets and reduce prices, but the social costs would likely be enormous. The Task Force believes that jettisoning excising professional norms is neither necessary nor prudent. Again, the Task Force concludes that clients are protected by current ethical rules and can be further protected from distorted markets by less radical measures.

Client protection starts with fiduciary behavior by lawyers. This is required by all professional codes and is exhorted by trial lawyers themselves. For example, the Association of Trial Lawyers of America advises lawyers and potential clients in its pamphlet, “Key to the Courthouse,” as follows:
The percentage charged in contingent fees may vary from case to case depending on the circumstances, including but not limited to, the risk of recovery, the impact of the expense of the prosecution, and the complexity of the case... Attorneys should exercise sound judgment and use a percentage in contingent fee contracts that is commensurate with the risk, cost, and effort required... Attorneys should discuss alternative fee arrangements with their clients.  

The Task Force found that Florida practice is exemplary for requiring lawyers to admonish clients of their rights, including their right to negotiate fee matters. The Task Force concludes that asymmetric information lies at the heart of potential problems with client negotiating power, which, in turn increases the chance for a standardized or excessive fee regime. Therefore, efforts to provide clients with more information can result in more competitive and equitable fees. Price caps are not a long-term solution and precipitate their own market distortions.

C. “Lawyer contingency fees are a significant factor causing a rise in medical liability premiums.”

The Task Force has discovered no data that support the assertion that contingent fees are a substantial factor in the increase of medical malpractice insurance premiums. Medical liability experts and others appearing before the Task Force consistently opined that contingent fees have little if any effect on medical liability premiums. For example, Senator Campbell, who had studied the problems of medical liability insurance for many years said that “There is no reason to believe that contingent fees are driving up the costs of anything.” On the other hand, they and others also noted that other factors have had such an effect, including improved medical technologies, higher patient expectations, and the longer human lifespan. They also noted that in many markets only a small percentage of physicians purchase medical liability insurance, often those with the highest risk specialties. For example, in Florida, only about sixty percent of physicians are insured. Because risk is spread so narrowly, premiums are believed to be higher than they otherwise would be.

Given this absence of evidence, the Task Force concludes that contingent fees have not themselves caused the spike in medical liability premiums. Nonetheless, the Task Force agrees that materially limiting contingent fees—especially to the ultimate 10% suggested by the Florida proposal, could have a tempering effect on such premiums. The reason is simple, medical malpractice victims will not find lawyers to assist them in their claims.
Several incontrovertible economic and litigation realities of lawyers’ fees help to demonstrate this. First, contingent fees are by definition a percentage of the plaintiff’s recovery. They are not added onto or paid as a separate claim. For this reason, limiting the allowable contingent fee percentage will not directly reduce the defendants’ liability or the amount of the liability that is paid under a medical liability policy.

Second, price controls distort markets for products and services. Limitations on lawyer fees are a form of control on the price of lawyer services. If prices for lawyer services are fixed below what the market would yield, lawyers will have incentive to employ their services elsewhere, where their expertise and skills match the demand for them. That is especially true where their litigation costs—including lawyer time and effort—are high, as in medical malpractice litigation.

Third, current fee-limitation proposals apply only to plaintiffs’ lawyer contingent fees; they do not apply to defense lawyers’ fees. Defense lawyers would remain unconstrained by law. There would be no limit on the number of lawyers the defense could employ or the amount of fees those lawyers could charge. That creates a potential imbalance in favor of the defense. Thus, even where medical malpractice victims could find representation, the law would say to them, “you are not allowed to use a lawyer whose market valuation is equivalent to those who might represent the defendant.”

Given these facts, and assuming that there is a connection between liability premiums and contingent fees, it must be for the second and third of these facts, not the first. Limiting contingent fees will likely squeeze lawyers out of medical malpractice litigation, leaving some, perhaps many, victims with no representation. Fewer claims could mean lower overall insurance payouts and the elimination of defense lawyers and their fees. Both could mean reduced premiums.

The Task Force concludes that limiting contingent fees has the potential for reducing medical liability premiums, but at the societal cost of barring access to justice for serious and legitimate victims of medical negligence.⁸²
V. Plaintiffs' Lawyer Claims of Fact:

A. "Lawyers bring only meritorious actions because prosecuting medical malpractice actions is very costly, and lawyers who prosecute non-meritorious or frivolous cases will soon bankrupt themselves."

The Task Force heard anecdotal estimates ranging from a low of $50,000 to a high of $500,000 to prosecute a single case of medical malpractice. Whether or not such estimates would hold up in the face of controlled studies, the Task Force heard from no one who asserted that investigating and bringing a medical malpractice claim was inexpensive. Nor has anyone made it aware of others who make such an assertion. On the contrary, the typical assertion was consistent with Professor Shaffer's conclusion:

[E]very case require[s] hundreds of hours of work and a huge outlay of money to pay for the investigation evaluation by experts, deposition testimony, travel, etc. While I have heard the claim that many of these cases settle quickly, with little time or effort on the part of the plaintiff attorney, I can unequivocally say that I have never see or heard of such a case [with but a single exception].

The Task Force concludes that there may be no such thing as an "inexpensive" medical malpractice action. Even if there were, the overwhelming majority of cases require a significant investment of lawyer time, expertise and investigatory costs. In fact, plaintiffs' costs, borne initially by the plaintiffs' lawyer, include paying the defendants' expert witnesses for their time during the discovery phase, such as sitting for depositions.

As shown in Section IV.A., a large pool of unnoticed injury cases or cases do not result in a claim, many for lack of legal representation. A number of victims are eliminated from the claim pool because the very high costs of investigation and litigation require very high damages potential to justify the litigation as a matter of economics. They cannot retain lawyers because plaintiffs' lawyers reject cases that lack sufficient damages to warrant the litigation expense. In addition, medical malpractice specialists cannot effectively spread the risk among clients, even if they were allowed to do so by professional ethics. The cases are so time intensive and expensive that only a few can be handled at a time. For these reasons, many malpractice victims are left without legal remedy. These problems are only exacerbated by damage caps, already in place in Florida and other states, which artificially reduce plaintiffs' damages.
Also, as discussed above, plaintiffs already have a tough row to hoe in medical malpractice cases. Especially in states such as Florida, where they encounter special procedural hurdles, cases are difficult to win: "Florida has already slanted the field greatly against plaintiffs in medical malpractice actions. They have the shortest statute of limitations. They have numerous additional procedural requirements. For those reasons, plaintiffs usually lose." 87
B. "Limits on contingent fees would significantly impede access to justice for medical malpractice victims."

This assertion has already been discussed in part in Sections IV.A. and V.A. above. Its accuracy depends largely on two issues: (1) whether there exists such a thing as a simple, inexpensive medical malpractice claim and (2) whether there is a pool of lawyers willing to bear the up-front costs and accept the risks inherent in medical malpractice actions for materially reduced compensation.

The resolution of both issues stems largely from one fact: There is already a very large pool of unclaimed injury cases that exists because the costs of investigation and litigation exceed the likely return. Information provided the Task Force suggests that a medical malpractice claim must amount to $100-200,000 simply to break even. Anything less means that, at typical rates of return, the case will be refused. The economic barriers – the investment of time and money to establish a valid claim – are simply too high to allow much of the pool of medical malpractice victims to be served:

Elimination of, or significant constraints on, contingent fees would make legal assistance available only to those injured persons who are wealthy. The poor, the retired, African Americans, and women especially will suffer because they are often unable to afford hourly fees. The contingent fee is often their key to the courthouse. The only goal of people who want to eliminate contingent fees is to reduce the incidence of lawsuits. To do so would be unfair to those who need a lawyer. 88

In addition, according to reliable studies, because they would reduce the number of victims who could afford a lawyer, limitations on fees would likely reduce optimal compensation for all victims and, in effect, reduce the deterrent effect on medical negligence. 89 Thus, even those victims who enter the system and find a lawyer might be short-changed when it comes to appropriate remedies.

In the words of a prominent patient rights advocate in Florida: “The call for a cap on contingency fees for medical malpractice cases does not help the patient... The idea of placing caps does nothing to reduce medical errors and improve patient safety.” 90

This conclusion is echoed in the recent Florida Supreme Court case that determined the proposed Florida constitutional amendment will be allowed on the ballot. Justice Pariente noted in concurrence that “If approved, the amendment may well hamper citizens' ability to press their medical liability claims because its
ceiling on contingency fee percentages would discourage the participation of knowledgeable and experienced counsel.”

Justice Lewis’s dissent, concurred in by Justice Anstead, was stronger:

The chief purpose of the proposed amendment is to render it economically impossible for claimants and their legal representatives to proceed with actions to redress legitimate injuries. With the artificial percentages of recovery mandated by the proposed amendment, unquestionably, legal counselors will be unable to accept responsibility for processing medical actions. Due to the complex nature of medical negligence claims, including the requisite statutory screening process, injured citizens will be unable to navigate the field alone. Moreover, health care providers will not be similarly handicapped, as the proposed amendment will in no way impact their rights to retain counsel on any terms or limit the funds available to secure defense counsel.

These three Florida justices agreed that the true effect of the amendment would be to erode the rights of medical malpractice victims to seek legal redress.

Limitations do not simply serve to ignore medical error and to eliminate medical malpractice victims from the system, they also would shift meritorious cases to less experienced (and therefore less expensive) lawyers. This could have the effect of reducing the likelihood or amount of recovery. Plaintiffs would not really be able to have the counsel of their choice and might have to settle for counsel unfamiliar with the procedural intricacies of the specialized area of practice.

Again, in the words of Florida Supreme Court Justice Lewis:

[B]efore a claim is ever filed or a trial may begin ... a litigant with a medical negligence claim must proceed through a lengthy, time-consuming, and certainly, costly process. This mandatory pretrial screening process will remain in effect even if the proposed amendment is adopted. Florida citizens need, and are entitled to, assistance to guide them through this process. As evidenced by the numerous decisions concerning the pretrial medical negligence process, the existing law has been a series of traps and a minefield for many Floridians.
Indeed, even Common Good agrees that caps on contingent fees, especially because they are placed only on the plaintiffs' lawyers, can be harmful to our system of justice: “Caps will deny plaintiffs access to justice.”94
C. “Malpractice litigation benefits society by tending to improve the quality of health care.”

If the health industry’s claims were generally on the mark – that there is excessive and unnecessary medical malpractice litigation, that claims made have played a part in the spike in medical liability insurance premiums, and that physicians are leaving practice, the question arises, “Why not eliminate medical malpractice claims directly, perhaps by granting physicians immunity from liability for negligence?” In other words, do medical malpractice actions have societal utility so that severely restricting or eliminating them would be harmful to the public interest?

Medical malpractice litigation can have two main beneficial influences on the delivery of health services. First, claims themselves, whether successful or not, can cause health care providers and their insurers to review and tighten procedures. Second, a successful case might deter the negligent health care provider from repeating the mistake. This is called specific deterrence. Publication of the case might cause other providers to avoid the same mistake. That is called general deterrence.

Some in the medical community believe that legal liability plays no significant role in improving the quality of medical care. 95 The Task Force has found a legitimate difference of opinion on this question. One the one hand, there is good evidence that recognizing that one can be potentially liable for medical malpractice results in modest deterrence, meaning exercise of increased care and avoidance of medical error. 96

On the other hand, liability costs might be spread too broadly to produce either a general or specific deterrent effect among physicians. In other words, physicians guilty of malpractice usually do not pay damages out of their own pockets. Victim damages are paid by the physicians’ liability insurers, by the hospital’s insurers or are covered less directly by others in the health care system. Plaintiffs rarely pursue defendant physicians’ personal assets beyond insurance coverage limits. In any case, such assets are subject to bankruptcy court protection and are often sheltered from liability in other ways.

On balance, the Task Force accepts the conclusion of those experts associated with the so-called Harvard Study: "$W[e] believe that for purposes of practical policy-making, the safest course is to accept the indication . . . that malpractice litigation does have an injury prevention effect, however statistically fragile the specific point estimate might be." 97

Page 35 of 66
Physicians also claim that litigation has led to increased medical costs, through the phenomenon of "defensive medicine." Physicians are said to employ tests and procedures that are not medically necessary simply to protect themselves against a charge that they did not do all that was required. Again, there is mixed information and contrary interpretations of the data that support this claim. If physicians employ unnecessary procedures – such as caesarian deliveries in lieu of natural ones – the question arises whether they would consciously subject a patient to a more dangerous procedure – whichever it is – and if they do not, whether a peer medical expert would support a conclusion that they were negligent in doing so.

Similarly, there is little or no evidence that fear of liability will always impede improvement in care by encouraging silence and cover-ups. Data about whether physicians practice excessively defensive medicine are inconsistent. Physicians in specialties that employ few "procedures" – such as family medicine, psychiatry and endocrinology – privately accuse the procedures-oriented specialists of ordering extra procedures following. Willie Sutton’s advice: "because that's where the money is."

Eliminating sanctions, including money damages, for negligence, would likely accentuate another aspect of the health care market. As it is, physicians have defective incentives. In technical terms, their "compensation is quality and outcome invariant." Simply put, they get paid for the service and not for results. Two things suggest they will employ care in the process: their medical ethos and their belief that their errors will be discovered and they will be sanctioned.

In the opinion of the founder of Common Good, improvements in the health care system and the judicial system as it deals with medical malpractice will come not from capping attorney's fees, but from other approaches: enforcing the "reasonable fees" requirement of the attorneys' ethics code; enhancing judicial oversight of fee agreements and awards; and allowing more, not less, access to justice for injured persons.98
VI. Proposals Regarding Attorneys’ Contingent Fees

The medical profession and allied groups have in recent years lobbied in numerous jurisdictions for adoption of either of two types of contingent fee limitations. The first type of limitation is simply a new but more severe, Florida version of the “sliding-scale” already in place in Florida and other states. The more common proposal, so far unsuccessfully introduced for adoption in some fourteen states, is the “Common Good” or “early offer” proposal.

For the reasons discussed below, the Task Force concludes that neither approach to contingent fees serves the interest of the public or the victims of medical malpractice. The Task Force also concludes that suggestions designed to assist client negotiating power are premature and unwise. Instead, the Task Force offers suggestions of its own for protecting victims as well as physicians.

A. Medical Association Proposals

1. The Florida Proposal

The Florida proposal is cast in the form of an amendment to the Florida State Constitution. Its proponents, most notably the Florida Medical Association, call it a “fair share” proposal. Under the Florida proposal, which by its terms applies only to “medical liability” cases, lawyers’ contingent fees would be limited to 30% of the first $250,000 of the net recovery and to 10% of anything above that amount. The goal, say its supporters, is to assure that medical malpractice victims receive their fair share of any recovery, and that the lawyer does not take too much of it. Some, including justices of the Florida Supreme Court, are skeptical not only of the design of the proposal but also of the FMA’s stated altruistic goal. In dissenting from the Court’s decision to allow the proposed Florida constitutional amendment on the November ballot, Justice Lewis wrote that the amendment:

attempt[s] to “hide the ball” from the voters and disguise a very clear end... [with] false promises of benefits when [it] really restrict[s] existing rights... Clearly, the proposed amendment as written portrays that it will provide protection for citizens by ensuring that they will actually personally receive a deceptive amount of all money determined as damages in any medical liability action. However, the amendment actually has the singular and only purpose of impeding a citizen’s access to the courts and that citizen’s right and ability to secure representation for a redress of injuries. Its purpose is to restrict a citizen’s right to retain counsel of his or her
choice on terms chosen by the citizen and selected counsel and to thereby negatively impact the right of Florida citizens to seek redress for injuries sustained by medical malpractice. This is truly a wolf in sheep’s clothing. 101

[The FMA] should not falsely claim they are providing a benefit to those injured by medical malpractice when they are in fact restricting their rights to secure adequate legal representation. There really is no other purpose of this proposed amendment.” 102

Long-time Florida legislator and business lobbyist, Art Simon, believes that the proposed amendment is “the wrong thing, wrong time and wrong vehicle.” 103 He also believes that true rationales for the proposal are not so patient oriented:

[R]ationalists at least have some logic at the root of their proposal: ‘reducing contingent fees will reduce premiums.’ They are told this by medical malpractice insurers. If lawyers have less incentive to bring a case, there will be fewer cases, lower claims and therefore lower premiums.104

On the other hand, he says that

The irrationalists’ argument is as follows: attorneys are the enemy; they pursue jumbo judgments; they block legislative action; so hit ‘em where it hurts – in the back pocket. Even just driving attorneys crazy is good... Doctors insist that attorneys haven’t given enough, so it’s now time to hit attorney fees... The proposal is unconscionably arbitrary and vindictive.105

The amendment’s proponents have met the procedural requirements to have the Florida proposal appear on the November election ballot. Although the voters may be presented with a simple, intelligible version of the proposal on their ballots, the underlying issues and potential impacts are anything but simple and intelligible. As noted, the proposal will not describe its most salient feature: it will reduce the opportunity for victims of medical negligence to secure justice.

It is no small irony that medical malpractice actions in Florida are already the most highly regulated in the country, largely in favor of the physician. 106 Florida has long been among the leaders in addressing medical malpractice issues and limiting claimants’ rights in such cases, including addressing a number of the key issues raised in this report. The Task Force heard presentations from several
current and former Florida legislators, all of whom had worked in significant ways over many years with the recurring crises of malpractice insurance. 107 (Unfortunately, the Task Force was unable to convince the Florida Medical Association to explain the rationale of it proposal. 108) They described important several important procedural and ethical rules adopted in Florida to encourage client negotiation of fees, to protect against lawyer overreaching, to protect against frivolous lawsuits, to encourage reasonable settlement, and to limit contingent fees.

a. Encouraging Fee Negotiation

Florida requires that before a lawyer and client arrive at a contingent fee arrangement, the client must receive and understand a “Statement of Rights.”109 The first paragraph of the Statement admonishes the prospective client that

“You . . . have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with one lawyer you may talk with other lawyers.”110

This provision, especially when coupled with the general ethical requirement that lawyers discuss alternative fee arrangements with prospective clients, increases the likelihood that tort victims will act to inform themselves as consumers of legal services, to compare lawyers, to compare alternative fee structures and to negotiate contingent fee percentages and other terms in their interest.

b. Other Florida Client Protections

Among other things, clients must also be advised in writing of their rights:

• to a three-day “cooling off” period for withdrawing from a contract for representation
• to be informed of any fee-sharing arrangement by the lawyer retained
• to be informed of any referral and to have a new contract if that occurs
• to know of how all expenses and legal fees will be calculated and paid whether the case is settled, won or lost
• to be kept abreast of progress in their case
• to make final decisions regarding settlement and their right to learn of all offers of settlement

• to report to the Florida Bar any concerns over an illegal or excessive fee, including how to lodge a complaint.

III c. Protecting Against Weak and Frivolous Lawsuits

Physicians, as would anyone, fear the possibility they will be named defendants in a lawsuit. A greater fear is that they will be sued for something they did not do; that is, to be the object of a weak or frivolous suit. As discussed above, the typical investigative and time costs to the lawyer in an unsuccessful action renders this unlikely. Nonetheless, Florida requires an additional procedural step that inures principally to the benefit of the potential physician-defendant. Whenever a medical malpractice action is filed in Florida, it must be accompanied by an affidavit from a licensed physician supporting the allegations of medical negligence. In other words, the assessments of the patient and a lawyer, no matter how obvious or subtle the matter, are insufficient.

d. Existing Limitations on Contingent Fees and Damages

As noted, the Florida proposal is a variation on the “sliding scale” approach adopted by a number of states. Interestingly, Florida itself has already adopted a sliding scale, one that falls in line with those in operation in other states. Depending on procedural alternatives, including arbitration, contingent fees in medical malpractice actions are limited to varying percentages, typically 33 1/3 - 40 percent of first $1 million; 30 percent of next $1 million; and 20 percent of any recovery over $2,000,000.

2. The Common Good or “Early Offer” Proposal

The Common Good proposal’s principal terms were described as follows by its proponents in their effort before the Utah Supreme Court:

First, if a settlement offer is made before an injured person retains an attorney, and the injured persons accepts that offer, a subsequently hired attorney may only charge an hourly fee that does not exceed 10% of the first $100,000 and 5% of any additional recovery.
Second, if an injured person retains an attorney on a contingent fee basis, the attorney must provide a written notice of claim sufficient to allow the allegedly liable party to assess the claim and make a reasonable offer of settlement under the circumstances. If the attorney does provide that notice, the attorney may only charge an hourly fee that does not exceed the limits described above, regardless of how the case concludes.

Third, if a settlement offer is made within 60 days of the required notice, and the client accepts that offer, the attorney may only charge an hourly fee that does not exceed the limits described above. In each case, an offer of settlement must, by its terms, have an expiration date at least 30 days after the offer is made, and the limitations on fees are subject to waiver by the Court upon application by counsel.

The proposal does not require a party to make or accept an early offer, and the proposal will have no impact if no offer is made or accepted. In ensuring a reasonable fee in cases where early settlement does occur however, the proposal will encourage early settlements and engender substantial benefits to all parties and the Court. 115

3. Task Force Conclusions Regarding Medical Association Proposals

If a principal goal of our system of justice is to preserve the rights of victims to recover for injuries from medical negligence, neither the Florida constitutional amendment proposal nor the Common Good proposal would advance that goal. For the public, both proposals might tend to further reduce the exposure of physicians to liability for actual negligence and might, in turn, increase the probability of adverse medical events. At best, they appear to offer little practical application in medical malpractice actions. At worst, they may entail unknown, unintended consequences. For actual medical malpractice victims, they can encourage uninformed settlements and discourage or effectively preclude making legal claims through counsel.

The founder of Common Good, Philip Howard, in his presentation to the Task Force, acknowledged that the early offer proposal is an ill fit with medical malpractice litigation. 116 The reason is that such claims and cases require extraordinary effort and costs investigate and develop that any early offer would likely be uninformed and ill-founded.
Similarly, Professor Kritzer commented that proposals such as the Common Good proposal fail to take into account that a significant proportion of cases handled on a contingency basis involve small damage amounts. He cited data that showed that fee caps would have the effect of allowing the lawyer to spend very few hours on the matter. He also noted that such proposals reflect a lack of understanding of what the representation of injured parties entails. Lawyers move reasonably promptly to settle routine cases as soon as the client's medical condition has reached a suitable state; through that time, the lawyer has been monitoring the client's medical situation, collecting documentation related to expenses and other losses, and counseling the client to be sure that there is documentation and that the client has obtained appropriate treatment. By the time the case is ripe for settlement, the lawyer will have put in a "nontrivial" amount of time. He said that the time required to prepare a demand letter with the relevant documentation of loss and to negotiate the actual settlement would, for a large proportion of cases, represent a time investment worth considerably more than the 10% of the recovery as called for by the Common Good proposal. The net effect is that fee caps eliminate representation at least for smaller claimants, those with meritorious cases but non-catastrophic injuries.

The Florida legislators who appeared before the Task Force said that they did not see any useful purpose to be served by the proposed amendment, for physicians or for the general public. They also said that not only did the proposal not enjoy the support of business interests or insurers, but that the idea of limiting fees was never seriously proposed to the Florida Legislature or its pertinent committees.

For all these reasons, the Task Force opposes the proposal. In addition, it notes that according to Florida legislators and lobbyists, no hearings have ever been conducted on the design, purpose or reasonableness of the amendment. In contrast, the current, already restrictive, Florida rules affecting medical malpractice actions arose as the product of extensive hearings and debate and after factual findings on the "best practices" of the "best practitioners." In the words of Mr. Simon, who emphasized that he "had no dog in this fight," the amendment is simply "vindictive and arbitrary."

The Task Force is not alone in questioning the proposed Florida amendment. Among others, even the Florida Hospital Association opposes it.
B. Task Force Proposals

The Task Force agrees with contingent fee critics on several points. First, information and sophistication imbalances between lawyer and client – asymmetric information – can create opportunities for lawyer overreaching. Lawyers can take advantage of this imbalance to extract what economists call “rents” – excessive fees – from unwitting clients. Although lawyers’ fiduciary obligations are designed to protect against this, equipping clients with the tools and skills for successful negotiation should bring more trust to the system. The most important tool is information and the most important skill is the expertise to use that information wisely. One challenge is how to equip clients with the information and expertise effectively and efficiently without introducing new dangers and inefficiencies. Another challenge is how to enhance enforcement of existing procedural and ethical rules to protect clients.

1. Bar-supported Public Information Services

The Bars of the many states already provide a great deal of advice to potential clients about finding a lawyer, negotiating fees, etc. Some states, including Florida as noted, require lawyers to provide and discuss with prospective clients some version of a “client’s statement of rights.” Although no doubt helpful, the challenge is to ensure that its benefits enure to all potential clients, even to the relatively uninformed or uneducated. Such statements will need to be simple enough for laypersons to understand, short enough for them want to read and specific enough to provide meaningful information for specialized cases. Those criteria suggest standardized disclosure documents designed for various types of cases, including medical malpractice cases.

Public information needs also to describe clear procedures for reporting complaints, especially by clients.

2. Standardized Disclosure

A combination of on-line or published public information and private lawyer communications occurs often in the cases of mass torts, especially airline crash cases. Approved form letters are sent directly to potential clients designed to raise the level of disclosure and to caution and educate potential clients. In medical malpractice cases a variation of this idea could help potential clients. Incorporating the central principle – standardized disclosure – into all lawyer-potential client interactions also has merit for other kinds of cases, medical malpractice among them.
Such standardized disclosure letters should provide, among other information:

- details about how medical malpractice cases are typically handled,
- predicted costs of litigation, including expert fees, investigation, discovery, etc.,
- alternative fee arrangements, including how fees, including contingent fees, are calculated,
- admonish clients to seek out experienced, perhaps specialized firms,
- acknowledge that net costs of the litigation to them could be less if they interview several firms, perhaps even ask for written bids.

3. Improved Enforcement of Procedural and Ethical Rules

A number of persons appearing before the Task Force emphasized that procedural and ethical rules already exist that are designed to protect clients, prospective litigants, and the integrity of the judicial system. They expressed concern that bar associations and judges do not always enforce such rules with adequate vigor. To the degree that is true, such passivity arises in many cases from lack of judicial and bar resources. The time and expense necessary to investigate ethical and procedural complaints is not insignificant.

The Task Force agrees that courts and bar associations should enforce rules requiring, for example, established factual bases for complaints, such as Rule 11, and reasonableness of attorneys’ fees, such as ethical Rule 1.5, rigorously and vigorously. Lawyers who overreach or otherwise skirt their professional obligations to their clients, their peers and the judicial system ought to be sanctioned. Courts and bar associations responsible for such sanctions need the support of their members and of the public fisc to make enforcement resources available. Otherwise, lawyers will enjoy the limited exposure to liability for professional negligence that this report finds to exist for most physicians.

4. Alternative Dispute Resolution

Alternative dispute resolution techniques — mediation, arbitration, mini-trial, etc. — have the potential to reduce the costs of pursuing medical malpractice claims and to shorten the route to resolution. Bar associations should educate their
members about such techniques and encourage their use in appropriate cases. Lawyers ought to inform clients about such techniques and discuss with them the possible applicability in individual cases. Where alternative dispute resolution approaches suggest reduced risk and more efficient resolution, contingent fee percentages should reflect that. Also, these approaches avoid some of the extraordinary costs of pursuing medical malpractice claims, they offer the possibility of legal representation for victims whose potential damages do not rise to the high levels that justify full litigation.

These four suggestions, if adopted by lawyers and their professional associations, should not only improve client access to justice but also enhance the ability of clients to establish fair and informed terms of legal representation, including reasonable contingent fee arrangements.
Endnotes

1 The origins of the most common proposal are academic. See Brickman, Horowitz & O'Connell, Rethinking Contingency Fees (Manhattan Inst. Monograph Series No. 1, 1994). It proposed an “early offer” fee limitation under which an offer of settlement would limit lawyers fees to about 10% of the first $100,000 of recovery and 5% of any amount over that. Early offer proposals apply generally to all tort litigation, not just medical malpractice litigation. Versions of this proposal have in recent years been endorsed by Common Good and offered for adoption unsuccessfully in some fourteen states. A recent Florida constitutional amendment proposal departs from the Common Good proposal by applying a different “sliding scale” fee limit only to medical liability actions. This report discusses both proposals below in Section VI.


3 E.g., Cal. Bus. & Prof. Code § 6146(a) (2002) ("MICRA") (contingent fees in medical malpractice actions limited to 40 percent of the first $50,000; 33 percent of the next $50,000; 25 percent of the next $500,000; and 15 percent of any amount over $600,000); Conn. Gen. Stat. § 52-251c (b)(2001) (contingent fees in personal injury, wrongful death and property claims limited to 33 percent of the first $300,000; 25 percent of the next $300,000; 20 percent of the next $300,000, 15 percent of the next $300,000; and 10 percent of any amount over $1,200,000); Florida Bar Rule 4-1.5 (contingent fees in medical malpractice actions limited to varying amounts depending on arbitration, admission of liability, and other factors, 33 1/3 - 40 percent of first $1 million; 30 percent of next $1 million; and 20 percent of any recovery over $2,000,000);

4 E.g., Okla. Stat. tit. 5 § 7 (2003) (contingent fees limited to 50 percent of the net recovery); Tenn. Code Ann. § 29-26-120 (2002) (contingent fees in medical malpractice actions limited to 33 percent of all damages awarded); Tex. Lab. Code Ann. § 408.221 (Vernon 2002) (contingent fees in workers compensation cases limited to 25 percent of the plaintiff’s recovery); Wis. Stat. § 655.013 (1986) (contingent fees in medical malpractice actions limited to 25 or 33 percent of the first $1 million, depending on a statutory deadline for stipulation of liability; and to 20 percent of any amount over $1 million).


6 Memorandum in Support of the Petition for Rulemaking to Revise the Ethical Standards Relating to Contingency Fees, submitted to the Supreme Court of the State of
Utah, May 6, 2003 (hereinafter, the Utah Common Good Memorandum) at 16-17.

7 Philip Howard, President of Common Good, Meeting Minutes Appendix (Exhibit 3) at 34-35. Even the Florida Medical Association, the main advocate for limiting them in medical malpractice actions, has a use for contingent fees in other contexts. When it engaged Florida Senator Walter Campbell to represent it in a litigation against HMOs, it did so on a contingent fee basis. Campbell, Meeting Minutes Appendix (Exhibit 3) at 46.

8 Interestingly, this debate finds supporters on both sides within the legal community itself. As noted by the ABA Committee on Professional Responsibility:
    The term contingent fees evokes an almost instantaneous visceral response among lawyers. Some view the contingent fee as the salvation of the impecunious, a means to redress great wrongs, vindicate rights and reform the law. Others view it as an inducement to frivolous lawsuits which abuse tort laws, and a means of exacting outrageously high fees for already overpaid lawyers.
ABA Formal Opinion 94-389 (December 5, 1994) [footnotes omitted].

9 The Task Force plans to issue a later report that addresses contingent fees in class actions.

10 E.g., Lawyer contingent fees limited by a proposed Florida constitutional amendment should be enough for “greedy trial lawyers.” Sandra Mortham, Executive Vice president and CEO of the Florida Medical Association VP, quoted in Florida Medical Business.

11 Dr. William Sage: Physicians have a longstanding ethical aversion to accepting contingent fees for medical services because such fees suggest to patients that success is guaranteed. Meeting Minutes Appendix (Exhibit 3) at 20.

12 E.g., In 2003, the United States House of Representatives passed H.R.5, a tort reform bill that would preempt state law and impose, among other things, a $250,000 cap on non-economic damages and limits on attorneys fees in medical liability actions. The Senate rejected the legislation. President Bush has also taken a side in this debate. See, e.g., “President Bush "Dis-Torts" the Truth About Impact of Lawsuits on Health Care and the Economy, Public Citizen Corrects Bush's Misstatements on Tort Reform, Releases Briefing Book on the Facts about Medical Malpractice Lawsuits,” (fact sheet of “eight glaring misstatements” by the president about lawsuits by consumers and medical patients). <http://www.citizen.org/congress/civjus/medmal/articles.cfm?ID=%2012173>

13 Dr. David Hyman, Meeting Minutes Appendix (Exhibit 3) at 17. Dr. Hyman cited one common myth in his article on the same subject: “If you don’t do this [medical] test, it will cost you a ton of money and your reputation by the time the legal
system is done with you. Anyone can sue you for anything; they just want to settle the case and move on. Juries don’t like doctors, and they hand out money solely based on sympathy for the plaintiff. It doesn’t matter what you said or did; what matters is what is in the chart. etc.” “Medical Malpractice and the Tort System: What Do We Know and What (If Anything) Can We Do About It?”, 80 Texas L. Rev. 1639, 1640 (2002) (hereinafter, “Hyman Comment”).

14 Hyman Comment at 1640.

15 Tort reform in general and contingent fees in particular tend to reappear periodically as social issues, often hand-in-hand with recurring insurance crises. See, e.g., Wall Street Journal, June 24, 2002.

16 A list of Task Force members, with their professional affiliations and brief biographical descriptions, is attached as Exhibit 1.

17 Comments can be sent by email to Chris Wells at <wells_dc@mercer.edu> or to Patrick Longan at <longan_p@mercer.edu>.

18 A compilation of brief biographies of each guest is attached as Exhibit 2.

19 The Meeting Minutes Appendix (hereinafter “Meeting Minutes”), attached as Exhibit 3, is a compilation of the minutes of the Task Force meetings, summarizing guest presentations.

20 The studies supporting these assertions were presented in summary form to the Task Force by Professors Sage and Hyman. In commenting upon the “best available empirical studies of medical injury and medical malpractice,” Professor Hyman summarizes the data in Hyman Comment. See also Sage, “Medical Liability and Patient Safety,” 22 Health Affairs 26 (July/August 2003). Other published analyses and summaries of similar data can be found in Mello & Brennan, “Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform, 80 Texas L. Rev. 1595 (2002); Danzon, Medical Malpractice: Theory, Evidence and Public Policy (1985); Weiler et al., Medical Malpractice on Trial (1991); Institute of Medicine, To Err of Human: Building a Safer Health System (1999); Saks, “Medical Malpractice: Facing Real Problems and Finding Real Solutions,” 35 Wm. & Mary L. Rev 693 (1994)(hereinafter “Saks”). Most such studies and analyses draw upon the Harvard Study, described to the Task Force as the best available empirical study on medical injury and claims. The study, which covered more than a decade, analyzed over 100,000 medical, legal and insurance claims from New York, Utah and Colorado and interviewed thousands of physicians and patients. See Harvard Medical Practice Study, Patients, Doctors and Lawyers: Medical

21 Hyman Comment at 5. These estimates are based on somewhat conservative definitions of medical error. According to a new national review of Medicare records by a Denver-based health care ranking group, HealthGrades, if medical errors such as failure to respond to signs of infection or other serious problems were to be included, medical error would rise to the third leading cause of death. Boston Globe, July 27, 2004. The Institute of Medicine “shocked the American Public in late 1999 with a report that found medical error to be the fourth-to-eighth-largest cause of preventable death in the United States.” Hatlie & Sheridan, “The Medical Liability Crisis of 2003: Must We Squander the Chance to Put Patients First?”, 22 Health Affairs 37, note 1 (July/August 2003).

22 Id.

23 According to a report in Laryngoscope, 45% of otolaryngologists who responded to a survey reported errors in their medical practice. Over a third of the errors caused major harm to patients and 4% caused death: “The largest category of errors -- 19% of the total reported -- was technical mistakes during procedures, and 56% of those caused major injury or harm, the study said. About 14% of errors reported were related to medication, and approximately 10% were testing errors, including ordering incorrect tests, failing to review tests or not acting on results. . . Researchers said they believe the proportion of physicians encountering an error is an ‘underestimate,’ suggesting that many physicians may not be trained to recognize errors.” Modern Physician, August 2004.


25 Hyman, Meeting Minutes at 18.

26 Id.

27 One atypical situation was described by Linda MacMullen, who related Mississippi’s “unique experience” in finding that one-half of the state’s physicians had been sued for malpractice in 2003.


31 Id. at 1095.


33 Howard, Meeting Minutes at 36.

34 Hyman Comment at 5; California Study at 63; Weiler at 69-75. These data are generally consistent with a Rand study that only one in ten persons who are victims of accidental injury bring a legal action. Hensler et al., Compensation for Accidental Injuries in the United States, at 173 (Rand Institute for Civil Justice, Doc. No. 3999-HHS/ICJ, 1991) (hereinafter cited as the Rand Study).

35 Hyman, Meeting Minutes at 17.

36 The figure may well be lower. A 1991 study found that only 1.53% of patients who fell victim to medical malpractice filed a claim. Relation Between Malpractice and Adverse Events Due to Negligence: Results of the Harvard Medical Practice Study III, 325 New England Journal of Medicine 245-51, July 1991, cited in Dept. of Health and Human Services, confronting the New Health Care Crisis, at 8, July 2002.

37 Howard, Meeting Minutes at 35 (“$250,000 medical malpractice case is “untakeable.”); Campbell, at 45; Kritzer, at 23.

38 See, e.g., “Insurers Missteps Helped Provoke Malpractice Crisis,” Wall Street Journal, June 24, 2002. See also, Gunnar, “Is There an Acceptable Answer to Rising Medical Malpractice Premiums?”, 13 Annals Health L. 465, 477-78 (2004) (“U.S. News and World Report reported the findings of the Physician Insurers Association of America in 2002: in a sample of 5524 malpractice cases, 0.9% resulted in jury verdicts for the plaintiff, 27.4% were settled before trial, 67.7% were dropped or dismissed, and 4% ended in a verdict for the defendant. . . . In other words, when a malpractice case goes to
trial, the injured party has only a 20% chance of a verdict returned in his favor. The total number of cases resulting in a jury verdict for the plaintiff has remained stable over recent years at around 400 cases annually, as reported to the federal National Practitioner Data Bank (NPDB). Between 1995 and 2000, the median national jury award in malpractice cases doubled from $500,000 to $1 million. However, the NPDB reported the sum of all jury awards against physicians increased only 20% from $143 million in 1993 to $172 million in 2002.”


40 The most reliable, often cited comprehensive study of actual patients and claims found that a minority of filed claims arise from the incidents of actual malpractice. In that study, from the 1980-s and now somewhat dated, majority of filed claims arose from an actual iatrogenic injury, but not one that involved true medical malpractice, or from no adverse event at all. Although further analysis of the data shows that many of the so-called false positives still involved evidence of medical error, it might be said that the tort system at the time of the study was inaccurate – too often pursuing false positives while at the same time it too often ignores valid claims, resulting in many false negatives. In short, some physicians and hospitals were made defendants in cases not involving wrongdoing as a matter of law. Procedural requirements for expert verification of claims and the disastrous impact on the plaintiff’s lawyer who misjudges a claim have probably gone a long way to correcting this problem

41 Id at. 703.

42 “The number of cases in which no negligent adverse event occurred vastly outnumbers the negligent injuries (about one hundred to one), and even a ninety-nine percent accurate system would produce more invalid than valid filings on so skewed a distribution. This problem is regularly faced in biomedical testing, and therefore should present no surprise or confusion to the medical profession. Thus, in the legal context as well, false positives can outnumber true positives (by five times, based on the data in Table 2). Yet at the same time, the system targets negligent injuries with sufficient accuracy that a doctor who causes a negligent injury stands a far greater chance of being claimed against than one who has not (better than twenty-two to one odds). Both of these dramatic and important facts about malpractice litigation are overshadowed by a third fact, which perhaps has the greatest bearing on the system's level of deterrence. Underlying the odds in the preceding paragraph are the probabilities of becoming a defendant at all. That twenty-two to one ratio comes from a probability of being sued given a negligent injury of .029 and a probability of being sued given no negligent injury
of .0013.” Saks at 714-715.

43 E.g., Georgia, O.C.G.A. 9-11-9.1.; Florida Stat. §766.203(2) (2002) (In Florida, medical malpractice actions require the attorney filing suit to have made a reasonable investigation to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the client. The pleading must contain a certificate of counsel to that effect. Good faith can be shown by a written professional opinion that there appears to be evidence of medical negligence. The consequences of not showing good faith or any justiciable issue against a health care provider, may subject counsel to attorney’s fees, costs and disciplinary repercussions. In addition the complaint must include a medical expert’s sworn affidavit that the claim involves medical negligence).

44 Simon, Meeting Minutes at 48.


47 Campbell, Meeting Minutes at 44.


49 That conclusion notwithstanding, it does appear that plaintiffs’ lawyers sometimes misjudge which claims involve true malpractice and which do not. Those who do will likely suffer the disastrous consequences of a failed suit and no recovery of fees or expenses. The results are Darwinian for lawyers. Those who lose risk bankruptcy.

Because charging negligence where none occurred serves no one’s interest – the physician’s, the lawyer’s, the client/patient’s, the insurer’s or that of the other participants in the legal and health systems – improvements in making accurate assessments about negligence would serve the public interest and the society’s pocketbook.

50 According to one expert, physicians’ belief that medical malpractice claims are frequent might have a salutary effect. Even though there are few medical malpractice claims made, misperception of the severity and frequency of claims may be just the right thing to offset the infrequency of filings and the greater infrequency of plaintiff success, even when negligent injury did indeed occur. Saks, fn 25.]
“No change to the contingent fee rules will not be harmful to medical malpractice deterrence.” Sage, Meeting Minutes at 20. But limitations on fees might well change the quality of the legal actions: “Whether or not a lawyer is willing to take a case on a contingency fee basis provides a strong signal to plaintiffs about the quality of their case. But an hourly fee encourages lawyers to advise their clients that the client’s case is worth pursuing no matter how low the true chance of recovery. As a result, we find that when contingency fees are limited, plaintiffs file suit in many cases that they end up later dropping—an indication that limits on contingency fees cause a reduction in legal quality.” Helland & Tabarrok, “Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Data Sets,” 19 J.L. Econ. & Org. 517, 540 (2003).

ABA Formal Opinion 94-389 [footnote omitted].

According to Kritzer, 90% of contingent fee cases generate an average fee premium of 25-30% over what an hourly fee would generate, which helps to account for the marginal risk associated with contingent fee cases: Lawyers’ fees, whether hourly or contingent are about the same as those of a Twin Cities’ plumber. Meeting Minutes Appendix at 22.

E.g., “The ethical standards of Rule 1.5 are often disregarded in personal injury litigation.” Utah Common Good Memorandum at 5.


A lawyer shall not provide financial assistance to a client in connection with a pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.” Model Rule of Professional Conduct 1.8(e)(1).

For example, the death of a medical malpractice victim usually reduces the damages by reducing both economic and non-economic losses. This is especially true where the victim dies without survivors. In fact, death can sometimes save the defendant from having to pay anything, rather than damages for a severe injury.

See, e.g., Kritzer, Meeting Minutes at 23.

ABA Formal Opinion 94-389 [footnotes omitted].

Id.
61 Utah Common Good Memorandum at 1, 3. Howard, Meeting Minutes at 40.

62 Meeting Minutes at 41.

63 See, e.g., Kritzer, 80 Wash. L. Q. 739, 777-78 ([T]he time required to prepare a demand letter with the relevant documentation of loss to negotiate the actual settlement will, in a large proportion of cases, represent a time investment worth considerably more than 10% of the recovery).

64 Even the harshest critics allow that lawyers do not actively conspire by meeting to fix fees. “[L]awyers have] a strong incentive for acting collusively to maintain a uniform price. By "collusive," I do not mean that lawyers meet together, clandestinely or otherwise, to agree on a uniform price. Rather, I mean that lawyers act in the same manner as do gas stations owners on adjacent corners who recognize that if any of them lower the price, the others will respond by lowering their prices.” Brickman, “The Market for Contingent Fee-Financed Tort Litigation: Is it Price Competitive?” 25 Cardozo L. Rev. 65, 99 (2003).

65 “[A] lawyer who always charges the same percentage of recovery regardless of the particulars of a case should consider whether he is charging a fee that is, in an ethical context, a reasonable one. One standard fee for all cases may have the effect, given the difference among cases, of both over- and under-compensating the lawyer. Cf. In re Recorder’s Court Bar Association v. Wayne Circuit Court, 503 N.W.2d 885 (Mich.1993) (finding that a fixed fee system for compensating attorneys who represented indigent defendants that did not take into account the particulars of the case was unreasonable).” ABA Formal opinion 94-389.

66 His most recent article directly on point is “The Market for Contingent Fee-Financed Tort Litigation: Is it Price Competitive?” 25 Cardozo L. Rev. 65 (2003).

67 The accusation of evil and wickedness denoted by this term is consistent with Professor Brickman’s harsh critiques of contingent fees, plaintiffs’ lawyers and the ABA.

68 Brickman, Price Competitive at 73-74. See also Utah Common Good Memorandum at 5, citing O’Connell et al., “Yellow Pages Ads as Evidence of Widespread Overcharging by the Plaintiffs’ Personal Injury Bar and a Proposed Solution, 6 Conn. Ins. L.J. 423, 427 (2000), among other sources.

69 Kritzer, Meeting Minutes at 24.

70 Utah Memorandum in Opposition at 11.
71 Id. At 74.

72 Brickman, “Price Competitive?” at 107-112; Meeting Minutes at 39.

73 Id.

74 Cited in Utah Memorandum in Opposition, at 12.

75 See below, Section VI.A..

76 E.g., Sage, Meeting Minutes at 20; Campbell, at 44. Thorpe, “The Medical Malpractice ‘Crisis’: Recent Trends and the Impact of State Tort Reforms,” Health Affairs–Web Exclusive (January 21, 2004) <http://content.healthaffairs.org/cgi/reprint/hlthaff.w4.20v1> Thorpe’s analysis of the effects of tort reforms across the United States found no association between the adoption of various limitations on attorneys’ fees and reduced insurance premiums or improved loss ratios. The Thorpe study was discussed and cited for this proposition in the recent Congressional Budget Office Paper, “The Effects of Tort Reform: Evidence from the States” (June 2004).

77 Campbell, Meeting Minutes at 44.

78 Campbell, Meeting Minutes at 44; Simon, at 47.

79 Id.

80 In Florida, a total of $380,000,000 was paid out by insurers for the costs of medical liability, including defense costs, settlements and judgments. There are 38,000 physicians in Florida. That works out to only $10,000 per physician. Because so few are insured, there are too few to spread the risks appropriately. Also in the current cycle, insurers are moving out of state. Campbell, Meeting Minutes at 44.

81 The Task Force did invite the Florida Medical Association to present data to support this link, but it declined the invitation.

82 See below Section V.B. for further discussion. In addition: “Slowing the increase in physician premium costs does nothing to improve the system’s deterrence of medical error.” Hatlie & Sheridan, “The Medical Liability Crisis of 2003: Must We Squander the Chance to Put Patients First?” 22 Health Affairs 37 (July/August 2003).

83 E.g., Campbell, Meeting Minutes at 45. One published estimate puts the figure somewhat lower, but uses an “average”: “The attorney’s cost of bringing the case of an
injured plaintiff to trial can average in the range of $35,000 to $50,000.” Gunnar, “Is There an Acceptable Answer to Rising Medical Malpractice Premiums?”, 13 Annals Health L. 465, 479 (2004).

84 Affidavit of Thomas A. Schaffer, cited in Memorandum in Opposition to Petition for Rulemaking to Revise the Standards Relating to Contingency Fees, at 5-6.

85 Sage, Meeting Minutes at 20. Also see note 34 and the associated text.

86 E.g., Howard: “[E]ven with unlimited contingent fees, a $250,000 medical malpractice case is ‘untakeable.’” Meeting Minutes at 35.

87 Campbell, Meeting Minutes at 44.

88 Campbell, Meeting Minutes at 43. The statement was agreed with by Florida State Representative Jeffrey Kottkamp, a defense lawyer in private life (Meeting Minutes at 45).


http://www.flcourts.org/sct/sctdocs/ops/sc04-310.pdf

92 See, e.g., Wells v. Sullivan, 907 F.2d 367, 369-370 (2d Cir.1990) ("[A]bsent fraud or overreaching, courts must enforce such private contingency fee agreements, which are, after all, embodiments of the intentions and wishes of the parties . . . [T]o deny [plaintiffs] the option of entering contingent fee arrangements would tend to defeat the general remedial purpose of the statute by unnecessarily restricting claimants' options in securing adequate counsel or counsel of their choice.").

http://www.flcourts.org/sct/sctdocs/ops/sc04-310.pdf
"The conventional wisdom that liability has no useful role in addressing medical liability is wrong." Id.

Saks, quoting Weiler, at 132.

Howard, Meeting Minutes at 39.

See notes 3 and 4 above.

Owing to another provision of the Florida Constitution, limitations on attorneys’ fees cannot be made by statute alone, but must have equivalent constitutional basis.

http://www.flcourts.org/sct/sctdocs/ops/sc04-310.pdf

Id at. 25-26.

Simon, Meeting Minutes at 49.

Simon, Meeting Minutes at 48.

Id.

Justice Lewis of the Florida Supreme Court recently summarized the many Florida protections afforded medical professionals charged with medical malpractice and the negatively synergistic implications of the proposed amendment:

Pursuant to Florida law, medical negligence actions are currently highly regulated, and, unquestionably, Florida's citizens require the assistance of knowledgeable and experienced attorneys to navigate through the extensive and complicated process. . .

Prior to filing a legal action, a claimant is required to notify all prospective defendants of the claims. See § 766.106, Fla. Stat. (2003). At times, it is often difficult to initially identify those responsible for clear injuries. Once a claimant has filed notice with the prospective defendants, there are specific time periods and limitations that must be precisely followed before the actual legal action is considered timely filed. See § 766.106, Fla. Stat. (2003). Unlike all other
areas of Florida law, our law now mandates that prior to initiating a medical negligence action, a claimant must conduct an entire presuit investigative process as a condition precedent to proceed with any claims. See §§ 766.203-766.206, Fla. Stat. (2003). Failure to follow this required presuit screening process constitutes a basis to defeat any claim even if the claim is absolutely valid and the damages enormous. See § 766.106, Fla. Stat. (2003).

Once an action has been filed, the court may require, upon motion by a health care provider, that the claim be submitted to an arbitration process that is totally nonbinding. See § 766.107, Fla. Stat. (2003). In the alternative, the parties may mutually agree to binding arbitration. See § 766.207, Fla. Stat. (2003). If the parties do not agree to binding arbitration, section 766.108 of the Florida Statutes (2003) requires that the parties participate in mandatory mediation and settlement conference activities prior to any trial. See § 766.108(1)-(2)(a), Fla. Stat. (2003). Clearly, before a claim is ever filed or a trial may begin or damages are awarded, a litigant with a medical negligence claim must proceed through a lengthy, time consuming, and certainly, costly process. This mandatory pretrial screening process will remain in effect even if the proposed amendment is adopted. Florida citizens need, and are entitled to, assistance to guide them through this process. As evidenced by the numerous decisions concerning the pretrial medical negligence process, the existing law has been a series of traps and a minefield for many Floridians. See, e.g., Goradesky v. Hickox, 721 So. 2d 419, 420 (Fla. 4th DCA 1998) (affirming dismissal of claim for failing to file corroborating expert affidavit and failure to conduct reasonable presuit investigation before filing notice of intent); Kukral v. Mekras, 647 So. 2d 849, 850-51 (Fla. 3d DCA 1995) (affirming dismissal of claim and holding no reasonable investigation was conducted), quashed, 679 So. 2d 278 (Fla. 1996); Archer v. Maddux, 645 So. 2d 544, 547 (Fla. 1st DCA 1994) (affirming dismissal of claim for failure to provide corroborating expert opinion within statute of limitations). The district courts have recognized that the presuit investigation requirements are "complex and confusing." Coffaro v. Hillsborough County Hosp. Auth., 752 So. 2d 712, 713 (Fla. 2d DCA 2000), approved, 829 So. 2d 862 (Fla. 2002), and that the "interrelationship of [the] tolling and extension periods has produced [a] type of mathematical puzzle." Id. at 714. Further, they have recognized that while the procedures were not designed to function as traps for the litigants, they have nonetheless become just that—a trap. See id. at 715; Zacker v. Croft, 609 So. 2d 140, 141-42 (Fla. 4th DCA 1992). Unquestionably, without competent counsel, the process is impossible.

It is also vital to note the damage caps which now exist within the medical negligence statutory provisions, which are rarely mentioned but will continue to remain in effect should the proposed amendment be adopted. If the parties agree to binding arbitration pursuant to section 766.207, economic damages, including past and future medical expenses and eighty percent of wage loss and loss of
earning capacity can be awarded, offset, however, by collateral source payments. In this process, noneconomic damages are capped at $250,000 with future economic losses available, but they must be paid in periodic installments. Punitive damages are not available no matter how egregious the conduct may be. See §766.207, Fla. Stat. (2003). If a claimant rejects a medical provider's offer to enter voluntary binding arbitration, the only damages awardable at trial are limited to net economic damages and noneconomic damages are absolutely capped not to exceed $350,000 per incident. See § 766.209, Fla. Stat. (2003). If the parties proceed to trial, and damages are awarded to a claimant, noneconomic damages for the negligence of practitioners, regardless of the number, are capped at $500,000 per claimant if the negligence resulted in personal injury or wrongful death, and $1 million for all practitioners if the negligence resulted in a permanent vegetative state or death. See § 766.118, Fla. Stat. (2003). Similarly, noneconomic damages for the negligence of nonpractitioners are capped at $750,000 per claimant if the negligence resulted in personal injury or wrongful death, and $1.5 million from all nonpractitioners if the negligence resulted in a permanent vegetative state or death. See § 766.118, Fla. Stat. (2003). Finally, for the negligence of practitioners providing emergency services, noneconomic damages are capped at $150,000 per claimant, and a total claim of $300,000. See § 766.118, Fla. Stat. (2003). [fn3: It should also be noted that the Legislature has created the Florida Birth-Related Neurological Injury Compensation Plan. The purpose of this plan, as expressed by the Legislature, is to provide compensation, on a no-fault basis, for birth-related neurological injuries. The compensation plan is the exclusive remedy for such injuries, and limits recovery to $100,000. See § 766.303, Fla. Stat. (2003); § 766.31(1)(b), Fla. Stat. (2003).] All of these seldom discussed damage caps demonstrate that injured claimants are not eligible to receive enormous sums of money even if they are totally correct, suffer the consequences of absolutely clear negligence, and have been egregiously injured. In this highly specialized field, damages are currently artificially limited, and if the proposed amendment is adopted, these damage caps, along with the expensive and time consuming pretrial process, will remain in effect.

Several statutes which relate to the rights of third parties to enforce hospital liens and receive reimbursement or subrogation are also substantially implicated by the enactment of the proposed constitutional amendment. Pursuant to chapter 27032, Laws of Florida (1951), (commonly known as the "Hospital Lien Act") many of Florida's counties have adopted hospital lien acts that entitle hospitals to liens upon all causes of action for all reasonable charges for hospital care, treatment and maintenance. See, e.g., ch. 78-552, Laws of Fla. (Lee County's hospital lien act); ch. 57-1688, Laws of Fla. (Palm Beach County's hospital lien act); ch. 57-1644, Laws of Fla. (Orange County's hospital lien act); ch. 30615, Laws of Fla. (1955) (Broward County's hospital lien act). Additionally, there are both state and federal laws pertaining to the reimbursement of Medicaid and Medicare payments and the right of insurance and health maintenance organizations to be reimbursed for payments to subscribers who suffer injury, disease, or illness by virtue of the negligent act of a third party. See, e.g., 42
U.S.C. § 1395; § 409.910, Fla. Stat. (2003); § 641.31(8), Fla. Stat. (2003). If the proposed amendment is adopted, these provisions for payments to entitled third parties may be impacted, and due to the statutory damage caps, damage awards in some situations may not be sufficient to ensure that all eligible third parties receive full payment after the claimant receives seventy percent of the first $250,000 and ninety percent of all damages over $250,000, as mandated by the amendment. Common law and traditional subrogation rights are also implicated. Most importantly, the true purpose of the proposed amendment is truly revealed in the convergence of the proposed amendment, the unique presuit process, the statutes pertaining to the rights of third parties, and the damage cap statutory provisions. All converge to leave little, if any, funds remaining for Florida citizens to obtain counsel. Without knowledgeable and experienced attorneys to provide representation, the citizens of Florida will have no meaningful access to the courts, and the end result will be that the courthouse door will be open to only those wealthy enough to afford to compensate an attorney on some non-contingency fee basis.

http://www.flcourts.org/sct/sctdocs/ops/sc04-310.pdf

107 E.g., Simon, Meeting Minutes at 47: “Medical malpractice is unequivocally the toughest issue ever encountered by legislators. This is true now and is was true before. In 1985, as a supporter of ‘patients’ rights’ I received two death threats... No other issue has engendered one complete and four partial special sessions of the [Florida] legislature.”

108 The Florida Medical Association (FMA) was invited but declined to speak with the Task Force or otherwise to provide information supporting its proposal. The invitation to Mr. John Knight, General Counsel of the FMA, read in part:

Your participation could be valuable to our work in several ways. First, you might help us understand the facts that underlie the Florida insurance crisis for health professionals. We would like to discover, for example, what the role of the contingent fee has played in that crisis. Second, you might help us to imagine alternative contingent fee regimes, ones that would better serve the goals of the health professions to improve the delivery of high-quality health care. You might also help us to understand the current proposal to amend the Florida constitution.

On August 10, 2004, the Task Force requested that FMA clarify the reasons for its proposal in writing, with the following message:
Dear Mr. Knight:

Last week the ABA Task Force on Contingent Fees met in conjunction with the ABA Annual Meeting in Atlanta. Among the topics discussed was the proposed Florida constitutional amendment regarding lawyer contingent fees and three basic propositions believed to underlie it:

1. Contingent fees have caused an explosion in medical malpractice litigation, much of it frivolous.
2. Even meritorious medical malpractice lawsuits involve excessive, unreasonable fees paid to lawyers.
3. Lawyer contingency fees are a significant factor causing a rise in medical liability premiums.

Task Force members want to make sure they do not misunderstand the basis of the proposal. Does the FMA agree with these propositions? Is the FMA aware of data that support them? Are they the basis for the proposed amendment? If not, which factual propositions are? And what data supports them?

The FMA has not responded.

The written Statement of Client’s Rights is found in Florida Rule 4-1.5:

**STATEMENT OF CLIENT’S RIGHTS FOR CONTINGENCY FEES**

Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer, but, as a prospective client, you should be aware of these rights:

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with 1 lawyer you may talk with other lawyers.
2. Any contingent fee contract must be in writing and you have 3 business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within 3 business days of signing the contract. If
you withdraw from the contract within the first 3 business days, you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. If your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the 3-day period, you may have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you, the client, have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a contingent fee contract with you, a lawyer must advise you whether the lawyer intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers, the lawyer should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least 1 lawyer from each law firm must sign the contingent fee contract.

5. If your lawyer intends to refer your case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contract that includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interests and is legally responsible for the acts of the other lawyers involved in the case.

6. You, the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money will be or has been spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to lend or advance you money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered or on the amount recovered minus the costs.

7. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include...
money that you might have to pay to your lawyer for costs and liability you might have for attorney's fees, costs, and expenses to the other side.

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement your lawyer cannot pay any money to anyone, including you, without an appropriate order of the court. You also have the right to have every lawyer or law firm working on your case sign this closing statement.

9. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

10. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

11. If at any time you, the client, believe that your lawyer has charged an excessive or illegal fee, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar, call 850/561-5600, or contact the local bar association. Any disagreement between you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement. Usually fee disputes must be handled in a separate lawsuit, unless your fee contract provides for arbitration. You can request, but may not require, that a provision for arbitration (under Chapter 682, Florida Statutes, or under the fee arbitration rule of the Rules Regulating The Florida Bar) be included in your fee contract.

Client Signature  Attorney Signature

Date  Date

110  Id.

111  Id.

113 See note 4 above.

114 As described more thoroughly in note 106 above, since the late 1980s, Florida has limited damages in medical malpractice cases. For example, prospective defendants can limit damages to 80% of economic loss and $250,000 non-economic loss by admitting liability and submitting to binding arbitration during the 90-day pre-filing, screening period. In addition, the defendant pays a small portion of the plaintiff’s fees. These measures are clearly designed to encourage early resolution of medical malpractice cases. If suit is filed, caps remain in place; non-economic damage caps limitations vary from $350,000-$500,000. Florida also has low caps on neurologic damage to newborns. Apparently, these statutory caps so limit potential damages that few such cases are brought in the state.

115 Utah Brief in Support at 2-3.

116 Howard, Meeting Minutes at 35-38.

117 Kritzer, Meeting Minutes at 23.

118 E.g., Art Simon, who worked with a business coalition that urged the FMA not to proceed with the amendment. The same group had favored contingent fee limitations in class actions, but “FMA had the wrong thing, wrong time and wrong vehicle. . . The proposal is unconscionably arbitrary and vindictive.” Meeting Minutes at 49.

119 Id.

120 Id.

121 Id.

122 Three other proposals have come to the Task Force’s attention: Lawyer “brokers,” extended engagement contract revocation periods, and “health courts.” The first would introduce expert intermediaries into the process of lawyer selection. Clients would, in effect, hire one lawyer to assist them in hiring another. A informal version of this system already exists in practice, by the mechanism of referrals, usually with fee sharing. In the best of such cases, clients rely on a trusted local lawyer to secure them an expert lawyer to handle a difficult case. In the worst of such cases, lawyers hustle clients in high volume, and farm out the matters to others who will do them cheaply, often taking the lion’s share of the fees although they did little in the way of legal work. The Texas Supreme Court has recently studied referral fee issues and, finding potential harm, has recommended restrictions on the practice. See Justice Hecht, Meeting Minutes at 27.
Referring lawyers can offer important efficiencies. They can provide an alternative to the potentially ineffective approach of educating laypersons to choose counsel and negotiate a fee. Instead, potential clients would rely on professionals who possess the requisite information and expertise, not just in general tort practice, but in the precise specialties in which the clients need legal assistance. Going further than the current referral practices, a more efficient system would have the referring lawyer (whom some refer to as a “broker”) negotiate lower fees (and perhaps other, better terms) for the client, charge a modest fee for the service, and thereby reduce the overall contingent fee percentage and potential cost to the client. It might also involve sealed bids that specify all the terms of the engagement, especially fees. Currently, “brokerage” services of this sort are not sanctioned by professional rules. Referrals, to the extent allowed, require referring counsel to remain involved with the client as “co-counsel.”

Unfortunately, unrestrained referral practices already present opportunities for collusive practices and lawyer overreaching and do not ensure efficiency. Unless effectively regulated, so-called “brokerage” services might simply present new such opportunities. If, as critics charge, some lawyers extract excessive fees in contingent cases, there is no certainty that client ability to choose a good broker will preclude the possibility that the combination of broker and lawyer fees will not equal or exceed those that would otherwise be charged. Also, if unscrupulous lawyers currently breach their fiduciary duties and professional ethics to clients by overreaching with fee agreements, a broker system might simply present the opportunity for two unscrupulous lawyers to do so.

The second suggestion is an extended engagement letter revocation or “cooling off” period. Permitting clients to revoke a contingent fee contract for a period of time after it is executed so that clients could reflect on the arrangement, consult with others – including other lawyers – and perhaps even conduct an auction. The original, now replaced, lawyer would receive a fee based on a stated hourly rate, and contingent upon ultimate recovery, for hours actually worked prior to the revocation. Although a carefully structured revocation rule could provide some marginal client protection it is difficult to assess whether that protection is worth its potential costs, including the uncertainties and complications of contract revocation and resulting fee-sharing obligations.

The third proposal, a special health court, would effectively scrap the current tort litigation system and replace it with a streamlined set of rules and tribunals. Although the Task Force endorses the notion of a more efficient and accurate system of justice for victims, it has not studied any detailed proposals along these lines and therefore withholds judgment on such a proposal.

124 E.g., McMullen, Meeting Minutes at 28-29; Howard, 38-39.
Exhibit 1

Membership of Task Force on Contingent Fees of ABA Tort Trial & Insurance Practice Section

Steven B. Lesser (chair), Shareholder, Becker & Poliakoff, P.A., Ft. Lauderdale, Florida

Mr. Lesser devotes his practice exclusively to construction law and litigation and has substantial experience representing owners, developers, contractors, design professionals, and government entities in a variety of construction cases. He successfully represented homeowner Phillipe Moransais in a landmark case before the Florida Supreme Court (Moransais v. Heathman, et al.) which in effect, reshapes construction law in Florida by retreating from the economic loss doctrine and forcing architects, engineers and other professionals to be accountable for their own negligence. Mr. Lesser is AV Rated by Martindale-Hubbell. In addition, Mr. Lesser serves as special construction litigation counsel to the School Board of Broward County handling delay claim litigation and as prosecuting attorney for the Building Code Services Division of Broward County. He received the prestigious Deborah M. Smoot Memorial Award by the Editorial Board of the Florida Bar Journal & News for his outstanding contributions to the Journal and News as Chair and Board Member. Florida Trend Magazine recognized Mr. Lesser in 2004 among its "Legal Elite" in the area of Construction Law. This designation was based upon a poll of Florida attorneys, who selected peers in the top 2% of their respective practice areas. Mr. Lesser has held several leadership positions in the Tort Trial & Insurance Practice Section of the ABA, including serving as chair of the Standing Committee on Professionalism. A prolific author on construction-related legal issues, Mr. Lesser wrote a "Florida's New Construction Defect Statute: The Aggrieved Homeowner's Obstacle Course", Florida Bar Journal (October 2003) and a chapter entitled, "Damages In Commercial Cases", Florida Civil Practice Damages, The Florida Bar Continuing Legal Education, Fifth Edition (September, 2000), and co-authored a chapter of the Florida Bar Manual entitled, "Florida Condominium Law and Practice - Construction Defect Litigation", 3d ed. 2003. In addition, he has published articles including: "The Great Escape, How to Draft Exculpatory Clauses That Limit or Extinguish Liability", Florida Bar Journal, November, 2001);co-author of "Risky Business: The Active Interference Exception to No Damage for Delay Clauses", Construction Lawyer, Winter, 2003; "Chipping Away of the Economic Loss", Florida Bar Journal (October, 1999); "The Inadvertent Waiver of Mandatory Construction Arbitration Clauses", Florida Bar Journal (October, 1997);"Economic Loss Doctrine and Its Impact Upon Construction Claims", Volume 14, No. 3, The Construction Lawyer (August, 1994);"Beyond the Rules of Civil Procedure: The Use of Case Management Techniques in Complex Multi-Party Litigation," Volume 15 Trial Diplomacy Journal 223-234 (1992); "Deposing The Expert Witness" Volume 20 The Brief No. 1, American Bar Association, (1990); "The Validity, Force And Effect Of No Damage For Delay Clauses," 62 Florida Bar Journal No. 1 (January, 1988); and "Discovery In Construction Litigation" Volume 62 Florida Bar Journal No. 11 (December,1988).
Edward R. Blumberg, President, Deutsch & Blumberg, P.A., Miami, Florida

Edward R. Blumberg practices trial law in Miami, Florida specializing in medical malpractice. He is President of Deutsch and Blumberg, P.A. Mr. Blumberg is listed in the current edition of Best Lawyers in America. From 1987 to 1996 Edward Blumberg was a member of the Board of Governors of the Florida Bar and was the President of the Florida Bar in 1997-1998. In this capacity he was directly involved in the drafting and enforcing of rules regulating contingency attorney's fees and lawyer discipline.

Mr. Blumberg is currently board certified in civil trial law by the Florida Bar and the National Board of Trial Advocacy. He is a member of the American Board of Trial Advocates, which is composed of defense and plaintiff lawyers in equal numbers.

Mr. Blumberg is also licensed to practice in the Federal Courts including the United States Supreme Court. He has authored articles in the field of torts and lectures frequently to lawyers and insurance adjusters. A 1972 graduate of the University of Georgia with a B.A. in psychology, he received his J.D. degree from The College of William and Mary in 1975.

Mr. Blumberg has the AV rating from Martindale-Hubbell and is listed currently in Who's Who in America and Who's Who in American Law. He has been presented with numerous awards including the Great American Traditions Award presented by B'nai B'rith in recognition to his abiding faith and devotion to the U.S. Constitution and the freedom it stands for.

Janice P. Brown, Principal, Brown Law Group, San Diego, California

Janice P. Brown is known for her professional distinctions as well as her commitment to the legal community with nearly 20 years as a trial lawyer with significant trial, arbitration and appellate experience. Ms. Brown formed Brown Law Group in 2003, a law firm focused on business and employment litigation. She was recently honored with the Bernard E. Witkin Award for civic leadership and excellence in the teaching, practice, enactment or adjudication of the law. Ms. Brown received her undergraduate degree in Journalism and graduated with honors from the University of Montana in 1981. She graduated from Gonzaga Law School in two years, and joined the Justice Department’s Honors Program in 1984. Her distinguished career includes receiving the Department of Justice “Outstanding Trial Attorney” Award in 1987. In 1995, she was honored as the “Lawyer of the Year” by the California Association of Black Lawyers. She received the “Women Who Mean Business” Award in Law from the San Diego Business Journal in 1998. In 2003, the San Diego County Bar Association recognized Ms. Brown for her commitment to diversity in the legal profession. She also has received recognition for her community involvement. Ms. Brown served on the Steering Committee of the California Minority Council Program; is a member, Past President and Treasurer, of the Earl B. Gilliam Bar Association; and is a member of the Board of Directors of the NAACP. From 1995-1997, Ms. Brown served on the Board of Directors of the San Diego County Bar Association. She currently serves as a San Diego delegate to the House of Delegates for the American Bar Association, was recently selected as Vice Chair of two sub-committees of the ABA’s Tort and Insurance Practice Section, Employer and Employee Relations and Solo and Small Firm Practitioners, and is a Master of the American Inns of Court.
Michael V. Ciresi, Partner and Chairman, Robins, Kaplan, Miller & Ciresi, LLP

Michael V. Ciresi is Chairman of the Board of Robins, Kaplan, Miller & Ciresi LLP, headquartered in Minneapolis, MN. He is a trial lawyer with focuses in the areas of product liability, intellectual property, business and commercial litigation. He has acted as counsel for corporations, individuals, and governmental entities throughout his career and has taught and lectured nationally and internationally to professional and business groups.

Mr. Ciresi is admitted to the bars of Minnesota and New York, to the U.S. Court of Appeals for the Second, Fifth, Eighth, Ninth and Tenth Circuits, and to the United States Supreme Court.

Mr. Ciresi is active in public service and has served on the Board of Trustees of University of St. Thomas; the Board of Governors of University of St. Thomas School of Law; the Advisory Board of the Centre of Advanced Litigation at Nottingham Law School in Nottingham, England; the Board of Directors of Equal Justice Works; the Board of Directors of the Institute of Judicial Administration at New York University School of Law; the Board of Trustees of the Lawyers' Committee for Civil Rights Under Law; the Board of Directors of the Guthrie Theater; and the Board of Directors of the Ordway Center for the Performing Arts. He is also on the boards of the Trial Lawyers for Public Justice and the National Association of Public Interest Law.

Mr. Ciresi is a member of the Minnesota State Bar Association, the American Bar Association, Hennepin County Bar Association, the Inner Circle of Advocates, the International Academy of Trial Lawyers, the International Bar Association, the Ramsey County Bar Association, the Association of Trial Lawyers of America, the American Board of Trial Advocates, and the Minnesota Trial Lawyers.

Mr. Ciresi received his B.A. from the University of St. Thomas, St. Paul, Minnesota in 1968, and his J.D. from the University of Minnesota in 1971. He also received the honorary degree, Doctor of Laws from Southwestern University School of Law in 2001.

Thomas A. Demetrio, Corboy & Demetrio, P.C., Chicago, Illinois

Thomas A. Demetrio of Corboy & Demetrio is a trial lawyer with an emphasis on medical negligence, airplane crash, product liability and commercial litigation on behalf of plaintiffs. He is Past President of the Chicago Bar Association and Illinois Trial Lawyers Association. He is a fellow of The International Academy of Trial Lawyers, The American College of Trial Lawyers, and The Inner Circle of Advocates.

Mr. Demetrio has been listed in Best Lawyers in America since its inception in 1987. In 1990 he was named by the National Law Journal as one of the Nation's Top Ten Trial Lawyers. In 1999 he was listed first by the National Law Journal in its list of the top ten trial lawyers in Illinois. In 2003 he was voted by his peers to be among the top of all lawyers in Illinois. He has done extensive teaching and lecturing nationwide in the field of trial techniques and has authored numerous continuing legal education articles in the field of civil litigation.

Mr. Demetrio earned his B.A. from the University of Notre Dame in 1969 and a J.D. from IIT Chicago-Kent College of Law in 1973.
Lewis H. Goldfarb, Partner, Hogan & Hartson, LLP, New York, New York

Lewis H. Goldfarb is a partner in the New York office of Hogan & Hartson LLP and a member of the firm’s Litigation Group. His practice focuses on class action defense and a variety of regulatory areas, including antitrust and product safety regulation. Mr. Goldfarb is a former vice-president and associate general counsel for DaimlerChrysler Corporation. He was responsible for most of the company’s regulatory matters, including antitrust, trade regulation, franchising, advertising, marketing, environmental and motor vehicle safety. He successfully represented DaimlerChrysler before federal, state and local regulatory agencies and served as an advocate for the automobile industry before congressional and judicial proceedings.

Mr. Goldfarb was also in charge of DaimlerChrysler’s class action litigation and was the architect of the company’s highly successful class action defense program. He has authored several articles, lectured frequently and has been quoted widely in business and industry press on strategies for countering abusive class actions. His published articles include "Selling Res Judicata – Class Action Abuse and How to Fix It" and "It's the Lawyers, Stupid! - Lawyer Misconduct As A Basis to Defeat Class Certification." He serves on the Board of Lawyers for Civil Justice and has been actively involved in seeking reform of federal and state class action and product liability laws.

Prior to joining DaimlerChrysler, Mr. Goldfarb served for 12 years at the Federal Trade Commission, first as a trial attorney, then as assistant director of the Bureau of Consumer Protection in charge of the Division of Consumer Financial Services. In that role, he was responsible for enforcement of federal regulations governing financial privacy and disclosure. He also served as the task force director for the Board of Governors of the Federal Reserve Board drafting regulations to implement the Equal Credit Opportunity Act. Mr. Goldfarb received his B.A. from New York University and his J.D. from Rutgers Law School. He is a member of the Bars of New York, the District of Columbia, Virginia, Michigan, and is admitted to practice before the U.S. Supreme Court.

Kim D. Hogrefe, Attorney and Managing Director, Chubb & Son, Warren, New Jersey

Kim D. Hogrefe is a Managing Director of Chubb & Son and serves on the Management Committee of Chubb Specialty Insurance. He is the Worldwide Manager of Chubb’s Specialty Claim Department, with responsibility for Directors’ and Officers’, Fiduciary, Employment Practices, Professional Liability E&O, Fidelity, Surety and various Financial Institution claims.

Mr. Hogrefe joined Chubb in 1986 after nine years experience as a trial attorney, supervisor and administrator in the New York County District Attorney’s Office. He is a graduate of Yale University and the University of Pennsylvania Law School. He is a member of the American Bar Association, where he serves in various leadership positions in the Tort Trial & Insurance Practice Section (TIPS). He was Co-Chair of the Professionals’ Officers’ and Directors’ Liability Committee of TIPS. He was also the Chair of the Directors’ and Officers’ subcommittee of the Insurance Law Committee of the Association of the Bar of the City of New York.

Mr. Hogrefe is a frequent speaker on the topic of Directors’ and Officers’ liability claim handling and related issues. He has made presentations at National and Regional RIMS, PLUS,
the Stanford Law School Directors' College and various bar associations. He is the co-author of an article on D&O claim management published in 1997 by Risk Management Society Publishing, Inc. and a 1998 article on utilization of damage analysis in the settlement of securities class action claims.

Michael S. Hull, General Counsel, Texas Alliance for Patient Access, Austin, Texas; Partner, Hull Henricks & MacRae, LLP, Austin, Texas

Michael S. Hull was recently included in the 2001-2002 edition of The Best Lawyers in America, an award recognized by The New York Times, Forbes, and The Washington Post. Mr. Hull has tried more than one thousand jury, non-jury and administrative matters and is Board Certified in Personal Injury and Civil Trial Law by the Texas Board of Legal Specialization. His trial experience includes mass tort work in asbestos, breast implant, tobacco, Norplant and Fen-phen litigation, numerous product liability matters, defense of pharmaceutical companies, health insurance carriers, medical negligence, construction disputes, employment issues and numerous administrative matters. Mr. Hull has also drafted legislation, and works on litigation matters that have sensitive political aspects. Further, Mr. Hull has substantial experience managing extremely complex litigation.

Mr. Hull is a member of the International Association of Defense Counsel, the Texas Association of Defense Counsel, the Defense Research Institute, the American Bar Association, the Travis County Bar Association, and the State Bar of Texas and is a Fellow of the Texas Bar Foundation.

Since graduating from law school, Mr. Hull has served as Co-Chair of the Texas Young Lawyers Voter's Rights and Registration Committee and as Secretary and Vice-Chair of the Texas Commission on Alcohol and Drug Abuse by appointment from Governor Ann Richards. Mr. Hull has also served as President of the Universal Park Committee, as Chair of the Business Advisory Council of United Cerebral Palsy and received the 1991 John Ben Shepperd Alumni Achievement Award, and as Board Member of the Central Texas Mental Health Board.

Mr. Hull received a B.S. Degree in 1979 from Wayland Baptist University and graduated from Texas Tech Law School in 1981.

Perry K. Huntington, Attorney and Senior Vice President, AIG Technical Services, Inc., New York, New York

Perry K. Huntington is a Summa Cum Laude Graduate of the University of Hartford and a graduate of the University Of Connecticut School of Law. Prior to working at AIG Technical Services, she was employed for eleven years in Casualty and Environmental Claims. For 15 years she has been employed by the AIG Companies, and is currently the Senior Vice President of Environmental Claims for AIG.
Robert Johnson, Senior Counsel, McDonald’s Corporation, Chicago, Illinois

Mr. Johnson is Senior Counsel in McDonald’s Corporation’s Customer Action Team, where he is responsible for the oversight and management of all customer-related claims and litigation initiated against the company. Mr. Johnson is directly responsible for the management, supervision, coordination and defense of every aspect of the customer claim and litigation process, including decision-making authority regarding sensitive cases brought against McDonald’s by customers.

Mr. Johnson formerly owned Robert Johnson & Associates Ltd., a full-service law firm and consulting firm that specialized in representing business and individual clients in commercial and civil litigation. Prior to starting his own firm, Mr. Johnson worked as a civil trial attorney for several prominent defense firms where he represented Fortune 500 clients and various individuals. He has extensive experience in alternative dispute resolution and has negotiated many complex deals. He also has extensive experience in risk assessment and has developed programs to prevent business hazards and reduce legal exposure. He has also presented seminars on crisis management and avoidance.

As a complement to his legal and consulting experience, Mr. Johnson has also emphasized diversity and social responsibility issues. He has served as chair of organizations and committees focusing on diversity and pro bono concerns. He has actively addressed issues of diversity and the role that diversity initiatives play in risk reduction and crisis management strategies. He currently serves in leadership positions on boards and organizations that emphasize youth development and economic development in underserved communities.

Mr. Johnson received his J.D. from the University of Illinois College of Law and dual B.S. degrees in Economics and Business Administration, and in Sociology and Anthropology from Knox College.

Daniel M. Klein, Buckley & Klein, LLP, Atlanta, Georgia

For 25 years, Dan Klein has specialized in employment litigation. He has represented hundreds of employees and companies in a wide range of employment cases, including sexual harassment claims; class actions; race, age, and sex discrimination; and non-competition and other contract disputes. A native of New York City, Dan received his undergraduate degree from Brown University and his law degree from Georgetown University Law Center. Dan is admitted to the United States Supreme Court, the United States Court of Appeals for the 11th Circuit, and all other federal and state courts in Georgia. Dan is ranked as one of “America’s Leading Business Lawyers” by Chambers & Partners, and a “Super Lawyer” by Atlanta magazine. Dan is also listed in Martindale Hubbell’s Bar Register of Preeminent Lawyers.

Since the early 1990s, Dan has also developed his practice in the field of alternative dispute resolution. He has served as mediator or arbitrator in more than 300 employment or business disputes, and has taught mediation and negotiation around the United States and in Europe. Dan has developed a mediation website, www.kleinmediation.com, that allows users to analyze and value lawsuits using “decision trees.” Dan speaks fluent French and, in 2003, was appointed to the mediation panel of the Centre de Médiation et d’Arbitrage de Paris.
Marc S. Moller, Partner, Kreindler & Kreindler, LLP, New York, New York

Marc S. Moller is a partner in the law firm Kreindler and Kreindler and has been representing victims of aviation accidents and other tortious conduct and their families for more than twenty-five years.

Mr. Moller has been Lead Counsel or served as an active member of several Plaintiffs' Steering Committees which have directed the handling of aviation and other mass disaster cases involving complex factual, technical and legal issues, such as Warsaw Convention, foreign law, choice of law, and other problems relating to discovery and damages assessments.

Mr. Moller has devised innovative demonstrative evidence secure liability verdicts and awards and settlements for his clients. These include sophisticated dynamic computer generated accident reconstructions which have been received in evidence in courts whenever they were presented and innovative economic forecasting systems to illustrate the magnitude of losses sustained by plaintiffs. His professional experience also covers a broad range of non-aviation litigation matters including general tort, malpractice and commercial cases.

Mr. Moller is a frequent lecturer in the United States and throughout the world and is the author of numerous articles relating to aviation and product liability litigation, aviation safety, and litigation and settlement strategies generally. He has served as the Chairman of the Aviation and Space Law Committee of the Tort and Insurance Practice Section of the American Bar Association, as well as the Aviation Committee of the New York State Bar Association, and has held a broad range of leadership positions in many organizations devoted to law, civic and charitable pursuits. Because of his expertise in analyzing and presenting evidence of psychological and post-traumatic stress disorder injury, he has been asked to serve on the Advisory Board of the Forensic Center for Stress & Post-Traumatic Stress Disorders.

After receiving his B.A. and J.D. degrees at Cornell University, he was admitted to the Bar of the State of New York in 1964, thereafter he became a member in good standing of the United States Supreme Court, the United States Courts of Appeals and has been routinely admitted to federal and state trial and appellate courts throughout the United States in which results favorable to his clients have been achieved.

Professor Charles M. Silver, University of Texas Law School, Austin, Texas

Professor Silver holds the Roy W. and Eugenia C. McDonald Endowed Chair at the University of Texas School of Law, where he writes and teaches about civil procedure, professional responsibility and, increasingly, health care law and policy. His recent works include "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?", Cornell Law Review (forthcoming 2004); "We're Scared To Death: Class Certification and Blackmail", 78 N.Y.U. L. Rev. 1357 (2003), "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs", 44 Ariz. L. Rev. 787 (2002); "Does Civil Justice Cost Too Much?" 80 Tex. L. Rev. 2073 (2002); and "What's Not To Like About Being A Lawyer?", 109 Yale L. J. 1443 (2000). He is currently an Associate Reporter on the American Law Institute's Project on Aggregate Litigation and a member of the ABA/TIPS Task Force on the Contingent Fee. He has
been Visiting Professor at the University of Michigan Law School and the Vanderbilt University Law School. In 1997, he received the Texas Excellence in Teaching Award.

Professor Silver earned his B.A. from the University of Florida in 1979, M.A. from the University of Chicago in 1981, and his J.D. from Yale in 1987.

Professor Patrick E. Longan, Mercer Law School, Macon, Georgia (reporter)

Patrick Longan holds the William Augustus Bootle Chair in Ethics and Professionalism in the Practice of Law at the Walter F. George School of Law of Mercer University. He has previously served as Reporter for the State Bar of Georgia Multijurisdictional Practice Committee and currently serves as Reporter for the State Bar of Georgia Court Futures Committee. Professor Longan is a member of the State Bar of Texas (inactive) and the State Bar of Georgia. He earned an A.B. degree from Washington University; M.A. from the University of Sussex; and J.D. from the University of Chicago.

Professor D. Christopher Wells, Mercer Law School, Macon, Georgia (reporter)

Professor Wells has taught Business Associations, Securities Regulation, Contracts and Corporate Issues Seminar at the Walter F. George School of Law of Mercer University since 1990. Prior to that he taught similar subjects at the West Virginia University College of Law. In recent years, he has served as reporter for several bar committees and has drafted reports on engagement letters in transactional practice and on multidisciplinary practice. Prof. Wells has been a visiting professor at Al Akhawayn University in Ifrane, Morocco, and at the Modern University for the Humanities in Moscow, Russia.

Before entering law teaching, Professor Wells practiced law with Hughes Hubbard & Reed in New York and Los Angeles, where he focused on corporate litigation. He handled matters ranging from intellectual property and oil antitrust cases to tender offers and tort defense.

He earned his B.A. from Grinnell College in 1971 and his J.D. from the University of Iowa in 1978.
Exhibit 2

Task Force Presenting Guests

Savannah, Georgia Guest
October 2003

Robert S. Peck

Robert Peck is a lawyer and President of the Center for Constitutional Litigation, which, among other activities, represents the Association of Trial Lawyers of America (ATLA) against the efforts of state medical associations and other interest groups to limit contingent fees. Mr. Peck was formerly a senior litigator with ATLA.

Columbia University Guests
December 2003

John C. Coffee, Jr.


Jill E. Fisch

David Hyman


William Matthew Sage


John Degnan

John J. Degnan was promoted to the position of Vice Chairman and Chief Administrative Officer of The Chubb Corporation in December 2002. He has held various titles since joining Chubb & Son in 1990 as a Senior Vice President and General Counsel. A year later he became a Managing Director. In September 1996 he was elected President of The Chubb Corporation and also became President of Chubb & Son in 1998, responsible for the claim, general counsel, human resources, information technology and administrative services departments as well as Chubb’s communications, compliance and external affairs functions.

Currently Mr. Degnan is Vice Chairman of the American Institute for Chartered Property Casualty Underwriters and serves on the Boards of The School of Risk Management, Insurance, and Actuarial Science, St. John’s University; Saint Vincent College; St. Benedict’s Preparatory School; St. Barnabas Hospital; RAND Institute for Civil Justice; New Jersey Future; NJN Foundation; and the New Jersey Performing Arts Center. He is also a member of the Supreme Court of New Jersey Disciplinary Oversight Committee.

After working as a law secretary for the late New Jersey Supreme Court Justice John Francis, Mr. Degnan joined the Newark law firm of Clapp & Eisenberg. In 1974, he was appointed Assistant Counsel to Brendan T. Byrne, Governor of New Jersey, becoming Chief Counsel to the Governor in 1977. He was appointed Attorney General of the State of New Jersey in 1978 and served until 1981 when he became a senior partner with Shanley & Fisher, specializing in administrative law.

Mr. Degnan graduated from Saint Vincent College magna cum laude in 1966 and from Harvard Law School with a Juris Doctor degree in 1969. He received honorary degrees from the College of St. Elizabeth in 1978 and from Seton Hall University in 1979.
Justice Nathan Hecht
Texas Supreme Court

Justice Hecht has a special interest in referral fees, a sub-issue of contingent fees. The Texas Supreme Court has been involved recently in amending the rule in Texas to constrain such fees. (For more information about referral fees in Texas, see “Considering Referral Fees: A Look Back in History,” 66 Texas Bar Journal 977 (December 2003); “Regulating Referral Fees: An Evolutionary Process,” 66 Texas Bar Journal 982 (December 2003); and “State Bar Asks Court to Delay Implementation,” 66 Texas Bar Journal 972 (December 2003).)

Justice Nathan L. Hecht was elected to the Texas Supreme Court in 1988 and reelected in 1994. He began his judicial service on the 95th District Court of Dallas County, to which he was appointed on September 1, 1981, elected in 1982, and reelected in 1984. In 1986, he was elected to the Court of Appeals for the Fifth District of Texas at Dallas, where he served until his election to the Supreme Court.

Justice Hecht earned his B.A. at Yale University with honors in philosophy, and graduated cum laude from the Southern Methodist University School of Law. He was a law clerk to Judge Roger Robb of the U.S. Court of Appeals for the District of Columbia Circuit. He also served as a Lieutenant in the U.S. Naval Reserve.

He practiced law in the area of general litigation with the Dallas firm of Locke Purnell Boren Laney & Neely, and was a shareholder in that firm prior to his appointment of the bench. While on the District Court, Justice Hecht was local administrative judge, presiding over all county and district judges in Dallas county and representing them before other branches of government. Throughout his tenure on the Supreme Court, Justice Hecht has been designated to oversee all changes in state court rules.

Justice Hecht is a member of the American Law Institute, the Texas Philosophical Society, and a Fellow of the Texas and American Bar Foundations. He is on the advisory board of the S.M.U. Law Review and was named Outstanding Young Lawyer in 1984 by the Dallas Association of Young Lawyers.

Professor Bert Kritzer


Bert Kritzer is Professor of Political Science and Law at the University of Wisconsin-Madison. He serves as the director of the undergraduate Legal Studies Program (an interdisciplinary major) and of the Criminal Justice Certificate Program, and as editor of Law & Society Review, the scholarly journal of the Law & Society Association.
He has been at the University of Wisconsin since 1977. He has a Ph.D. in Political Science from the University of North Carolina at Chapel Hill (1974) and a B.A. in Sociology from Haverford College (1969).

He teaches *Judicial Politics and Process* and *Research Methods* (both qualitative and quantitative); the introductory course in American National Government; and a course entitled Politics and Theatre. His research and writing are primarily in judicial process (both U.S. and comparative), with some occasional writing on research methods.

**Linda McMullen**

Linda McMullen is General Counsel for the Mississippi State Medical Association (see MSMAonline.com). She was recommended to the committee as an especially articulate and knowledgeable proponent of the Common Good proposal. She also has experience with the tort reform proposals that have advanced in recent years in Florida.

Ms. McMullen graduated from Florida State University (B.A. 1972) and Florida State University College of Law (J.D. 1977). Prior to entering private practice, Ms. McMullen enjoyed a varied public service career, including experience in all three branches of government. While still in law school, she served as an aide to Florida State Senator Jack Gordon (D-Miami Beach). She continued her legislative career as a staff member of the Senate Appropriations Committee which work culminated in the Senate President appointing her Staff Director of the Finance and Taxation Committee. She was the first woman and the youngest person ever to assume a Staff Director position in the Florida Senate. After seven years and with a goal of obtaining trial experience, Ms. McMullen resigned from the Senate to assist then State Attorney Janet Reno with the Third Florida Statewide Grand Jury, investigating and prosecuting organized crime throughout the state. When the grand jury finished its work she went on to serve as an Assistant State Attorney for Florida’s Eighth Judicial Circuit. There she was responsible for a felony and misdemeanor caseload in addition to acting as legal advisor for the circuit grand jury. After several years and at the request of then Florida Governor Bob Graham, Ms. McMullen left her prosecuting duties to assume the position of Executive Director of the Florida Democratic Party, of which Governor Graham was chair. In this capacity she helped coordinate the southeastern United States Democratic presidential and statewide campaigns. At the conclusion of the 1980 presidential campaign Ms. McMullen became Legislative Counsel to Governor Graham and advised the Governor on legislative and political matters until she entered the private practice of law.

In early 1984 Ms. McMullen joined the law firm of McFarlain, Wiley, Cassedy and Jones, P. A., in Tallahassee, Florida. The firm provides legal services to a wide array of clients, with an emphasis on health care, professional regulation, administrative law, business transactions, insurance regulation, litigation and medical malpractice defense. As a partner in the firm Ms. McMullen practiced health, governmental, and administrative law, representing individual and corporate clients with an emphasis on health care, professional regulation, legislation, regulatory and insurance matters. Representative corporate clients included Citicorp-
Citibank, the Pillsbury Company, Merrill Lynch, The Florida Bar, several insurance companies and various professional groups.

In June of 1998, Ms McMullen joined the staff of the Mississippi State Medical Association as General Counsel. In that capacity she provides legal counsel to MSMA, its subsidiary companies, and members. She also assists MSMA with its legislative and political action programs.

[From the MSMA website:] “The Mississippi State Medical Association (MSMA) is a physician organization serving as an advocate for its members, their patients and the public health. The association promotes ethical, educational and clinical standards for the medical profession and the enactment of just medical laws. Founded in 1856, the Mississippi State Medical Association provides a way for members of the medical profession to unite and act on matters affecting public health and the practice of medicine.”

Michael S. Hull

Mike Hull is General Counsel of the Texas Alliance for Patient Access (TAPA). Mr. Hull has tried more than one thousand jury, non-jury and administrative matters and is Board Certified in Personal Injury and Civil Trial Law by the Texas Board of Legal Specialization. His trial experience includes medical malpractice defense of doctors, nurses and hospitals, mass tort work in asbestos, breast implant, tobacco, Norplant and Fen-Phen litigation, numerous product liability matters, defense of pharmaceutical companies, health insurance carriers, construction disputes, employment issues and numerous administrative matters.

Mr. Hull has also drafted and negotiated legislation, and worked on litigation matters that have sensitive political aspects. He most recently served as chief negotiator for House Bill 4, the 2003 omnibus tort reform bill.

Mr. Hull has been recognized as one of The Best Lawyers in America, a 2003 Texas Super Lawyer and as A Super Lawyer in Travis County. He is a member of the International Association of Defense Counsel, the Texas Association of Defense Counsel, the Defense Research Institute, the American Bar Association, the Travis County Bar Association, the State Bar of Texas, and the Texas Pro Bono College and is a Fellow of the Texas Bar Foundation and the College of the State Bar of Texas.

Since graduating from law school, Mr. Hull has served as Co-Chair of the Texas Young Lawyers Voter’s Rights and Registration Committee and as Secretary and Vice-Chair of the Texas Commission on Alcohol and Drug Abuse by appointment from Governor Ann Richards. Mr. Hull has also served as President of the Universal Park Committee, as Chair of the Business Advisory Council of United Cerebral Palsy and received the 1991 John Ben Shepperd Alumni Achievement Award, and served as Board Member of the Central Texas Mental Health Board.

Mr. Hull served as Associate Editor of the Texas Tech Law Review, authored two articles published by the Law Review, was a member of the National Moot Court Team, and served on the Board of Barristers. He has also published Sun Dancing: A Spiritual Journey on the Red
Road and is a contributor to From the Ashes: A Spiritual Response to the Attack on America, with all proceeds going to the disaster relief charities.

Mr. Hull was born in Colorado City, Texas, graduated from Hereford High School in 1976 and received a B.S. Degree in 1979 from Wayland Baptist University. Mr. Hull played basketball for the Pioneers, and graduated from Texas Tech Law School in 1981. He is married to Mignon McGarry, a legislative Consultant. They have one daughter, Michelle, who was born in January 1997.

[From TAPA’s website http://www.tapa.info/index.html]: “TAPA is a broad-based coalition of doctors, hospitals, businesses, professional associations and insurance carriers. The sole purpose of this nonprofit organization is to address patient access to health care in Texas through medical liability reform.

“TAPA has conducted extensive research on what factors are driving up health care liability costs and restricting patient access. TAPA has developed legislative solutions and is asking the Texas Legislature to consider these changes during its next legislative session in 2003.

“TAPA is providing new, creative thinking about how best to remedy this crisis created by greedy trial lawyers. Medical liability reform is state legislation that improves Texas’ civil justice system for everyone. This specifically includes reducing frivolous medical malpractice litigation. Common medical liability reform measures include limits on non-economic damages, limits on attorney contingency fees and rules on periodic payment of damages. These reforms improve the civil justice system by ensuring that suits are not filed frivolously, that injured patients receive fair compensation, and that the legal system is not abused and used for profit.”

[Note: Mr. Hull accepted the Task Force’s invitation to membership following this meeting. Unfortunately, because of trial obligations, he was unable to participate in the drafting or voting on the Report.]

Napa Valley Guest
April 2004

Philip K. Howard

Philip K. Howard is a senior corporate advisor and strategist at Covington & Burling, focusing on mergers and acquisitions and regulatory, appellate, and litigation advice. He was co-counsel in the Bank of New York takeover of Irving Trust, lead counsel in MetLife's challenge as a bondholder of the RJR Nabisco buy-out, represented ex-Salomon CEO John Gutfreund before the SEC, and is adviser to UBS's M&A Group.

He is the author of the best-selling, The Death of Common Sense: How Law is Suffocating America (Random House, 1995) and The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom (Ballantine, 2002) - originally issued as
The Lost Art of Drawing the Line (Random House, 2001). He is a periodic contributor to the op-ed pages of The New York Times, The Wall Street Journal, and The Washington Post. He speaks before judicial, government, and professional organizations around the country. In the new Oxford Companion To American Law, he contributed the section on American law since 1968. He was Special Advisor to the SEC Task Force on Regulatory Simplification in 1996 and 1997, and has advised numerous federal agencies and state governors on regulatory reform issues. He is also Chairman of the Municipal Art Society of New York, a leading civic group that spearheaded initiatives to preserve Grand Central Terminal and to construct a new Penn Station in the Farley Post Office building.

Mr. Howard is founder of Common Good, a national bipartisan coalition organized to overhaul America's lawsuit culture and restore the role of common sense in American institutions. The Advisory Board of Common Good is composed of leaders from a broad cross-section of American political thought including, among others, former Speaker of the U.S. House of Representatives Newt Gingrich, former U.S. Senators George McGovern and Alan Simpson, and former New Jersey Governor Tom Kean.

Mr. Howard received a J.D. from the University of Virginia in 1974 where he was a member of the Order of the Coif and a member of the Editorial Board of the Virginia Law Review. He received a B.A., with honors, from Yale University in 1970.

Boca Raton, Florida, Guests
June 2004

State Senator Walter G. "Skip" Campbell, Jr.

Senator Walter G. "Skip" Campbell, Jr., was born in Rockaway Beach, New York, on November 12, 1948. Skip began at St. John Vianney Seminary and continued at the University of Florida, where he was inducted into Alpha Epsilon Delta Pre-Medical Honor Society. Senator Campbell graduated from the University of Florida in 1970 and its Law School in 1973. He began his career with a defense firm in Miami. He then joined with Jon Krupnick in Broward County. In 1975, they became known as Krupnick & Campbell.

Senator Campbell was board-certified as a civil trial lawyer by The Florida Bar in 1983. He is also a licensed helicopter pilot and a member of the Lawyer-Pilots Bar Association. He is admitted to practice before the United States District Court for the Southern and Middle Districts of Florida, the United States Court of Appeal for the Fifth and Eleventh Circuits, the United States Supreme Court, and the District Court of Columbia Court of Appeal.

Senator Campbell has consistently received an AV rating by the Martindale-Hubbell Law Directory, which is the highest rating given by this publication. He is also among a select group to be included in the book, The Best Lawyers in America, and the publication Leading American Attorneys. He has served as an adjunct professor of law at Nova Southeastern Shepard Broad Law Center, has been a review editor for Matthew Bender Publishing Company, and has hosted a popular television show, You and the Law.
During his career Senator Campbell has been a leader within the profession. He has served as President of the Broward County Bar Association, President of the Broward County Trial Lawyers' Association, and President of the Federal Bar Association of Broward County. He was elected to the Board of Governors of The Florida Bar from 1988 through 1996, and was the recipient of The Florida Bar Meritorious Service Award.

Senator Campbell has also been active in his profession as a Founding Fellow and member of the Board of Governors of the Southern Trial Lawyers, a Diplomate of the Academy of Florida Trial Lawyers, a sustaining member of the Association of Trial Lawyers of America, a Founding Sponsor of the Civil Justice Foundation and a Founding Member of the Trial Lawyers for Public Justice.

In 1996, he was elected to the Florida Senate, where he proudly serves the communities of the western portions of central and northern Broward County. He is an accomplished legislator who has sponsored and supported numerous bills in the areas of crime fighting, education, consumer rights and safety, and the protection of the quality of health care.

Senator Campbell's dedication to his community is well demonstrated by his civic involvement. He has served as local chairman of the Broward Chapter - National Multiple Sclerosis Society, as a board member for Kids in Distress, and on the Legal Advocates Committee of the Miami Project to Cure Paralysis. He has been actively involved with the Cystic Fibrosis Foundation, the Arthritis Foundation and the Emerald Society. He has received numerous awards for his civic, professional, and legislative efforts including the Hope Award of the National Multiple Sclerosis Society, the Distinguished Community Service Award of the B'nai B'rith Anti-Defamation League of Coral Springs/Parkland, the VALOR award from the American Diabetes Association, and the Outstanding Senator Award from the Academy of Florida Trial Lawyers.

Arthur M. Simon

Mr. Simon is currently in private practice and consulting. Former positions include: Senior Vice President for Governmental Affairs, Associated Industries of Florida (2003-2004). Responsible for research, policy development, and legislative lobbying on issues of concern to the Florida business community; supervised AIF lobbying team; participated in state administrative proceedings; interacted with member companies and aligned business organizations; performed general management functions.

Company commander, U.S. Naval Station, Guantanamo Bay, Cuba.


State Representative Jeffrey D. Kottkamp,

Rep. Kottkamp is currently a member of The Florida House of Representatives where he represents portions of Lee and Charlotte counties. He is Chairman of the House Judiciary Committee, Vice-Chair of the State Administration Committee and Deputy Majority Whip.

Rep Kottkamp was born November 12, 1960, in Indianapolis, Indiana. He earned an A.A. degree at Edison Community College in 1982; a B.S. at Florida State University in 1984; and a J.D. at the University of Florida College of Law in 1987. He was admitted to the Florida Bar in 1988.

Rep. Kottkamp was first elected to the Florida House of representatives in 2000 and has been reelected. He was appointed to the American Legislative Exchange Council (ALEC) Task Force on Civil Justice for the 2001-2002 term. He has served as Lee County Bar Association President (1998); on the Christian Chamber of Commerce of Southwest Florida 1998-present, the Edison Community College Legal Assistant Advisory Committee 1998-present, the Cape Coral Chamber of Commerce, the Sanibel-Captiva Republican Club, the Cape Coral Civic Association, the Cape Coral Youth Center Board of Directors and the Lee County Deputy Sheriffs Association Advisory Board. He is past Vice President of Southwest Florida Federal Bar Association (1996); former Chair of Florida Bar Journal Editorial Board (2000); and a former member of The Florida Defense Lawyers Association Editorial Board.

His law practice includes personal injury defense and appellate law in State and Federal court.
Exhibit 3
Meeting Minutes Appendix

ABA Tort and Insurance Practice Section
Task Force on Contingent Fees
Minutes of First Meeting
October 24, 2003

On October 24, 2003, at approximately 1:00 p.m. the Task Force on Contingent Fees of the ABA Tort and Insurance Practice Section (TIPS), convened its first meeting at the Hyatt Regency Hotel in Savannah, Georgia.

Members present were:
Steve Lesser (chair), Becker & Poliakoff P. A., Ft Lauderdale, FL
Edward Blumberg, Deutsch & Blumberg, Miami, FL
Kim Hogrefe, Chubb & Sons, Warren, NJ
Perry Huntington, AIG Technical Services, Inc., NYC
Robert Johnson, McDonald’s Corporation, Chicago
Marc Moller, Kreindler & Kreindler, NYC
Professor Charles Silver, University of Texas Law School, Austin, TX
Serai Shacklett (TIPS staff) and
Professor Chris Wells, Mercer Law School, Macon, GA (reporter).

Members not present were:
Michael V. Ciresi, Minneapolis, MN
Thomas A. Demetrio, Corboy & Demetrio, Chicago
Stephanie E. Parker, Jones Day, Atlanta, GA
Professor Patrick Longan, Mercer Law School, Macon GA (co-reporter)

Also attending for all or part of the meeting were guests:
Janice Brown, TIPS Plaintiff’s Involvement Committee, Brown Law Group, San Diego, CA
Tom Bordeaux, Chair, Georgia House of Representatives Judiciary Committee, Atlanta, GA
Justice Carol Hunstein, Georgia Supreme Court of Appeals, Atlanta, GA
Linda Klein, Chair, TIPS, Gambrell & Stolz, Atlanta, GA, and
Bob Peck, Center for Constitutional Litigation.
Steve Lesser began the meeting by having the members and guests introduce themselves and describe their professional backgrounds. He noted that the committee has considerable freedom to define its mission and to that end he also wanted members to indicate special concerns they might have relating to contingent fees. Members and guests indicated interest in the following areas and observed that each will likely have differing focuses of concern with respect to contingent fees:

- Securities class actions (Kim Hogrefe)
- Personal injury (Robert Johnson)
- Employment and employment class actions (Janice Brown)
- Mass tort (Marc Moller)

In response to a question from Marc Moller about the committee’s goals, Steve noted that although the Task Force had been formed in part to assist state bars that were considering a Common Good proposal (to amend their professional ethics codes to limit contingent fees under certain circumstances), the committee’s general mandate was to make a broadly useful contribution to the ongoing debate over contingent fees.

Steve handed out to members four items (attachments 1-4): Florida, Utah and Oregon proposals to limit attorneys fees and a discussion draft Mission and Organizational Statement prepared by Chris Wells. Steve also drew the committee’s attention to the 2000-pages of articles and cases compiled by WestLaw in CD format, and to his summaries of those materials. He asked all who had not yet received the CD or the summaries to request them from him.

Chris reviewed briefly the draft mission statement for the committee. Members noted that the first paragraph suggested a bias against defense and insurance interests. Chris agreed to propose an amendment (attachment 5) along lines suggested by Janice Brown.

Kim Hogrefe asked whether there were any empirical studies on attorneys’ fees in securities class actions. Charlie Silver briefly described a recent study on the subject. Kim then suggested that to the extent needed, the Task Force should consider sponsoring its own empirical studies.

Members then raised questions they had about the use and effects of contingent fees, among which were:

- Are insurance companies and other critics concerned about fees or total recoveries? What relationship, if any, exists between the two? Do contingent fee arrangements tend to boost total damages awards?

- What impact do “clear sailing agreements” (defense agrees to cover plaintiff’s attorney
fees) and other fee shifting arrangements have?

- Do securities class actions, which often result in significant attorneys’ fees and only nominal awards (e.g., coupons) to plaintiffs, present a special problem?

- Do contingent fees provide an incentive for plaintiffs’ attorneys to inflate the costs of litigation?

- Do contingent fees induce non-meritorious claims and strike suits? Do they encourage fraud, either in evidence of current injury or potential but as yet unknown injury?

Charlie commented that the “committee might be biting off more than it can chew,” and suggested dividing the universe of contingent fees issues into two constellations: (1) class actions, where there is no face-to-face bargaining between lawyer and clients; and (2) private actions, where the parties can privately order fee agreements. In the latter category would fall medical malpractice, personal injury, and auto and aviation accident cases. He noted that med mal cases now seem to have the highest public and political profile.

Tom Bordeaux noted that the Common Good and other contingent fee proposals do not cover all areas and tend to be directed somewhat differently in each of the states. In Georgia, the focus is med mal. Janice expressed the hope that the committee not be simply reactive, but to look broadly at contingent fees issues. Steve said that he hoped the committee would be able to study the complaints and propose alternative solutions, if necessary.

At this point Linda Klein addressed the committee, reviewing her decision to name the Task Force. She said she envisioned the committee would hold open forums where interested parties could describe their concerns, propose solutions and generally air fully all pertinent issues. She hoped that the committee would ultimately produce a report that would be useful to state and federal bars, courts and legislatures as they consider contingent fee regulation.

Ed Blumberg noted that Florida had held public hearings, taken testimony, etc. on lawyer advertising issues, which created an authoritative body of information useful to its legislature, bar and courts in devising regulation. He suggested, by way of example, inviting insurance company CEOs to describe the problems they encounter with attorneys’ fees and provide data in support. Marc Moller supported the idea and suggested that the Task Force compile a formal record that it and others could use as a reference. Other members expressed agreement.

Bob Peck said that he thought that the ABA’s Ethics 2000 project might already have created such a record and suggested we track that down. Chris agreed to follow up.

Kim expressed concern that public hearings might not induce complete candor on the part of witnesses, as in securities class action fee arrangements. He also observed that the federal
judiciary does not have the time or resources to monitor fee issue aggressively. Marc suggested that the committee invite Jack Weinstein and other noted federal judges to discuss the issues with us.

Members then generally noted that there was much we did not know about background issues relating to the various litigation areas. Charlie Silver volunteered to organize two educational sessions on class actions and on private actions. He described several law professors and organizations centered in New York City that would likely be willing to participate. It was generally agreed that he would seek to organize two half-day sessions to run back-to-back on one day. Members agreed that Thursday, December 11, and Tuesday, December 16, would be convenient. Charlie agreed to try, but warned that it might be late January before the sessions could be held. He said he would let the chair and members know by email (or fax) as soon as he had further information.

The chair then asked Bob Peck to describe the Common Good proposal and its status in the various states. Bob represents state trial lawyer associations seeking to have the Common Good proposal rejected and recently briefed and argued the issue before the Utah state bar committee responsible for proposing ethics rules amendments. [Note: Steve sent members the Utah briefs by email last week.] Bob said that Arizona and Alabama had rejected the Common Good proposal outright. Other states have returned the proposal as improperly filed. Only Utah is actively reviewing the proposal.

Bob also mentioned that Florida is considering a constitutional amendment proposed by the Florida Medical Association, to limit attorney fees in med mal cases. Ed said that the Florida insurance industry does not actively support the proposal. Oregon is also considering a constitutional amendment to limit contingent fees in general. Texas and California have already acted in that direction. Bob briefly discussed possible Constitutional law problems, such as equal protection, inherent in some proposals.

The chair thanked the members and guests for their attendance and contributions and declared the meeting adjourned to a date to be later noticed. The meeting concluded at approximately 3:55 p.m.

Respectfully submitted,

Chris Wells
Reporter

Action items:

1. Chris Wells will research and report findings as to Ethics 2000 hearings pertinent to
contingent fees.

2. Charlie Silver will seek to organize two, half-day sessions in New York City to educate members about class actions and individual actions.
On December 16, 2003, beginning at approximately 10:00 a.m. the Task Force on Contingent Fees of the ABA Tort and Insurance Practice Section (TIPS), convened its second meeting, at the Columbia Law School in New York City.

Members present were:

Steve Lesser (chair), Becker & Poliakoff P. A., Ft Lauderdale, FL
Janice Brown, TIPS Plaintiffs Involvement Committee, Brown Law Group, San Diego, CA
Edward Blumberg, Deutsch & Blumberg, Miami, FL
Kim Hogrefe, Chubb & Sons, Warren, NJ
Perry Huntington, AIG Technical Services, Inc., NYC
Robert Johnson, McDonald’s Corporation, Chicago
Linda Klein, Chair, TIPS, Gambrell & Stolz, Atlanta, GA (ex officio)
Marc Moller, Kreindler & Kreindler, NYC
Professor Charles Silver, University of Texas Law School, Austin, TX
Professor Chris Wells, Mercer Law School, Macon, GA (reporter) and
Professor Patrick Longan, Mercer Law School, Macon GA (co-reporter)

Members not present were:
Michael V. Ciresi, Minneapolis, MN
Thomas A Demetrio, Corboy & Demetrio, Chicago
Stephanie E. Parker, Jones Day, Atlanta, GA

The purpose of the meeting was to hear from experts in the areas of securities class action litigation and medical malpractice litigation. Charlie Silver arranged presentations by Professor Jack Coffee (Columbia) and Geoff Miller (NYU) on securities class actions and by Professors Bill Sage (Columbia) and David Hyman (Maryland) on medical malpractice. Owing to a family emergency, Geoff Miller had to bow out, and Jill Fisch (Fordham) filled in. These expert deepened the members’ understanding of those specialized practice areas and offered their comment on the practice and effects of contingent fees.

In addition, Kim Hogrefe arranged for former New Jersey Attorney General and now The Chubb Corporation Vice-Chairman, John Degnan, to speak during lunch on his perceptions, as
an insurance executive and experience lawyer, on the impact of lawyers' fees in the areas of mass
torts and securities class actions.
I. Morning Session – Securities Class Actions

Professors Fisch and Coffee provided the members and overview of securities class actions with special attention to contingent fees. Their comments addressed five principal areas: (1) The objectives of class action litigation; (2) the history of contingent fee awards; (3) the current judicial procedures and methodology for calculating fees; (4) some empirical evidence of the nature and size of awards; and (5) several alternative approaches to establishing fees. [Reporter’s note: The following summary paraphrases the presenter’s words. Only where quotation marks are used is there an attempt to portray precise language and then often without attribution. Because Professors Fisch and Coffee overlapped their presentation substance, this summary integrates the two sets of remarks.]

1. The Objective of Securities Class Actions (Fisch)

Securities class actions usually involve many plaintiffs, most of whom have suffered too little economic injury to justify bringing suit individually. The class action mechanism seeks to provide competent legal representation by employing economies of scale. The cost to any one plaintiff of bringing a lawsuit is potentially staggering, with the reward often very small. In the aggregate, however, the damages sought are sufficiently large to attract competent representation, assuming an award of fees in a successful case, and the marginal cost of adding additional plaintiffs in the representation is quite low, nearly zero. Because all plaintiffs in the class suffered similar harm, the action can treat each similarly in representation and result.

Securities litigation in general and class actions in particular have two goals: victim compensation and deterrence of misconduct. If the class can prove violations and damages, their remedy is the ordinary tort remedy of money damages, or some other potentially valuable award. Optimally, such awards will make all class members “whole.”

Deterrence is also a general goal. Requiring securities law violators to disgorge ill-gotten gains, to submit to injunctions and other equitable remedies, and to suffer the notoriety often resulting from public scrutiny should deter them from future violations. [Reporter’s note: Publication of the awards might also have a general deterrent effect on others who might contemplate such behavior.] In these ways, private class actions perform a typical governmental function by identifying wrongdoing and holding the wrong-doers accountable. Fees can be adjusted to account for the value of non-economic relief, but they are generally based on money damages recovered as victim compensation.

2. The History of Contingent Fee Awards (Coffee)

Contingent fee awards provide the “incentives, the fuel that makes the engine run.” Without the promise of a fee award, paid directly or indirectly by the defendant, at the successful conclusion of a class action, many securities violations would go unremedied for or lack of willing plaintiffs and plaintiffs’ lawyers.

Contingent fees in such actions find their roots in unjust enrichment doctrine in mid-19th century cases dealing with equity, admiralty and bankruptcy. In such cases, successful plaintiffs
created a “common fund” from which all similarly situated parties were entitled to share. The right to recover from the fund was the party’s, not the party’s lawyer’s, but lawyers typically received a portion of the recover in recognition of the value they provided in prosecuting the successful action.

3. Current judicial methodology for calculating fees

This historic practice became established practice up through the 1970s when modern class action rules added “jets” to the prevailing contingent fee practice engine. Class actions abounded and courts revisited the question of formulating contingent fee awards. They adopted to the Lodestar method, which is based upon hourly billing practices of lawyers. In part necessity was the mother of invention, because many of the class actions involved no economic recovery - 1983 actions, school busing cases, prison reform, etc.-- which precluded awards from a common fund of monetary damages.

The Lodestar method involved at least three steps: (1) determine a reasonable hourly rate for the legal services (usually one that does not exceed the “local” market rates); (2) calculate the reasonable number of hours worked by the lawyers and other legal staff and then (3) multiply (1) by (2).

In many jurisdictions the court would then take the fourth step of adjusting or multiplying the product by a “risk multiplier” to account for numerous factors, such as the risk of non-payment, the significance of the case, etc. (see Fisch materials, attached list). The risk aspects of such multipliers especially suffered criticism because the more the case is a long-shot, the greater the multiplier would be. That seems nonsensical to many because it appears to penalize defendants the greatest, at least in fee-shifting cases, for behavior that was less clearly problematic.

In 1985, the Third Circuit Court of Appeals formed a task force, led by Professor Arthur Miller, that identified serious deficiencies in the Lodestar method. Among them, three deserve emphases. First, basing fee contingent awards on hours worked increases the inducement for lawyers to stretch out the litigation and slow its pace. “If time equals money, the meter runs longer.” Even where plaintiff lawyers received a reasonable settlement offer with defendant early in a litigation, they might proceed with “confirmatory discovery” to add work hours to the bill.

Second, the Lodestar method has also fallen out of favor with courts because of the burden it places on judges and court personnel to scrutinize lawyer billing records to avoid charges for duplicative work and overbilled hours. Federal courts viewed their billing oversight as more appropriate to a public utility commission – looking at every cost and expenditure – than a judicial body. Ultimately, the time the court spent on the billing questions often exceeded that devoted to addressing the legal issues and moving toward settlement. “The fee tail was wagging the litigation dog.”

Third, and perhaps most serious, the Lodestar method exacerbated a conflict of interest between the plaintiff class and its lawyers. Once the attorneys had wasted a substantial number of hours on the case and could predict a substantial fee, they might become financially indifferent
to the amount of recovery. A greater recovery – presumably the client goal – would not necessarily yield a greater fee; so plaintiff lawyers might settle early for a lesser amount to avoid further work and assure the fee without risk of trial. Defense lawyers of course realize these incentives and the stage is then set for possible collusion. The plaintiff’s attorney is not prepared to risk trial and possibility of a loss with no fee, even if trial potential recovery is quite a bit greater. “The plaintiff lawyer is under-incentivized for optimal plaintiff outcome.” Although this unfortunate aspect of Lodestar can be counterbalanced by the prospect of a large multiplier, the Supreme Court has essentially eliminated multipliers in statutory fee-shifting cases.

4. Some empirical evidence of the nature and size of awards

In the early 1990s federal courts returned largely to a common-fund approach and its “percentage-of-recovery” formula. That approach has its own challenges. The first is determining what percentage is appropriate to apply. The 9th Circuit has applied a presumptive benchmark of 25%, which grew to an effective 30% in practice to suggest good work on the part of the lawyers and to encourage earlier settlement. NERA did a study in the mid 1990s that demonstrated a national median of 32% of the recovery amount.

By the late 1990s, there grew a general perception that plaintiffs’ lawyers fee awards suggested overcompensation under ethical norms and statutory prescriptions (e.g. PSLRA) of “reasonableness.” “Claims-made” recovery basis received special attention. In those situations, the litigation settles with the defendant establishing a fund from which class members can later make claims for compensation. To recover even a relatively small amount, however, class members often had to submit burdensome documentation of eligibility (“18-page form for a $5 recovery”). The net effect was a low claim rate. Only a fraction of the total fund would be claimed, with the remainder often reverting to the defendant. Nonetheless, the plaintiff’s fee was determined as a percentage of the total fund, not just of the portion claimed. Claims-made settlements resulted occasionally in fee awards much higher than the recovery claimed by the class. For example, in International Precious Metals Corp. v. Waters, 530 U.S. 1223, class counsel received 33% of a $40 million reversionary settlement fund ($13+ million) but the class claimed only $6,485,362.15. In other words, the lawyers received more than twice the amount plaintiffs did. [Reporter’s note: Professor Lester Brickman filed a amicus brief in the case.]

Counsel for neither plaintiff nor defendant had sufficient incentive to challenge the practice. The defendant appreciated the barrier to recovery and the incentive for opposing counsel to settle on favorable fee terms. Plaintiffs’ counsel received a high fee no matter what rate of claims followed on the settlement.

In 1980, the Supreme Court appeared to have approved contingent fees based upon a fund size in lieu of claims actually paid. That interpretation might go too far. As Justice O’Connor’s dissent to denial of certiorari in International Precious Metals noted, in neither it nor in Van Gemert was the issue of “whether there must at least be some rational connection between the fee award and the amount of the actual distribution to the class” properly before the court. [Pertinent excerpts from Boeing v. Van Gemert and International Precious Metals Corp. v. Waters are attached as an appendix.]

Member Kim Hogrefe asked how remedies directing corporate governance improvements
are valued. Coffee replied that any form of non-pecuniary relief agreed to by defendant can be
given a dollar value to inflate the total settlement value, apparently to entice plaintiff lawyer’s to
settle. He said that CALPERS reduces the impact of award size problems by negotiating with its
counsel to accept limited fees from settlements. Such a limiting fee contract resulted in a 1.7%
fee in the $3.2 billion Cendant class action. [Reporter’s note: 1.7% of $3.2 billion is not chicken
feed – it’s $54.4 million.]

Coffee noted also that some smaller investment funds and state agencies have very tight
relationships with plaintiff firms, and they even run their own auctions for counsel services in
what is called “pay to play.” If plaintiff counsel want to represent governmental agencies in, say,
securities class actions, they must first demonstrate they have contributed to appropriate public
officials’ reelection funds.

Marc Moeller asked what interests led to the PSLRA “reasonable fee” limitation. Coffee
noted that the PSLRA passed over President Clinton’s veto and included a “Christmas tree” of
provisions to please a number of constituents, including the auditing industry and the California
electronics industry, both of which were claiming to be victims of “class action abuse.” The latter
was a prime target because of its market volatility. Both claimed that the consistency of attorney
fee percentages, despite differing merits of various litigations, the cases against them and others
had been brought and settled in a judicial and legal environment where “merits don’t matter.”

Marc then noted that those concerns are less about contingent fees than they are about
limiting total recovery amounts. Coffee agreed and noted that many smaller plaintiff’s firms had
been priced out the market because PSLRA raised the effective cost of bringing a securities suit.
Two arguments seemed to prevail: (1) it is necessary to reduce the wave of litigation by reducing
fees, the “motive force” of the litigations; and (2) class actions are practically indefensible on the
merits, so it is necessary to change pleading rules and limit damages.

Coffee reiterated that the conventional wisdom regarding the two principal fee formulas
is the (a) the lodestar method ordinarily stretches out litigation but can result in quick settlements
where the civil action follows on the heels of a successful government enforcement action; and
(b) the percentage of recovery method produces some excessive and premature settlements.

What else do the data show? Given that most collected data is about securities class
actions, there is enough information to engender some confidence in the following points:

a. The actual percentage of fees awarded in securities class actions is quite low and apparently
decreasing. Recent studies have shown between 5.2 and 6.2% in the late 90s, declining to 3% in
2000 and 2.3% in 2002.

b. Damage awards are also falling in securities fraud cases, given the requirement of proving
loss causation (plaintiffs’ injuries caused by the fraud and not by other forces, market or
otherwise.

c. Although plaintiffs and defendants might disagree about the economic losses in a particular
case, their estimates are still within ballpark range of one another, suggesting that plaintiffs’
claims are not entirely unreasonable.
d. There are a few cases where fees awarded are in the 30-40% range, but most are in the 2, 3, 4% ranges.

Marc asked who determines the fees. Coffee said the court must in a settled case, even one where the parties have agreed to damages or have negotiated fees as part of the settlement. Marc then asked whether the 2-3% figure represents largely cases where the parties fought over the fees. Coffee said not necessarily. Every circuit has well-known averages regarding fee awards. Parties will often stay within that range and negotiate “clear-sailing” awards, where the defendant promises not to challenge the plaintiff counsel’s fee. Most objections to fee awards come from outside objectors, some of whom are “professional objectors” in that they make it their business to challenge fee, on principal, awards whenever they can.

5. Alternative Approaches to Contingent Fee Awards

Reform proposals for contingent fee awards include three differing approaches:

1. Tinker with the percentages in a “percentage of recovery” regime. One proposal is to lower the percentage as the amount of total recovery rises. The attorney will get less from each marginal dollar. For example, recoveries of $100-200 million might yield attorney fees in the nominal or traditional 22-27 % range. For the amounts recovered over $1 billion, though, the fee might drop to 2% for those dollars. This makes sense to those who criticize the magnitude of the some fee awards.

Data show that in the seven largest antitrust settlements, 25% was the highest fee (in a $696 million case) and 8% was the lowest. Fee determinations vary by a factor of up to four. They can “produce a lot of noise” because judges can base the variations on many reasons, some stated, some not. Typically, judges will approve fees based upon such factors as the importance of the case, whether they like or dislike the attorney,

A second percentage-based reform is to increase the fees as the recovery rises. Because the first dollars recovered are “easy,” they deserve the least reward. Start with perhaps 2%. Then compensate upward to reward the degree of success, to perhaps 30% at the margin. This approach should provide disincentives for cheap, early settlements and align the lawyer’s interests more closely with the clients.

The 2d and 3d Circuits seem to seek to “tame or domesticate” the percentage of recovery approach. In addition, courts can use the lodestar method to “cross-check” the accuracy of whatever percentage is applied. Coffee notes that some district courts have employed lodestar methods with a multiplier of 5, 6 or 7.

2. The Manhattan Institute [Common Good] proposal. This would award fees based principally on the value the lawyer adds by taking the matter through trial if a settlement is rejected. If the plaintiff accepts a settlement offer, the lawyer earns a percentage of that settlement. If, on the other hand, the defendant makes a good faith settlement offer that is rejected by the plaintiff, then the plaintiffs’ lawyer’s fee is contingent on improving the recovery at trial. For example, if the
settlement offer is $800,000 and the trial judgment is $1 million, the $200,000 improvement would provide the predicate amount for the fee. Such an approach would likely encourage lawyer to avoid the risk of trial by settling. This might force plaintiffs to accept higher attorney fees because of the predictably lower average settlement. (?)

No court has yet accepted the Manhattan Institute approach.

3. The “Market-Mimicking” Approach. The 7th Circuit, home of “Chicago school” lawyer-economists Posner and Easterbrook has suggested a “market-mimicking” approach. The Circuit eschews an presumptive percentage. That would require to court to determine the relevant market for lawyer services of the sort present in the case and then to interpolate a market price for the services. The market would be determined generally by reference to what sophisticated purchasers of legal services – major corporations and securities firms – are paying for those services.

Coffee worried about the difficulty of determining the relevant market and the tendency of lawyers to draft high-paying fee agreements to create a record of high percentages.
II. Luncheon Presentation – John J. Degnan

John Degnan, Vice Chairman of The Chubb Corporation, was the luncheon speaker at the meeting. [Mr. Degnan’s biography is attached as Appendix 2.]

Mr. Degnan began with a brief description of Chubb. It is a “niche market” insurer focusing on high-net-worth individuals and technology and life-sciences companies. Along with the AIG and Lloyds, it is one of the top three writers of D & O policies and errors and omissions policies. That business gives it great exposure to mass tort and securities class actions.

His comments are designed to express more or a practitioner’s perspective that a theoretical one. He has little comment on contingent fees as they relate to individual tort actions, except to agree that they are useful in providing access to the judicial system and serve a “legitimate and warranted purpose.” Neither would his comments address fee-shifting statutes.

The actuarial firm, Tillinghast, recently estimated that the American tort system cost in 2002 $233 Billion, a 27% increase over 2001. That represents $890 per citizen and 2.33% of Gross Domestic Product (GDP). The amount is the highest since 1990, following an 11-year decline. It is inevitable that that degree of drag on the economy will increase political pressure to correct it.

Three current matters attract significant comment and attention: Asbestos, Tobacco and Cendant.

Asbestos litigation so far has yielded about $10 billion dollars in legal fee, which represent a greater dollar figure than the sum of benefits paid to the impaired and truly sick plaintiffs. Of the $54 billion spent to date on asbestos litigation, plaintiffs have been awarded 39%, plaintiffs’ lawyers 27% and defense lawyers 34%. It is estimated that before the conclusion of all the asbestos litigations, 50 law firms will have shared $55 billion in legal fees.

The tobacco litigations tell a similar story. 300 lawyers in 86 firms have shared $30 billion in legal fees, in Florida alone, the fees have amounted to $233 million per lawyer. Facts like these will generate a public reaction.

The Cendant settlement is $3.2 billion, with an original agreement of $262 million in legal fees. The fees represented an fee to each lawyer of $10,000 per hour. The fee award was judicially reduced to $55 million (about 21% of original) or about $2,000 per hour.

The usual rationales for the contingent fee include risk, effort and justice. None of these rationales appears to have applied in these fee award situations. The end result is that a great portion of the American public believe that the legal system exists only to protect the powerful lawyers within it.

Degnan was once an independent director of a company that was being sold to Merck. A suit was filed challenging the sale. It appeared to have little basis or chance for success. At the closing, the lawyers (Cahill, Gordon) were asked what the result of the suit was. The answer was that the suit was being settled for $1.3 million because it “was not worth fighting.” The settlement included a handsome lawyer’s fee and was structured to make it appear that the plaintiff’s lawyer had done something useful to deserve it.

This is just one example of an unfortunate legal industry in securities class actions. As soon as share price falls, an inevitable event in volatile industries, plaintiff counsel draft a minimal complaint and then shop for a plaintiff. They then conduct discovery and usually find a
document in the process that forms the gravamen of an amended complaint, one that bears no resemblance to that originally filed. The damages sought are always extremely high (and therefore it does not make sense to compare attorney fee awards to the original complaint).

Corporate boards have become thick-skinned about these strike suits. They will usually take the case through the motion to dismiss and motion for summary judgment and then settle. It is too risky for fiduciaries to risk trial. The settlements are always just a small discount off the insurance coverage.

It is frustrating for insurers, who must stand behind their clients. Analyzing risk potential is difficult when the likelihood of trial is so low.

The plaintiffs’ bar bears very little risk. The insurance company can’t fight the claim because the client wants to settle. The judge rarely sees any challenge to legal fees because the defendant insured usually pre-approves the fee to reach settlement. The insurer rarely challenges the fees, and might even be denied standing if it were to attempt to do so. Outside objectors rarely have the wherewithal to mount a decent fight.

Chubb would like to present expert testimony about fees awarded in the various circuits and the differing formulas used. In that way it could create a record for appeal. Plaintiffs’ lawyers usually have objected to Chubb’s appearance to fight fee awards. Chubb has also considered helping to establish a foundation to appear as amici and to fight fees. Such a foundation would buy stock in most major companies to create standing or to enter the litigation on behalf of an existing shareholder. As it currently stands, little truth about fee issues makes it way into court.

Degnan quoted an October 2003 opinion from the Middle District of Tennessee to the effect that in common fund cases the losing party no longer has an interest to monitor fees paid to the winning party’s counsel (as opposed to where fees paid directly by losing party might illuminate the fees request); therefore the court has a special duty in common fund cases to monitor attorney fees.

Degnan also cited two recent “coupon” awards cases, one involving the cruise industry (plaintiff class awarded coupons for $25-55 discounts on future cruises; attorney fees: $5 million) and the telecommunications industry (plaintiff class awarded $0.60 - $3.79; attorney fees $7.2 million). In the Lucent case, the $650 million settlement resulted in $100 million fee award. Plaintiff class is to receive $0.15 per share purchased during problematic period even though actual losses ranged from $9.00 to 80.00 per share. There was enhanced risk of non-payment in that case because Lucent might declare bankruptcy.

Because of fee awards such as these, Congress is likely to pass the pending class action bill that will require fee awards to be based on coupons actually redeemed or on a lodestar method without prohibition regarding a multiplier.

For insurance companies to operate in these areas, they must be able to determine risk and then required capital. The risk assessment requires:

1. A risk-based calculation for attorney fees.
2. A higher level of disclosure with respect to fee agreements in class actions.
3. A true adversarial process testing fee awards before the court approves a settlement.
There is currently a “very cozy arrangement” between plaintiff and defense counsel with respect to fee agreements and awards.

Although individual tort actions tend to demonstrate a close relationship between harm, recovery and fee award, class actions demonstrate little competition on fee rates in the selection of lead counsel.

Milberg, Weiss has one-half the market for securities class actions. (Professor Fisch here noted that is true for total cases filed, but not on damages sought. Milberg, Weiss has many “small dollar” cases.) Very few firms can afford the up-front costs now required by the PSLRA. Marc Moeller noted that it is a “big economic burden to take the case to the 20-yard line” so that the firm can settle the case. Contingent fees are necessary to level the playing field for the little guy to get legal redress. Mar asked to what extent the fee dispute is a proxy for the fight over the total recovery – reduce fees and reduce litigation.

Degnan noted that of the 3,000,000 potential little guys in the Lucent case, only 120,000 had filed claims.

The reporter asked Mr. Degnan after his presentation whether one of his points was that in many class actions there are so few interested “little guys” that there is effectively “no guy.” He agreed that his data support the idea that such private class actions are really performing a government function of protecting all where individual harm is difficult to measure or discern.
III. Afternoon Session – Private Medical Malpractice Actions

Professors Hyman and Sage made a joint presentation. Hyman began by noting that his remarks are his alone and do not necessarily represent the position of the FTC [Reporter’s note: David serves as Special Counsel, FTC Office of the General Counsel]. He has recently been involved in a series of comprehensive health care hearings conducted by the FTC [web site URL: http://www.ftc.gov/ogc/healthcarehearings/index.htm]. His presentation today is the third he has made to an ABA committee in the past five weeks.

Medical malpractice [“med mal’] is best studies as a part of the “tort economy” that experiences recurring crises in claims, costs, insurance rates, etc. Bill sage noted that the current crisis is the “first of the millennium”: with “sticker shock” regarding medical insurance premiums, physician strikes, lobbying campaigns for the adoption of California-style tort recovery caps and contingent fee limitations [“MICRA”].

The resulting laws are “legislation by anecdote and urban legend.” The repeating crises have a “kabuki-like” performance quality, each group repeats its traditional, stylized motions and dialogue:

Defining the problems: Lawyers assert there is too much med mal occurring, to many greedy physicians, too many greedy insurance companies. The physicians counter that there are too many greedy lawyers and too many lawsuits causing too much defensive medicine and agree that the insurance companies are greedy.

Prescribing the remedies: Lawyers demand access to the national Patient Data Base [NPDB], pursue tort litigation aggressively, seek elimination of the physicians’ peer review privilege, seek mandatory reporting of errors, demand antitrust scrutiny of insurers. Physicians seek caps on non-economic damages and ask for expert screening of cases and special medical courts.

Neither side is interested in finding the facts or publicizing them. Therefore the public finds fascination with anecdotes and horror stories.

The competing explanations for the current med mal insurance cost crisis are (1) malpractice litigation; (2) medical errors; and (3) the insurance cycle and profiteering.

1 and 2 Incidence of malpractice and litigation

Conventional wisdom has it that there are numerous med mal lawsuits and that plaintiffs always win. The truth is that there are few suits compared to potential claims and defendants usually win, unless the case is especially egregious, beyond ordinary negligence.

3-4% of hospitalizations result in an “adverse event,” a health care injury that is not an ordinary side concomitant of treatment. One-quarter of those are the result of negligence. That means that about 1% of hospitalizations result in medical malpractice. Only one in fifty (2%) of the actual malpractice incidents result in claims.

Of all filed claims, the Harvard Study found that only 20% were “valid” – come from the incidents of actual malpractice. 80% of filed claims were “invalid” (claims filed where injury, but no actual malpractice, occurred). [Reporter note: In medical terms, the tort system pursues many “false positives” and ignores many valid claims resulting in many “false negatives.”]
2 and 3. Incidence of malpractice claims and insurance industry profitability

Looking back at recent insurance company profits and loss as a percentage of net worth, the data are fairly stable to 1977, then drop like a rock to 2001, where the companies suffer actual losses.

Looking back further, these crises are periodic, with rates rising and profitability dropping in a cyclical pattern. There were mild increases in losses per doctor over the period 1976-2001, but no dramatic increase in filings or incidents. There was some increase in total judgments, adjusted for inflation. More dramatic were insurance company investment portfolio changes over time.

2. Incidence and costs of medical errors.

One-quarter of hospital deaths are preventable. 180,000 persons die each year as a result of iatrogenic (induced by physician or hospital) causes. That makes medical mistakes the eighth leading cause of death in the U.S., ahead of car accidents, breast cancer and AIDS. The number equates to two 747 crashes every three days. In other words, there are real problems in health care delivery – and they are problems for everyone, everywhere. The wealthy have no exemption. This can also be seen in Medicare procedural standards. In studying six medical conditions, there is general agreement that 22 clinical processes should always be followed. Of that number an average of only 73% (range: 11 - 100%).

What is the role of Tort law and practice in this area? First, note that the quality of health care is uncorrelated with the amount of money spent. The regions that spend more money do not receive better care. Neither do more medical disciplines correlate with improved quality.

The conventional wisdom that liability has no useful role in addressing medical quality is wrong. Nor does liability always impede improvement in care by encouraging silence and cover-ups. There is evidence of modest deterrence. The data about whether physicians practice excessively defensive medicine is inconsistent. Physicians in specialties that employ few “procedures” – such as family medicine, psychiatry and endocrinology – privately accuse the procedures-oriented specialists of ordering extra procedures because of the income they generate [Willie Suttons’ advice: “because that’s where the money is”?

One thing is clear: there is too much “bad litigation” and not enough “good litigation” as determined by the Harvard study (independent assessment of claims).

Physicians have defective incentives. Their “compensation is quality and outcome invariant.” They get paid for the service and not the results.

Good health care reform would involve three things:

1. Alignment of providers’ economic incentives.  
2. Harmonizing malpractice and safety standards.  
3. Focus on the real problem of quality of care, not on quantity.
What if hospital had to publicize “adverse events” like manufacturing companies often do: “X Days since an accident”?

At this point professor Hyman turned the floor over to Professor Sage. He noted that he was usually making these presentation to health care professionals, not lawyers. He drew his published “Rip Van Winkle” metaphor: The health care industry has slept through the past 15-20 years of profound, even revolutionary changes. They are trying to use antiquated, unproductive methods to solve new problems. These methods focus largely on the tort system, not on seeking actual improvements in health care quality.

The key to improvement in health care is revision of Medicare standards and policies.

In the distant past, physicians learned that any participation in the litigation systems would tarnish their professional reputations. Litigation became an emotional issue for them. Now that medicine is industrialized, the emotional response issue is somewhat attenuated.

To Err is be Human: urges enterprise liability as opposed to individual liability.

Ed Blumberg noted that physicians commonly ignore patient charts and keep records on undiscoverable “peer review” forms. The charts often don’t note even the most basic and serious information.

Sage then rested his main points:

1. The malpractice debate is not about health care policy.
2. Med mal reform is a stalking horse or proxy for general tort reform
3. Doctors resent malpractice fees and awards and want caps.
4. Fees become the focus where the door is closed on damages caps.
5. Med mal crisis is about how good medicine has become. Medical progress has engendered rising expectations, and improved procedures mean that even slight delay becomes actionable.
6. Medicine is now industrialized. [It’s not a cottage industry anymore.]
7. Physicians control most care decisions, but their fees are only 15% of the total cost of the care.
8. It is now harder to pass the increased costs through to the patients because of managed care, insurance and other cost and care monitors.

Med mal does not lend itself to study through published case opinions. There are few.
But it is clear that the tort system does not really improve health care.

In Sweden, the doctor helps the victim-patients file their own claims for med mal.
The system needs to strive for increased speed of resolution of med mal problems and for increased patient involvement.
Contingent fees should not be restricted, but it is “clear” there is no real market for them.

Ed Blumberg cited several situations in which med mal litigation resulted in discovering protocol deficiencies and encouraging care improvement.
Janice Brown noted that we must try to disentangle contingent fee issues from the tort reform issues. Sage noted that med mal is a special case and its special issues must be handled separately.
There is a very large pool of unnoticed injury cases or cases that do not find representation. Given the costs of litigation, they have to be at above the $100-200,000 mark to break even. Much of the pool is therefore unserved.
Robert Johnson noted that med mal looks a lot like regular products liability PI matters: new toys and procedures causing harm.
Sage: “No change to the contingent fee rules will not be harmful to med mal.” Doctors have a longstanding ethical aversion to accepting contingent fees because they suggest to patients that success is guaranteed.
Sage reiterated that nothing about the contingent fees rules will likely have a material effect on med mal.
Kim Hogrefe asked whether it might be useful to hold hospital liable for all adverse events, cause them to create a pool of funds to support plaintiff or government lawyers and investigators.
Sage replied that reforms have to come from the medical side. Also, the defendants in the med mal cases are not all doctors. There are hospitals and other health care professionals, many of whom might be amenable to view reform with non-emotional reactions. He cited the committee to the Pew Charitable Trust sponsored organization, The Project on Medical Liability in Pennsylvania, for which he does work [http://medliabilitypa.org/].

The meeting was adjourned at approximately 4:00 p.m.

Respectfully submitted,

Chris Wells
Reporter
ABA Tort and Insurance Practice Section
Task Force on Contingent Fees
Minutes of Second Meeting
February 6, 2004

On February 6, 2004, beginning at approximately 12:45 p.m. the Task Force on Contingent Fees of the ABA Tort and Insurance Practice Section (TIPS), convened its third meeting, at the Marriott Riverwalk Hotel in San Antonio, Texas. This meeting was held in conjunction with the ABA Midyear Meeting.

Members present were:

Steve Lesser (chair), Becker & Polia koff P. A., Ft Lauderdale, FL
Janice Brown, TIPS Plaintiff's Involvement Committee, Brown Law Group, San Diego, CA
Edward Blumberg, Deutsch & Blumberg, Miami, FL
Kim Hogrefe, Chubb & Sons, Warren, NJ
Perry Huntington, AIG Technical Services, Inc., NYC
Robert Johnson, McDonald’s Corporation, Chicago, IL
Linda Klein, Chair, TIPS, Gambrell & Stolz, Atlanta, GA (ex officio)
Professor Charles Silver, University of Texas Law School, Austin, TX
Professor Chris Wells, Mercer Law School, Macon, GA (reporter) and

Members not present were:
Michael V. Ciresi, Minneapolis, MN
Thomas A Demetrio, Corboy & Demetrio, Chicago
Marc Moller, Kreindler & Kreindler, NYC
Stephanie E. Parker, Jones Day, Atlanta, GA
Professor Pat Longan, Mercer Law

Other meeting observers included:
C. J. Francisco
Richard Turbin, former TIPS Chair
Bob Peck, Center for Constitutional Litigation
Mark Curriden, Practitioner
Robyn Traywick, Law Student
Dick Semerdjian, TIPS Plaintiff Involvement Committee
Terry Maxon, Dallas Morning News
Bob Bennett, Oklahoma Practitioner
Jackie James, Kreindler & Kreindler, NYC
Jim Carroll (?), Chair-elect of TIPS

Page 21 of 50
The purpose of the meeting was to hear presentations by Professor Bert Kritzer of the University of Wisconsin-Madison about contingent fee practices; by Justice Nathan Hecht of the Texas Supreme Court on referral fee rules in Texas; by Linda McMullen, General Counsel of the Mississippi State Medical Association (MSMA) on tort litigation in that Mississippi; and by Mike Hull, General Counsel of the Texas Alliance for Patient Access (TAPA) about tort reform in Texas.

I. Professor Bert Kritzer: Empirical Studies of Contingent Fee Practices

Charlie Silver introduced Professor Bert Kritzer (brief resume is attachment 1). Kritzer has established a reputation as the leading empiricist on contingent fees. His presentation, entitled “Myths and Realities of American Contingency Fees,” drew upon data from several sources: his own Wisconsin Contingency Fee Study; two Rand Institute studies; the Texas Plaintiffs’ Lawyer Study; and the Insurance Research Counsel Consumer Study (1999). Portions of his presentation had previously been published as, “Seven Dogged Myths Concerning Contingent Fees,” 739 Washington University Law Quarterly 80 (2002) and “The Wages of Risk: The Returns of Contingency Fee Legal Practice,” 47 DePaul L. Rev. 267 (1998). His book on the subject, Risk, Reputations and Rewards: Contingency Fees in Legal Practice, will be published by Stanford University Press later in spring 2004.

Professor Kritzer said that he has been studying contingency fees for many years, starting at about the time that the Manhattan Institute proposed reforms (1994?). (He noted that Professor Lester Brickman (Cardozo), who has worked with the Manhattan Institute and urged proposed contingency fee reform, has largely ignored or criticized this empirical work. Professor Brickman has declined our invitation to speak to the Task Force.)

Kritzer organized his presentation around seven “myths” that observers often believe about contingency fee practice.

A. Myth 1: Contingency Fees Are a Uniquely American Phenomenon

Contingency fees have a long history in the United States. One scholar has found evidence of such fees as far back as the early nineteenth century, although the widespread use of such fees did not come until much later. A popular perception both inside and outside the United States is that it is contingency fees that set the United States apart from the rest of the world. In fact, contingency fees--by which I mean "no win, no pay" fees--are not unique to the United States. Some form of legally accepted "no win, no pay" fee exists in a number of other countries: Canada, Scotland, Northern Ireland, Irish Republic, New Zealand, Australia, France, Japan, England, Greece, Dominican Republic, Italy, Luxembourg, Portugal. Each country's system is somewhat different. Nonetheless, the assertion that contingency fees are peculiarly American is clearly false. Moreover, even an assertion that the percentage-based contingency fee is specific to the United States is not correct.

B. Myth 2: Most Contingency Fee Cases Involve Little Risk for Lawyers
While there are some areas of litigation where lawyers face substantial risk of nonrecovery and hence no fee if a case is being handled on a contingency fee basis most contingency fee cases do yield some recovery and hence some fee. However, this assertion misses the real contingencies of contingency fee practice. For both the lawyer and the client, recovery or no recovery is only one part of the uncertainty inherent in litigation. The other contingencies faced by the lawyer (and the client) include:

--Non-recovery (no-win, no-pay)(uncertainty about winning on liability)
--Size of recovery (uncertainty about the amount that will be recovered and hence the fee the lawyer will receive);
--Investment of time and disbursements (uncertainty about what it will cost, in both effort and expenses, to obtain the recovery); and
--Time until recovery (uncertainty about how much time will pass before the recovery is obtained)

In fact, for most cases the real contingencies are less than there will be no recovery than the other areas of uncertainty.

C. Myth 3: Plaintiffs' Lawyers Obtain a Significant Portion of their Clients Through Advertising, Particularly Media Advertising and Direct Mail

Despite all of the prominence of modern advertising, most lawyers representing clients on a contingency fee basis get the vast majority of those clients through the "tried-and-true" means of referrals, largely from satisfied clients and from other lawyers. Most referrals involve no fee or sharing of fees (are not paid referrals).

D. Myth 4: Lawyers Accept as Clients Most of Those Individuals who Contact Them with Potential Claims

While the typical contingency fee practitioner wants to find highly lucrative cases, such cases are relatively rare. Many cases presented to lawyers are not winnable or do not offer a prospect of even a moderately acceptable fee. The contingency fee practitioner seeks to choose cases that offer a high probability of providing at least an acceptable return and hopes to find some fraction of cases that present the opportunity to generate a significant fee. Lawyers evaluate potential cases in terms of the risks involved and the potential returns associated with those risks. An attorney will reject cases that do not satisfy the attorney's risk-to-return criteria. Thus, contingency fee lawyers resemble portfolio managers, choosing to "invest" (their time) in risky cases hoping to obtain adequate-or-better returns.

The lawyers' acceptance rates of clients range from about one-third to one-half of potential clients. The bulk of rejections occur because of no liability or low damages. So-called "heavy-hitter" plaintiffs' lawyers are more selective than "bread and butter" ones, probably because they can be.
E. Myth 5: Contingency Fees Are Standardized at a Rate of 33%

All studies of contingency fee percentages find that the most common range is that close to 33%. Just over half of the reported fees fall in that range. Others range from 25% or below to 50% and (rarely) more.

F. Myth 6: Lawyers Routinely Receive Windfall Fees from Contingency Fee Work

Profits can be made from contingency fee work. While it is the top 10% of cases that tend to produce the most significant profits, the typical contingency fee practitioner can expect even the remaining 90% of cases to produce over a portfolio of cases a fee premium amounting to 25% to 30% over what hourly fee work generates. Relatively few lawyers ever see an exceptionally large fee.

Professor Kritzer compared lawyers’ fees with those from other employment:

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Auto mechanic</td>
<td>$75-100/hour</td>
</tr>
<tr>
<td>Twin Cities plumber</td>
<td>$150/hour</td>
</tr>
<tr>
<td>Routine doctor’s exam</td>
<td>$300-500/hour</td>
</tr>
<tr>
<td>Neurosurgery</td>
<td>$3000-5000/hour</td>
</tr>
<tr>
<td>Median hourly rate for</td>
<td></td>
</tr>
<tr>
<td>Lawyers</td>
<td>$125/hour</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>$125-133/hour</td>
</tr>
<tr>
<td>National</td>
<td>$125-133/hour</td>
</tr>
</tbody>
</table>

G. Myth 7: The Interests of Contingency Fee Lawyers and Their Clients Routinely Diverge

Lawyers do not simply manipulate clients to maximize their own short-term economic benefits. Lawyers regularly accept fee reductions and push cases beyond the point that their own immediate economic interest would suggest was rational. In other words, lawyers work beyond the point that their marginal return (what they will receive for the extra hour or effort devoted to the case) equals their opportunity cost (what they could get by devoting that hour on another matter). There are several reasons for this. They cannot predict what the return will be for the marginal effort; they have an ethical duty to provide professional service; and they are extremely attentive to the way that their clients see what has been accomplished on their behalf. The last has a potentially beneficial impact on reputation and future referrals.

H. Conclusions

Proposals such as the Common Good proposal, would limit fees that could be collected.
for "early" settlements, perhaps to 10% of the damages recovered up to $100,000 and 5% of any amounts over $100,000. An early settlement offer is any offer made within sixty days from receipt of a demand for settlement from a plaintiff's counsel. Such proposals fail to take into account that a significant proportion of cases handled on a contingency basis are quite small. Data show that the caps would allow the lawyer to spend very few hours on the matter. Such proposals also reflect a lack of understanding of what representation of injured parties entails. Lawyers move reasonably promptly to settle routine cases as soon as the client's medical condition has reached a suitable state; through that time, the lawyer has been monitoring the client's medical situation, collecting documentation related to expenses and other losses, and counseling the client to be sure that there is documentation and that the client has obtained appropriate treatment. By the time the case is ripe for settlement, the lawyer will have put in a nontrivial amount of time. The time required to prepare a demand letter with the relevant documentation of loss and to negotiate the actual settlement will, for a large proportion of cases, represent a time investment worth considerably more than 10% of the recovery.

The net effect of fee caps will be to eliminate representation for many smaller claimants — those who have meritorious cases but non-catastrophic injuries.

In addition, where caps on damages and fees have been imposed, lawyers have been successful in shifting recoveries to other areas, say from non-economic (pain and suffering) to punitive or economic damages.

Also, while some might assert that insurers would have settled the case without the lawyer's — or other representative’s — involvement for more than the claimant will net after paying a lawyer's fee, Kritzer finds the claim dubious. There are data from England suggesting that non-lawyers can represent clients effectively in some tort cases. If lawyers are systematically overcompensated in personal injury cases, the alternative to restricting contingency fees is to modify the market for representation of personal injury claimants. Insurance claims adjusters handle claims just fine for insurance companies. Perhaps "plaintiffs' claims adjusters" would work well to represent injured parties in negotiating settlements. More importantly, if there are cases that do not merit paying a lawyer a one-third contingency fee because they can be easily settled, then such cases could be handled by nonlawyers; nonlawyers who handled only such cases would be able to charge fees considerably lower than those charged by lawyers.

In other words, if the real goal is to protect the injured parties from "greedy, overcharging lawyers,” then the route is not to restrict contingency fees. Rather, the route is to let the market find the appropriate level for such fees by removing artificial controls that allow lawyers to overcharge in a clearly identifiable subset of clients.

In response to a question, Kritzer said that he had not seen any data suggesting that improved information about contingency fees would help clients in negotiating for representation. He said that clients, patients et al. (excepting perhaps corporate clients) rarely concern themselves with professional fees.

In response to a question about California’s MICRA [Medical Injury Compensation Reform Act of 1975], Kritzer noted that medical malpractice actions are odd ducks and cannot be compared easily to other tort actions. He noted that RAND is currently studying MICRA’s impact. There is a remarkable drop in the number of cases going to trial in the past ten years and a decline in auto injury verdicts, but a slight increase in overall tort recoveries.
He also noted that he does not study class action contingent fees. They are a special case
with a different lawyer-client dynamic.

He does not study clients and fees based upon demographic information such as race, age,
and sex. He did not that lawyers occasionally report taken such factors into account in predicting
jury verdicts and therefore client acceptances.

Mass torts, such as aircraft crashes, involve more lawyer shopping and fee negotiation.
Clients tend to know that they have good cases, as do the lawyers. Win-lose uncertainty (risk) is
less, but other uncertainties can remain.
II. Justice Nathan Hecht: Referral Fee Rules in Texas

Justice Nathan Hecht of the Texas Supreme Court outlined the history of referral fee rules in Texas practice. He began his presentation by distributing to the members a copy of the December 23, 2003, Per Curiam Order of the Texas Supreme Court (the “Court”) to delay implementation of new Rule 8a of the Texas Rules of Civil Procedure (the “Order”). That rule would require disclosure to the court of referral fee arrangement and define as “unconscionable” (effectively prohibit) referral fees that exceed $50,000 or 15% of the total attorney fees, whichever is less.

Justice Hecht provided a brief history of referral fees generally and noted the “significant ethical question” raised by their use. Attachment D to the Order sets out the many variations in referral fee rules across the states. He mentioned that the ABA and some state jurisdictions oppose the use of referral fees as a “generally unethical” practice but they do little to enforce that position.

The recent proposal to adopt Texas Rule 8a came about after prominent Texas lawyers, especially several from the plaintiffs’ bar, expressed concern to the Court that referral fee practices “were hurting the bar and clients.” In response, the Court appointed a task force chaired by plaintiffs’ lawyer Joe Jamail to look at a variety of issues, including referral fees. The task force heard from a number of witnesses and gathered many anecdotes, but it did not have reliable empirical evidence. Nonetheless, the task force recommended adoption of Rule 8a.

The standing Rules Committee of the Texas State Bar opposed the rule change for several reasons: “1. If it ain’t broke, don’t fix it. 2. If it is broke, Rule 8a won’t fix it. 3. In any case, it ought to be a Bar disciplinary rule, not a rule of civil procedure.”

The Court promulgated Rule 8a anyway, in part to get the attention of the Bar. It got a great deal of attention. The Court was inundated with commentary, much of it highly critical.

In response to the comments, the Court agreed to allow the State Bar to study the issue and to suspend the effectiveness of Rule 8a until the Bar reports back with its findings. The State bar has held two hearings to date, neither of which was well attended.

Justice Hecht described the potential harm to clients as derived from the client having to pay two lawyers for the work of one. Either that will result in an unnecessarily high fee or will provide a lower net fee to the lawyer handling the matter and thus some disincentive for the lawyer to provide full representation. The Court had received reports of some referring lawyers charging up as much as 60% of the total fee.

Charlie Silver asked why there should be concerned about splitting fees in this way with respect to non-affiliated lawyers but not to lawyers within firms. In law firms there are rainmakers and worker bees. (A partial answer is that in a law firm the rainmaking lawyer remains at least somewhat responsible for the quality of work, either as partner, as employer, or as participant in the firm finances and reputation.)

Janice Brown asked why the Court decided to implement the referral fee restrictions as a rule of civil procedure rather than an ethical rule. Justice Hecht gave three reasons: (1) The Bar has a formal role say in the adoption of ethical rules, but it does not in the adoption of rules of civil procedure. (2) Disclosure of referral fees in civil cases will assist judges and lawyers in making recusal and conflicts decisions. (3) It provides a better mechanism for public disclosure.
III. Linda McMullen: Problems in Mississippi Litigation Practices

Linda McMullen, General Counsel of the Mississippi State Medical Association, described the problems in Mississippi state litigation practices from the perspective of the health industry:

Mississippi (MS) has 5500 physicians and 6000 lawyers. That ratio is unusual, contrasting for example with Florida’s 3-1 ratio of lawyers to physicians.

Before 1995, there was one verdict in MS in excess of $9 million. Between 1995 and 2003 there were twenty-one such verdicts, seven of them over $100 million, not including the tobacco and Microsoft litigations. This pattern has made MS a very attractive commercial target for out-of-state lawyers. 45% of the most recent bar exam takers were out-of-state lawyers. That is true despite a very liberal pro hac vice rule (330 out-of-state lawyers litigating cases in MS in the past six months).

The American Law Journal named seven MS law firms among the fifty “winningest” firms in the United States. Small MS law firms currently hold down 10th and 11th places with over $200 million in verdicts. Texas, in contrast, with ten times as many lawyers, has only one firm in the top fifty. MS has the second highest percentage of jury verdicts over $1 million in the country. MS rules of procedure do not allow for class actions, but they do include a very liberal joinder rule that allows joining as plaintiffs “hundreds or thousands” of parties more easily that under typical class certification rules.

Ms. McMullen described small MS counties where the number of plaintiffs named in lawsuits exceeds the population of the county. These are generally low-income, high unemployment counties where juries have rendered high awards in diet-drug, acid reflux drug and asbestos suits. In some cases the plaintiffs prevail despite admitting to no current or likely future injuries. The “feeding frenzy” has gotten to the point where unhappy plaintiffs are suing their lawyers because their own judgments or settlements were less than their friends and neighbors got in similar cases. Firm runners are suing firms for failure to pay bounties for recruiting clients. There is reliable evidence of many faked claims, especially by patients changing their medical records.

One-half of MS physicians were sued for malpractice last year. MS has a physicians insurance program [“MICOM”] that grants the defendant physician more than usual authority in case settlements. It has allowed some to pursue and get defendant ($0) verdicts. The program is unable to accept new insured, though, for lack of capital reserves.

OB/GYNs in MS typically receive $700 per delivery. Insurance costs them $200,000 per year. To cover insurance alone, they must to deliver almost 300 babies.

Other specialists are become relatively scarce in MS:
- Internists: 20% nationally; 7% in MS
- Pediatricians: 10% nationally; 4% MS
- Neurosurgeons: 39 at last count, down from 60 the year before
  Only 8 do emergency work. There were 375 major head trauma cases in last 6 months.

Medical residents leaving, most say because of legal environment. The remaining physician population is aging.
MS might pass legislation for “patient compensation fund” like six other states. It appears to stabilize med mal actions. It provides caps on all damages except future costs and caps lawyers fees at 33 1/3 %.

MS has joined in the attempt to adopt the Common Good proposal. It might not do much good, but it will help to educate clients about lawyers fees and eliminate some windfall fees, especially in “no risk” cases.

The MS response to Common Good was to serve the Common Good lawyer, Nancy Udell, for with a show cause order for contempt for signing a “pleading” although not admitted to practice in MS.

Ms. McMullen concluded by asking the members to consider MS’s “unique experience” in recommending changes in contingent fee practices.

Guest Bob Peck noted that MS has proposed the “most draconian” version of the Common Good proposal, especially with respect to one-way discovery required of plaintiffs.

Janice Brown asked if there is any correlation between the quality of medical care in MS and the amount of litigation reported. Ms. McMullen said that there no suggestion of MS having “bad doctors” but it probably has relatively fewer specialists than many other states. She indicated that most cases that are brought are “without merit.”

Steve Lesser asked why the courts are not the appropriate monitor to dispose efficiently of meritless cases. Ms. McMullen said that some judges simply do not enforce the rules, some are overburdened and past their prime, and all are elected. There is reason to call for a general judicial “house-cleaning.” She said that the Common Good proposal would not fix that sort of problem.

Bob Peck and Charlie Silver cited GAO studies that showed more physicians in MS that Ms. McMullen had indicated earlier. She responded that the GAO studies rely on license data, which are often out of date and in any event do not reflect whether the licensed physician is actually in MS and in practice. Silver added that according to the 2002 GAO report, MS spends more than the national average per patient for medical care but is 51st in quality.

Guest Richard Turbin commented that the Common Good proposal appeared to be a “fake solution. . . The Hawaii review panels make a lot of work but add no value in solutions.” Ms. McMullen responded that MS’s problem is largely political, not legal. She believes that review panels work in some states.
Mike Hull has been working on the tort reform problems since the 1980s. He said that has “seen two major changes: House Bill 4 on med mal reform and Proposition 12, the constitutional amendment to protect caps.”

The main modern problems in addressing tort reform issues, especially in the area of med mal are polarization and politicization of the issues. In the 1980s and into the 90s, the plaintiff and defense bar were able to sit down together and quietly work out compromises that legislators and public would accept. Now, Hull says, politics has publicly intervened and the money at issue is too great to allow quiet communication and resolution.

Hull said that “bad outcomes are no longer insurable. Judgments are too high; fees are too high. Neither the plaintiffs nor defendants are to blame. Both sides have experts whose studies support their positions.”

Janice Brown asked why lawyers for opposing interests can no longer sit down and talk through their differences to compromise. Hull said that the issues have become much too politicized. “They are now the cornerstones of the Governor and Lt. Governor’s political platforms. Interested parties now look over their lawyers’ shoulders. Even President Bush has gotten involved.”

Hull said that the tort system had gotten out of control, especially with respect to medical malpractice.

Chris Wells asked if Hull though that contingent fees were the engine or fuel that power the “runaway train” Hull described and, if so, what changes in contingent fee practice would address the issue. Hull said that his organization, the “Texas Alliance for Patient Access (TAPA) had looked to other states for help in addressing the problem. It was especially interested in the California experience under MICRA.” TAPA asked what effect judgement caps and fees reforms had had on patient access to health care and on insurance costs and premiums. Actuaries were unable to attribute specific percentages of effects to either judgment caps or to fee limitations, but they found that California had, overall, more insurance carriers and better patient access to health care. “The reason for this was that California now has fewer med mal lawsuits.”

Hull was asked whether the California data is the result of MICRA or of Proposition 103. Hull said TAPA asked that question and determined that Prop. 103 was the cause, not MICRA. Peck added that his information was that after MICRA was passed in 1975, insurance premiums continued to rise; and that after the 1987 adoption of Prop. 103, insurance premiums stabilized. Hull responded that the data are confounded by the fact “that MICRA had an eight-year run-off. There was no real MICRA caps in place and enforced until the late 80s.”

Hull noted that House Bill 4 in Texas did not include contingent fee reform. Since HB$ was passed, Texas has gone from 19 down to 4 medical mal carriers in five years. There are no new carriers nor any returning carriers. It might be that since Texas did not follow the MICRA model its reforms have been ineffective.

Hull asked rhetorically whether any one “cookie-cutter” contingent fee rule or reform that the committee might recommend could effectively address the varying problems that afflict the different states.
Hull noted that "most contingent fee data are point-of-view driven." He said that in Texas "40% plus costs" fee arrangements are common. "They hurt the profession because lawyers take more of the judgments than their clients."

Brown asked "who favors caps on contingent fees?" Hull responded that physicians do ("our own fees are regulated and contingent fees prohibited."). The top two items on their political wish list are caps on contingent fees and elimination of frivolous lawsuits.

Lesser asked what abused TAPA has found to exist in contingent fees. Hull said that he "couldn’t prove any, but Texas has high 8 and low 9 figure med mal verdicts. Even though of the 3000 cases were filed, 60-80% were dismissed without payment, the occasional high verdicts cause a lottery mentality."

Blumberg asked that we distinguish frivolous suits from contingent fees. He noted that two things can screen out frivolous cases: pre-screening by board-certified physicians and weeding out by plaintiffs’ lawyers. The extraordinarily high costs of preparing a med mal case to the point of settlement would mean bankruptcy for any firm that accepted a frivolous case. He asked whether the real purpose of fee caps is to eliminate all lawsuits, not just supposedly frivolous one.

Hull noted that Texas has pre-suit review.

Someone [Janice Mulligan?] commented that "California has restricted the keys to the courthouse. It costs a minimum of $100,000, perhaps $200,000 to bring a med mal case but the California cap is $61,000."

Kritzer noted that med mal fees data demonstrate an average effective hourly rate of $330. [reporter’s note: Kritzer added some other comments about “lowest median” and “low payouts” that I did not note clearly. Can anyone help out with this?] He added that "blanket rules will not work for different kinds of tort cases."

Silver noted that GAO data show that Texas has higher per patient costs for health care than MS and also relatively low quality.

Hull concluded with a comment that managed care has reduced the personal physician-patient relationship.

The meeting was adjourned at approximately 5:00 p.m.

Respectfully submitted
Chris Wells
Reporter
ABA Tort and Insurance Practice Section
Task Force on Contingent Fees
Minutes of Fourth Meeting
April 30, 2004

On April 30, 2004, beginning at approximately 2:15 p.m. the Task Force on Contingent Fees of the ABA Tort and Insurance Practice Section (TIPS), convened its fourth meeting, at the Marriott Napa Valley Inn in Napa, California. This meeting was held in conjunction with the TIPS Spring Meeting.

Members present were:

Steve Lesser (chair), Becker & Poliakoff P. A., Ft Lauderdale, FL
Janice Brown, TIPS Plaintiff's Involvement Committee, Brown Law Group, San Diego, CA
Edward Blumberg, Deutsch & Blumberg, Miami, FL
Thomas A Demetrio, Corboy & Demetrio, Chicago
Jackie James for Marc Moller, Kreindler & Kreindler, NYC
Kim Hogrefe, Chubb & Sons, Warren, NJ
Daniel Klein, Buckley & Klein, Atlanta, GA
Professor Chris Wells, Mercer Law School, Macon, GA (reporter) and
Professor Pat Longan, Mercer Law School, Macon, GA (reporter)

Members not present were:

Michael V. Ciresi, Minneapolis
Perry Huntington, AIG Technical Services, Inc., NYC
Robert Johnson, McDonald's Corporation, Chicago, IL
Michael Hull, Texas Medical Association, Austin, TX
Stephanie E. Parker, Jones Day, Atlanta, GA
Professor Charles Silver, University of Texas Law School, Austin, TX
Linda Klein, Chair, TIPS, Gambrell & Stolz, Atlanta, GA (ex officio)

Visitors included:

David Diehl, Miami, FL, Chair, TIPS Trial Techniques Committee
Bob Peck, Center for Constitutional Litigation
Janice Mulligan, San Diego, CA
Dina Dagrizikos, Chicago, IL
Serai Sackett, ABA staff, Chicago
I. Introduction of Members and Visitors

Chair Steve Lesser asked Task Force members and visitors to introduce themselves. (The meeting was open to all attending the TIPS Spring Meeting, and other persons came and went during the session.)

II. Approval of Minutes of Telephone Conference dated March 30, 2004

After a motion seconded, the minutes of the March 30, 2004, telephone conference were approved by voice vote.

III. Presentation and Q & A Session with Invited Guest Philip Howard

Chair Steve Lesser introduced invited guest, Philip Howard. Mr. Howard is a partner in the New York office of Covington & Burling, is the founder of Common Good, and is the author of two books offering his critique of the litigation system in the United States: The Death of Common Sense: How Law is Suffocating America (Random House, 1995) and The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom (Ballantine, 2002) - originally issued as The Lost Art of Drawing the Line (Random House, 2001). Most pertinent to the issues before the Task Force, Common Good, has supported application of versions of the Brickman/ O'Connell/ Horowitz proposal to encourage early settlements in a limited category of cases, an aspect of which proposal would limit contingent fees. [A more complete professional bio is attached as Attachment 1 to these minutes.] Common Good, usually allied with the health professions, has urged adoption of the proposal in a number of states. He was invited to present his views on the proposal and on related matters.
I. Common Good

Common Good (CG) is not mainly about contingent fees. Its purpose is to unite the leaders of the country in recognizing fundamental flaws in the litigation system and to find ways to improve that system. In particular, Common Good believes that many cases that currently proceed to full discovery and trial ought to be dismissed by motion rather than being permitted to reach juries. Judges must be willing to draw lines regarding reasonable disputes. One example is that of seesaws on playgrounds. Some successful suits and the fear of more have effectively eliminated seesaws from playgrounds. That demonstrates a lack of judgment.

To identify other examples and to learn from those most affected, CG has recently convened four national programs, two about Law & Health Care, two about Law & Public Schools. One proposal that has come from these sessions is the creation of a new “Health Court.” The Health Court would involve judges who have expertise in the field, who would be empowered and encouraged to decide which cases are sufficiently meritorious to survive motions to dismiss — “what is a good case and what is a bad one.” The proposal would also, rather than being permitted to reach juries, include some means of oversight of the medical licensing system. Together, the Health Court and the new licensing oversight would constitute “a new medical justice system.”

Of course, the proposal of principal concern to the Task Force is that regarding early settlement of cases. As you know, that is based upon the “early settlement” proposal of Brickman, Horowitz and O’Connell back in the mid-90s. It recommends that court systems encourage early settlement of cases by providing incentives for both plaintiff and defendant to make and accept offers of settlement early in the litigation process. The plaintiff’s incentive is that he or she keeps a higher percentage of the settlement recovery because the plaintiff’s attorney’s fees are capped at 10% of the first $100,000 and 5% of any amount above that. The defendant’s incentive is similar, in that an early settlement should reduce the hourly defense attorney’s fees as well as eliminate the risk inherent in proceeding further with litigation and trial. Neither side is obligated to make or to respond to an offer.

The early settlement proposal has been placed before the bar or judiciaries of some twelve states. About half have declined to adopt it. It is pending at one stage or another in the other half.

Common Good does not support tort reform. That is because Common good is concerned with improving the behaviors of service providers such as health professionals and educators. Caps on damages do nothing to improve behaviors.

Common Good does support attorney contingent fees generally. They serve an important function of providing lawyers to injured persons who would otherwise not be able to afford one. Nonetheless, contingent fees do raise some troubling issues: their “reasonableness”; the “industries” that have developed for certain types of cases; and the ethical issues of advertising.

At this point the Chair asked “In what areas do you see that contingent fees work well and suffer from no problems?” Howard responded, “In general contingent fees have no problems. The early offer proposal is essentially a “tweak” to encourage settlement of some cases at low cost to all concerned. Whether or not there are better terms for such a proposal is quite debatable. In fact, I prefer...”
contingent fees myself. I like to bet on myself in any case. The core question is how to regulate contingent fees so as to protect clients and not to cast the profession into disrepute. I can think of no category of case, other than the currently described one – such as domestic relations and criminal defense – in which their use is inappropriate. [Reporter’s note: the use of quotations marks indicates words or passages as close to verbatim as possible from written notes. The absence of quotation marks indicates paraphrasing and summary.]

Even so, even with unlimited contingent fees, a $250,000 medical malpractice case is “untakeable.” This is where a “Health Court” could improve the system. The Health Court would operate under an expedited time frame, would pay for its own experts, although the parties could also have their own, all resulting in lawyers’ fees materially less than under the current system. The Health Court would also include expert judges and automatic discovery. Smaller cases need a “small claims, rocket docket approach with a jurisdictional amount under a couple hundred thousand dollars.”

In larger cases, the “standard fee is unreasonably high and unrelated to the risk of failure or to the amount of work done.” It is, therefore, a violation of Rule of Professional Conduct 1.5. The “Contract argument” – that the lawyer and client have negotiated a private and enforceable contract -- is unpersuasive. It is usually a short-term relationship, the ability to assess risk resides peculiarly with the lawyer and not with the client. It becomes an adhesion contract. Class actions have their own problems. They essentially challenge an aspect of societal conduct. Of course, companies do things wrong. Class actions are an important device. But they require better oversight, starting with the judge. The judge should ask what is a valid claim and what is not. Much of what the courts do in class actions is more appropriate for legislatures. In other words, we need to give more consideration to the societal implications of what cases are brought and why.

Justice requires human judgment. The justice system has seen huge growth and development in areas of substantive law, but few changes in process or rules. Abuses suggest more oversight is needed, perhaps starting with ethical abuses. The current ethical guidelines are reasonable, but they are not adequately enforced. “Professional” must mean something beyond maximizing returns. What about the lawyer’s ad “I collected $90,000 even though the doctor did nothing wrong”? That is wrong.

We must have a mechanism for reviewing fees, but reviewing them in all cases is impractical. For example, we could empower the attorney general to receive complaints about fees, using the existing guidelines.

We must question whether a lawyer who brings an x-ray truck to town and uses the results to bring a class action without evidence of any causal relationship is wrong. Such actions cast the profession in a bad light. Bar associations should undertake to review and sanction them. “We need to put teeth into Rule 11. The ad damnums are often ridiculous. An uninjured person on the Staten Island Ferry recently sued for $200 million. What lawyer would sign that complaint? Is the only rule the one that says ‘anything you can get away with is OK’.”

“We must recognize that litigation equates to a ‘civil indictment. There is state process involved. It is not a neutral process. It can be a tool for extortion. The rules exist for curbing such abuses, but they are not enforced”.
To recap:

1. The early offer proposal can help to settle “easier” cases more quickly and efficiently.
2. We need a new judicial mechanism for small cases. This proposal is actually “pro” plaintiff lawyer. It will help lawyers and clients to resolve small cases more efficiently and reduce plaintiff lawyer investment of time and money.
3. We need better oversight over fees and unethical litigation practices, including advertising.

Lesser: Are you saying that there are just bad lawyers taking bad cases or that there are fundamental problems with the legal system.

Howard: It’s a larger problem. There are class action lawyers who have made shocking amounts of money. Dicky Scruggs gets a billion dollar fee. No risk is that great. That just creates incentives for others to look for lawsuits. We need structural change. The problem is not just a few lawyers. There has been a general decline in the sense of the common good.

Janice Brown asked if the problem was just with plaintiffs’ lawyers or also with defense lawyers.

Howard responded that the problem with fees is more of a plaintiffs’ problem. Defense lawyers generally work by the hour and have longer term relationships with clients. Unlike plaintiffs, defendants have the ability to shop and get deals on fees, to negotiate

Diehl: Yes, the existing rules need to be enforced, but you need to be in the trenches to know what is really going on. Defense fees and tactics are as big of a problem. You are a dangerous man with dangerous ideas. You have no facts. There are no facts that support your see-saw example. I have read your stuff and it is garbage. You do not know what you are doing. You need to know more about what is really going on before you start taking away people’s rights. You are spreading destructive nonsense... I am going to leave now because I have heard enough of this.

Howard: You are going to leave without hearing my reply? I listened to you. Please have the courtesy to listen to my response. We do not believe in the “litigation explosion.” My focus is on people’s predictability instead of people’s perception. Perception of liability. The facts are that more often than not doctors prevail in litigation, even ones who have done something wrong. That is inconsistent with people’s perceptions. Common Good’s goal is to have judges make more decisions about right and wrong and to restore trust in the legal system.

Defense lawyers are also guilty of dragging out litigations. Under the current system, often doctors who have done wrong get off. But in big damage cases, Hospitals succumb to litigation pressures even where there is no fault. We look at health care itself, how it is really practiced. We look at the culture and why it costs so much. There is extraordinary distrust of the legal system by doctors and other providers. Everyone in chain must be held accountable for what he or she does.

A new system, like a Health Court, will cost more, but it will be more predictable and accurate. As it is, medical malpractice constitutes 1% of the medical budget. We look at the culture and why it costs so much. There is extraordinary distrust of the legal system by doctors...
and other providers. Most health care providers are good professionals. The system does not discriminate precisely.

Diehl: Managed health care is not accountable.

Jackie James: What about “998 offers”? No fee if judgment is less than offer of settlement. That requires the defendants to do the work necessary to know when to accept an offer or make a good counteroffer. They don’t do it.

Janice Brown: We need to find ways to resolve negative image problem. We need better communication within the bar – plaintiff and defense and public interest lawyers. We need to have correction for the benefit of consumers, not lawyers

Howard: We should be making agreements about where we want to go as a society instead of allowing our behavior to be guided by isolated lawsuits. Defendant teachers are never liable for anything, but they are afraid of the legal process of determining outcomes. People are risk-averse. Doctors need to believe that the system won’t “ruin” them if they make a mistake.

Howard: Quoting Justice Black (?): “An act is illegal if vulnerable as subject of legal action.” If you can get a system that is more reliable, then you can enforce all kinds of patterns against doctors.

Tom Demetrio: Why do health care providers distrust a system that usually finds in their favor? Why is corporate America beginning to call lawyers and seeking contingent fee arrangements?

Howard: people respond to risk, not probabilities. If the system tolerates risk, then that will guide behavior. Distrust is a fact.

Demetrio: Have you thought about prejudgment interest in tort cases?

Howard: I’ve not thought about that.

Demetrio: It relates to early settlement. There is no incentive for insurance company to settle early if they can continue to earn interest on money that will eventually go to the plaintiff in settlement.

Kim Hogrefe: Your premise is wrong. Insurance companies do not have a cash flow mentality. Even if they did, the economic calculus doesn’t work. Lawyers cost more than the interest. The discussion then digressed into the problem of overstaffing by defense firms.

Janice Mulligan: California's 998 offers can go both ways. It depends on who makes the offer. It's hard to do without discovery from the other side.

Howard: Change law to include that?

Brown: Federal courts require an early neutral evaluation conference.

Demetrio: The real problem is that everything is out of court now. It is a paper chase, and you won’t have the discovery that you need

Howard: The challenge is to create a system that provides defendants incentive to avoid fees and requires adequate information from the parties to support an offer.

Demetrio: Real world: CEO is in a plane crash. Liability seems obvious, victim is young, valuable, has a family surviving, etc. There is enormous economic loss, and the plaintiffs will submit detailed information to the defendant. Defense will find experts to question all elements of victims character – whether he missed some of his son’s birthday parties.
Howard: The early settlement proposal will never work in complex cases – multiple defendants, insurance apportionment disputes, etc. It was designed for simpler cases where the defendant knows liability is likely.

Edward Blumberg: A med mal case is usually a complex case, with joint tortfeasors.
Howard: A health court that could impose enterprise liability would help things.
Blumberg: Would you agree that it is better for the clients and easier to litigate when there are good, experienced lawyers on both sides?
Howard: Yes, I agree.
Blumberg: What happens with caps and contingent in place only for the plaintiff and not for the defendant?
Howard: Caps will deny plaintiffs access to justice.
Blumberg: Have you heard defense lawyers say words to the effect, “I can’t settle the case yet. It hasn’t reached its maximum billing potential yet”?
Howard: Insurance companies also need better representation. Lawyers who do that should be disbarred.
Blumberg: Insurance counsel bids for business using hourly rates, but the client gets abused anyway. The economic pressure on hourly billing is so great that this happens. The bottom line is that caps would harm access.
Howard: Yes, but there should be oversight to enforce rules that already exist. And if there were a health court, fees would be lower.
Hogrefe: Are you familiar with the current proposal to amend the Florida constitution to cap non-economic damages and limit fees?
Howard: Yes, but Common Good has not taken a position on that proposal.
Dan Klein: You have criticized the legal system for rendering inconsistent results, and you have criticized it for, in effect, making legislation by lawsuit. The 500-pound gorilla in the room is the jury trial. [summarizes Howard’s main points] I couldn’t help but notice that never have you used the word “jury.” Sometimes the most important word in any argument is the one not used. Are you in favor of eliminating juries?
Howard: Juries are needed to decide questions of fact, and often what is included in those “fact” questions are matters outside their ability. Many issues should be moved to questions of law for the court. For example, should they be asked “Should aspirin be given for a headache?” I think that is a question of law.
Dan Klein: Don’t you need to deal with the other reasons why we have juries?
Howard: John Edwards wrote a piece on juries in “Democracy in Action” that perfectly describes the problem—that more things should be decided by judges rather than juries. One of the most important and hardest questions for our system is what is fact and what is law. We need courts that can properly discriminate between the two. As it is, juries are too often asked to decide questions of law. For example, in a case where a plaintiff sues claiming very high damages, is the quantum of “pain and suffering” a question of fact or law? I think it is more likely a question of law.

I am now involved with a project that has some of the best minds in academia trying to elaborate on the distinction. Again, to summarize my main points:
1. We need to enforce the “reasonable fees” requirement of the ethics code.
2. There needs to be more oversight – judicial or otherwise – of litigation processes, including fee awards and agreements.
3. We need to improve the judicial system to allow more access, not less, for plaintiffs.

Brown: You made a comment that large fees are given that do not relate to the risk and that brings the profession into disrepute, primarily in class actions. There is truth in that. What can we do? How can we reverse the negative image of bar derived from very large fees in class actions where there is little social benefit?

Howard: The problem with those cases is that there is no real plaintiff and the defense colludes to settle the case. In effect the question becomes, “How much in fees will it take to “buy off” satisfy the class action lawyer?” Both sets of lawyers are conspiring to do something that puts the profession in a very bad light. Class action cases, such as the coupon cases, require more oversight.

Lesser: Aren’t judges supposed to be the gatekeepers on the fees?

Howard: The judges’ and the bar associations’ oversight mechanisms fail.

Hogrefe: That’s because there is no one with standing or sufficient interest to object to the fees. The plaintiff and defense lawyers negotiate simultaneously a settlement and a fee. It goes before the court as an uncontested matter. It is rubber-stamped.

Lesser: Should judges review fees even where the parties have a “clear sailing” agreement?

Hogrefe: Should contributors to the settlement – insurance companies – be able to challenge fees?

Howard: Insurance companies won’t challenge, just as defense counsel won’t challenge.

Hogrefe: Insurers would do it if the reduction in fees inured to the benefit of the insured client. Perhaps we should give all the shareholders standing.

Blumberg: In Florida, there is a sliding scale in personal injury cases. It creates a tremendous incentive for a lawyer to settle before trial. You’d have to tweak the rule so as not to jeopardize the client’s recovery in face of quicker settlement pressures. The last dollars recovered for the client always cost the lawyer more in time and risk. We do not tweak it because we care what the public thinks.

Howard: Lawyers respond to risk. One problem today is that lawyers are not at risk for what they do. Rule 11, and other rules, are not enforced.

Lesser: These rules are enforced, and most lawyers do not want to get near the edge.

Howard: The one place where there is no oversight is with respect to the reasonableness of fees.

Demetrio: It seems to me that fee oversight comes from two places. Oversight comes from more sophisticated clients and the marketplace. First is the market. More sophisticated clients negotiate for better lawyers at better prices. There is a lot of competition in the plaintiffs’ bar. Fees are often lower than the usually quoted 1/3.

James: In larger cases – like air crash cases – the usual fees are quite a bit lower. Not all comes from the supposed more certain liability. 15% is a typical fee, sometimes it is drastically reduced from that.
Howard: Common Cause focuses on health care. One reason to focus on the early offer program was to come up with a mechanism for early resolution of cases. It is not a condemnation of contingent fees. Those fees need oversight.

Wells: We have heard before of clients who shop their cases, effectively creating a fee auction.

Demetrio: Where is the criticism of the attorney-client fee agreements coming from?

Howard: The early settlement proposal is just that. It seeks to encourage early settlements at the lowest cost. Lots of disputes can and should be settled early and simply.

Wells: Given the academic and social critiques of fees – that they are often unreasonable in light of the risk, and that after all the rationale for contingent fees is that they account for risk in cases – I'd like to hear this group comment on two questions:

1. Is there such a thing as a “riskless” case?
2. What should we take into account when we speak of “risks” that justify the contingent fee concept?

Demetrio: I am not sure there is a “riskless” case. Take the Chicago scaffold case. A scaffold falls from the 42d floor of a skyscraper on an excessively windy day. The wind was forecast and obvious. The scaffold should have been placed lower or higher on the building. Instead, it was blown off and killed several people. It seems like a case of obvious liability, with only questions of damages. So far, it has taken 65 depositions by defendants, including various insurers, mostly jockeying to see who will have to pay what. The plaintiffs’ expenses and fees have mounted to $650,000, all borne by the plaintiffs’ lawyer. “Risk” therefore includes the cost just to preserve a case of clear liability. Insurance companies can go bankrupt. That is a risk. Defendants can be judgment proof.

Blumberg: By the way, plaintiffs rarely go after doctors individually. In effect, we have caps already, the amount of the insurance. No plaintiff wants to take a doctor’s home or car or savings account. They only go after the insurance. There is risk of death of a plaintiff dying without survivors. In that case, all the time and effort to prepare the case will never be compensated. It’s an irony that death can sometimes save the defendant from having to pay anything, rather than millions of dollars for a severe injury. [Mr. Blumberg gave two examples.]

Professor Wells quoted from an article by Michael Horowitz about cases that carry no risk.

Howard: I would not agree with that statement. But there is a category of cases where one-third is too much and we need oversight.

Howard: It is obvious that in some cases the potential fees are too little. That is why many injured people cannot find lawyers. Mixed-fee agreements?

James: We do it, but smaller clients are not doing it. Negotiation for fees occurs only in larger cases? Not in small cases?

Howard: Risk includes a quantification of work. Use an hours x dollars formula.

Klein: Mixed rates are often used in employment law cases. Employment law cases present a special problem. They involve a large amount of work and a relatively small amount of money. Prevailing party relies on an award of attorney’s fees paid by losing party.
Experienced lawyers must assume that every case will go to trial, and prepare accordingly, even though they know that very few will actually be tried. That is a part of the risk. Lawyers will quickly lose their credibility and cost their clients in settlement if they do not proceed to prepare for trial. Risk also involves the waiting pending appeal as well as the cost of the appeal.

Demetrio: In some states, fees in med mal cases are set by statute, but plaintiffs’ lawyers can petition for up to 1/3 if they have done “an exceptional job.” Aren’t all lawyers supposed to do an “exceptional job”?

Wells: Now I’d like to ask you for comments on judging whether fees meet the “reasonableness” requirement of the ethics code. In a private action, should that judgment be done ex ante, at the time the fee contract is made, or ex post, after the matter is concluded?

Demetrio: Fees should be judged ex post.

Howard: In fairness to the profession, I think before. Some mechanism for adjustments after might be nice. In federal cases, they often use the lodestar and multiplier. It’s not perfect but it’s an acceptable approach.

Lesser: Do we need more active judges?

Howard: In class actions, there are clear abuses, and it is incumbent upon the bar to come up with a mechanism where the lawyer is being bought off.

Demetrio: Do you have any opinion about defense contingency fees?

Howard: They are fine under some ethical circumstances. Note that negotiating with a sophisticated, long-standing client is different.

The meeting was adjourned at approximately 5:15 p.m.

Respectfully submitted,
Chris Wells
Reporter
On June 23, 2004, beginning at approximately 2:15 p.m., the Task Force on Contingent Fees of the ABA Tort and Insurance Practice Section (TIPS), convened its fifth meeting, at the Boca Raton Hotel in Boca Raton, Florida. This meeting was held in conjunction with the Florida State Bar Annual Meeting.

Members present were:

Steve Lesser (chair), Becker & Poliakoff P. A., Ft Lauderdale, FL
Edward Blumberg, Deutsch & Blumberg, Miami, FL
Thomas A Demetrio, Corboy & Demetrio, Chicago, IL
Kim Hogrefe, Chubb & Sons, Warren, NJ
Perry Huntington, AIG Technical Services, Inc., NYC
Daniel Klein, Buckley & Klein, Atlanta, GA
Linda Klein, Chair, TIPS, Gambrell & Stolz, Atlanta, GA (ex officio)
Professor Chris Wells, Mercer Law School, Macon, GA (reporter)

Members not present were:
Janice Brown, TIPS Plaintiffs Involvement Committee, Brown Law Group, San Diego, CA
Michael V. Ciresi, Minneapolis
Robert Johnson, McDonald’s Corporation, Chicago, IL
Michael Hull, Texas Medical Association, Austin, TX
Professor Pat Longan, Mercer Law School, Macon, GA (reporter)
Marc Moller, Kreindler & Kreindler, NYC
Stephanie E. Parker, Jones Day, Atlanta, GA
Professor Charles Silver, University of Texas Law School, Austin, TX

Visitors included:

Bob Peck, Center for Constitutional Litigation
Burton Young, Past President of the Florida Bar
Irvin Gonzales, TIPS

I. Introduction of Members and Visitors

At Chair Steve Lesser’s request, Task Force members and visitors introduced themselves. (The meeting was open to all attending the Florida State Bar Association Annual Meeting, press and public). Linda Klein spoke on the history and mission of the Task Force.
The Chair noted that the general Counsel of the Florida Medical Association had first accepted, then declined the Task Force invitation to attend and make a presentation. He asked Edward Blumberg, former President of the Florida State Bar Association, to formally introduce the special guests for the meeting:

Florida State Senator Walter "Skip" Campbell, who also maintains a private practice with emphasis on admiralty. His firm has represented plaintiffs in medical malpractice actions.

Florida State Representative Jeffrey Kottkamp, who also maintains a private defense practice. He has represented health care industry defendants, including hospitals and their directors.

Florida Attorney and former Florida State Representative Arthur Simon. In addition to representing the health care industry and other business interests and associations, Mr. Simon frequently speaks to business groups about the "tort crisis."

[Note: More complete biographies of the three guests are attached to these minutes as Exhibit 1.]

Each of the guests then made presentations and responded to questions.

II. Florida State Senator Walter "Skip" Campbell

Senator Campbell began by describing the breadth of his practice, including his representation of CEOs, physicians, the elderly and others in a wide variety of matters. "Clients always ask 'Will you take my case in a contingent fee?'" He noted that in a 1985 airline crash in which he represented a plaintiff, all victims families but one chose a contingent fee arrangement. The one who did not was charged by her lawyer $1.46 million on an hourly basis. She was the only plaintiff who failed to recover.

[Later he described Lloyd’s telling him that they would prefer that their lawyers handled matters on a contingency for them – perhaps a so-called "reverse contingent fee"– rather than the high hourly fees they usually pay.]

He emphasized that “elimination of, or significant constraints on, contingent fees would make legal assistance available only to those injured persons who are wealthy. The poor, the retired, African Americans, and women especially will suffer because they are often unable to afford hourly fees. The contingent fee is often their key to the courthouse."

"The only goal of people who want to eliminate contingent fees is to reduce the incidence of lawsuits. To do so would be unfair to those who need a lawyer."

Senator Campbell noted that in medical malpractice cases there seems to be a rising callousness, citing a recent New York Times article about a woman who had an unnecessary double mastectomy by mistake. The reaction of one health industry representative was that she
was not really harmed: "Reconstructive surgery can give her two new breasts that were better than her own."

Senator Campbell has been heavily involved in legislative attempts to reverse the medical malpractice insurance crisis in Florida. In recent years, the Florida Legislature has devoted one full session and four special sessions to medical malpractice issues alone. His Senate committee took a great deal of testimony from all interested parties. He noted that the catchphrase such as "frivolous lawsuits" were common as a justification for pursuing legislative action. To determine the extent of the problem, his committee put witnesses under oath. After that, no one - physician or other person - could cite a single example of a frivolous lawsuit. In fact, one insurer admitted that "there are no frivolous lawsuits in medical malpractice."

[Reporter's note: Is this actually the Sandra Mortham (Florida Medical Association) comment quoted in the NYT on June 25, 2004: "When questions about frivolous lawsuits arose, Sandra Mortham, the chief executive of the Florida Medical Association, told the panel, "I don't feel that I have the information to say whether or not there are frivolous lawsuits in the state of Florida."?]

The costs of medical liability -- including settlements, judgments, and costs of defense -- have remained stable over the years at about 1% of all medical costs.

Senator Campbell noted that the Heritage Foundation, known for conservative stances, has said that limits on attorneys fees would be a form of illegal price controls. If they can be limited why not also limit the salaries of corporate executives and doctors? He also emphasized that the 10th Amendment shields states from federal involvement in state bar matters such as attorneys' fees.

If it were true, and it appears not to be, that weak cases are making it through the system, then the approach should be to have courts apply stricter merit standards for maintaining cases, perhaps a rule like the current Florida rule requiring a qualified medical expert to support a malpractice complaint: "There is no reason to believe that contingent fees are driving up the costs of anything. In any event, it should be a matter for state courts or bar associations."

Tom Demetrio asked whether Senator Campbell knew why insurers have raised rates of doctors who have "clean" records [no malpractice claims]. He noted that much of the cries heard are from such doctors.

Senator Campbell responded that about 5% of all physicians are responsible for nearly 50% of all payouts. [Reporter's note: see Art Simon explains this later as a product not of bad doctors but of a few whose specialties are simply more likely to result in catastrophic injuries.] He sees little justification for raising rates of those with good records. He noted that Florida does not require physicians to carry medical malpractice insurance, and as a result, some 40-45% of Florida physicians do not. Most would prefer to be insured, but cannot afford it. (He added that his own firm of 18 lawyers pays $170,000 per year in professional liability insurance.)

In Florida, a total of $380,000,000 was paid out by insurers for the costs of medical liability, including defense costs, settlements and judgments. There are 38,000 physicians in Florida. That works out to only $10,000 per physician. Because so few are insured, there are too few to spread the risks appropriately. Also in the current cycle, insurers are moving out of state.
Senator Campbell plans to introduce a bill to establish a state company to compete with private insurers for medical liability insurance. It could be funded by a small tax on hospital beds, on medical malpractice judgments, etc. There is a very strong insurance lobby in Florida. It seeks to maintain maximum flexibility on offering policies.

Lesser asked how much it costs to prosecute a medical malpractice action. Senator Campbell said that his firms' experience ranges from $50,000 to about $500,000 per case. He described a recent case of erroneous diagnosis of esophageal cancer and resulting wrongful removal of a man's esophagus as costing $390,000. The costs were high because, among other things, a lab had switched two biopsies and DNA tests were required to prove the switch had occurred. (He noted that the hospital and physicians refused to notify the real victim of esophageal cancer, who then died.) His firm relies only on physicians from teaching hospitals as experts. He said that his firm accepts about 1 in 100 clients who seek assistance for a possible medical malpractice problem. One of the reasons for the low ratio is that many cases, although involving injury, do have sufficient potential damage recovery to justify the high expense of bringing the action. If the Florida constitutional amendment were to pass, his firm would likely be unable to afford to accept medical malpractice cases.

Dan Klein asked if it appears that the only rationale for the Florida amendment is to drive lawyers out of the field of medical malpractice.

Senator Campbell agreed and said that the FMA is short-sighted and overly optimistic. They knew that an attempt to cap damages "was not in the cards. They lost the last attempt. So they, on advice of consultants, began a smear campaign using phrases like "greedy trial lawyers." This was motivated by polls that indicated that doctors are much more popular with the public than are lawyers. Their proposal to limit contingent fees by constitutional amendment was recently before the Florida Supreme Court on the issues of its ambiguity and the clarity of the brief explanatory statement. Polls indicate that when the public is asked to opine on the amendment itself, it loses.

In response to the FMA proposed amendment, trial lawyers have proposed three amendments of their own: a "three strikes and you are out" of practice for repeat malpractice offenders; a limit on medical charges, and to require doctors to disclose their own medical malpractice suit history to their patients. Campbell predicts that the FMA proposal will fail to get enough signatures, but the lawyers' proposals will succeed.

III. State Representative Jeffrey Kottkamp

Although Rep. Kottkamp's career has been devoted largely to litigation defense, he emphasized that the "contingent fee means access to justice for the typical plaintiff." Eliminating or severely restricting contingent fee would leave only hourly fees. Because most people cannot afford to pay hourly fees, that alternative would effectively deny access to justice for them.

Florida's constitution grants access to courts for citizens, therefore any restriction on that access cannot be accomplished by statute; it must appear in the constitution.

His experience representing such clients as Publix has taught him that in "low-end cases, lawyers might well be entitled to take home more money that the client, at least when costs are
included.” In those cases, some lawyers reduce their fees. Clients don’t know or appreciate what the costs of representation would have been on an hourly basis.

Kottkamp asked several questions rhetorically: How do contingent fees affect the reputation of the profession? How do they affect the attorney-client relationship? Do clients need help to negotiate fee agreements? Does the market reduce the percentage of contingent fees charged?

Kottkamp noted that the legislative committee he chaired refused to propose anything like the currently proposed constitutional amendment because it is “unreasonable.”

He understands that a very high majority of cases that go to trial result in a defense verdict, but very few cases get to trial. If defendants would push more cases through to trial, it might deter some plaintiffs and their lawyers.

[Note: A little later in the meeting, Senator Campbell said that about 60% of cases are won by plaintiffs in medical malpractice cases. He said that “good cases will be settled; grey areas cases will be tried.” At that point, guest Bob peck interjected that the bureau of Justice statistics shoe that nationally tort plaintiffs win 55% of cases; medical malpractice plaintiffs, only 27%.]

Florida has already slanted the field greatly against plaintiffs in medical malpractice actions. They have the shortest statute of limitations. They have numerous additional procedural requirements. For those reasons, plaintiffs usually lose. The difficult odds lead plaintiff lawyers to want to collect their “40%” when their cases are successful.

At the mention of the fee percentage, Senator Campbell interjected that there is competition in fee percentages. He also noted that he represented the Florida Medical Association in a suit against HMOs. The FMA would only consider a contingent fee arrangement and negotiated a percentage with him.

Florida law requires that lawyers provide their clients a Statement of Rights, which advises them about negotiating fees. Lawyers discuss these rights with prospective clients. Campbell emphasized again that in his experience “clients frequently negotiate contingent fees percentages.”

Mr. Simon referred to the currently proposed Florida amendment and noting that medical professionals prefer the phrase “medical liability” over “medical malpractice.” Because that phrase is ambiguous, it creates a problem for the amendment. He said that polling had found strong opposition to the amendment, largely from persons who did not understand it. They thought it meant the opposite.

Campbell interjected that very few lawyers represent plaintiffs in med mal cases. It takes such specialized knowledge of law, procedure and medicine, as well as significant costs.
IV. Former State Representative Art Simon

Mr. Simon began by summarizing his practice experience. He has spent some 20 years in appellate practice, representing insurance companies, including medical malpractice carriers, hospitals and the Dade County medical Association. He said that he “has no dog in this fight,” and does not currently represent any interested clients or groups.

He entered the legislature in time for the “second wave” of medical malpractice “crisis” in Florida. The first such crisis, in the 1970s, caused the legislature to pass modest reforms to make insurance coverage available to physicians and create a patient compensation fund. A “prevailing party attorney fees provision was a disaster.” The second wave, in the 1980s, found liability insurance unavailable for some physicians, including emergency room physicians. In 1986-88, the legislature passed additional tort and medical malpractice reform legislation, imposing special procedural requirements in medical malpractice cases.

The current wave finds premiums higher and 48% of Florida physicians uninsured. “Medical malpractice is unequivocally the toughest issue ever encountered by legislators.” This is true now and is was true before. “In 1985, as a supporter of ‘patients’ rights’ I received two death threats.” “No other issue has engendered one complete and four partial special sessions of the [Florida] legislature.”

It’s tough in part because the adversaries are tough: doctors, the medical association, business groups, and trial lawyers. It also involves big money.

It’s also a complex issue. At the heart is the health care delivery system, where 1-2% of its total costs result from medical liability. Efforts to save money on other costs tend to exacerbate the costs of medical malpractice. Reinsurance outlets problems trickle down to affect med mal insurers. Medical technology increases exposure to med mal. Severely injured and seriously ill people stay alive, creating new opportunities for errors (no longer bury mistakes).

It’s hard to address the problem when the affected interest groups don’t agree on what the problem is. Doctors don’t like being sued. They don’t trust judges to make determinations or second guess their medical judgments.

Insurance problems lead to doctor problems with liability coverage, which causes suits against hospitals.

Insurers look at frequency and severity of cases, which determine risk exposure and drives up premiums.

Lawyers say there is too much medical malpractice, which causes the many suits. They say to reduce medical malpractice suits, doctors much reduce medical malpractice itself. “There are three great myths in medical malpractice politics” 1. bad doctors; 2. bad lawyers; 3. bad insurance companies.”

“If we weed out the handful of bad doctors that cause the problems, we’ll solve the problem.”

Fact: Although relatively few doctors are involved in most of the medical malpractice claims, that doesn’t mean they are bad doctors. The best doctors often take the riskiest cases, where the outcomes are hard to predict.” Too few insured doctors are covered by too few insurers.
“Frivolous lawsuits” myth, but myths survive on a kernel of truth. There was a time when frivolous lawsuits were more common: “file first, ask questions later.”

Fact: Florida’s procedural requirements, added in 1985, 1986, 1988 and 2003 virtually preclude frivolous suits. In addition, “every study I’ve seen shows that only a tiny percentage of valid claims ever result in a lawsuit.”

“Insurers manipulate the market, setting artificially high rates.”

Fact: There are good reasons for the high rates. Florida’s has tough insurance regulations that preclude market abuse. They are high because of the “frequency and severity of claims.”

“We must get past the mythology and rhetoric.”

Simon has worked closely with doctors over the years. They are unhappy for a number of reasons

“They are frustrated by a sea of paperwork. They hate it. They are drowning in it.”

“Fifteen years ago 98% had $1 million in coverage. Now 60% have only $250,000. It scares them.”

“Patient expectations have risen exponentially” because of advances in medical technology that lead people to expect cures for all illnesses.

The rise of corporate medicine.

Consumerism.

Average time spent with patients in an annual physical exam is now eight minutes. They have to churn patients.

“Myth 4” is that the legislature has not found a cure for what ails the medical profession because lawyers control the legislature. The fact is that the percentage of lawyers in the Florida legislature is very low.

Doctors believe that lawyers do make large campaign contributions with money earned from “fat contingency fees” in medical malpractice cases. The fact is that the biggest cases of medical malpractice occur when doctors sue other doctors for medical malpractice.

Organized medicine is behind the efforts of tort reform and contingent fee limitations.

There are two camps, the “rationalists and the irrationalists.”

The rationalists at least have some logic at the root of their proposal” “reducing contingent fees will reduce premiums.” They are told this by medical malpractice insurers. If lawyers have less incentive to bring a case, there will be fewer cases, lower claims and therefore lower premiums.”

Because lawyers are overpaid anyway for what they do there will be no harm to society by reduced fees.

The “irrationalists” argument is as follows: attorneys are the enemy; they pursue jumbo judgments; the block legislative action; so “hit ’em where it hurts – in the back pocket. Even just driving attorneys crazy is good.”

The legislature is more centrist. It understands the important issues are access to medical care with compensation for injuries from negligent care.

There are two legislative camps. One camp has a zero-sum perspective: “if neither side likes a proposal, it must be good.” Both lawyers and doctors must lose something. The other camp believes that compromise is necessary for optimal societal benefit.

Doctors insist that attorneys haven’t given enough, so it’s now time to hit attorney fees.
Simon was a sponsor of the 1985 act that created a sliding scale of fees in med mal cases, but he believes that it is probably unconstitutional. The constitutional issue was avoided when the Supreme Court interpreted the statute as a request for the court to promulgate fee guidelines, which both the Court and the Bar agreed to accept. Florida has now been living with the schedule for 18 years, "one of the most restrictive in the nation. MICRA [California law] is more restrictive."

The proposed constitutional amendment is even more restrictive than the current schedule. Simon had worked with a business coalition that urged the FMA not to proceed with the amendment. The same group favored contingent fee limitations in class actions, but "FMA had the wrong thing, wrong time and wrong vehicle."

The proposal is unconscionably arbitrary and vindictive."

It differs in important ways from the current schedule. The process for fashioning the current schedule involved assessing the "best practices" used by the "best practitioners" and not just some prevailing norms. It was concluded that excellent lawyers can still produce good results at lower fee rates. It also looked at defense costs, to assure the necessary balance in the adversary system. The plaintiff lawyer fees are roughly comparable to the defense fees charged.

In contrast, there has been no hearing or testimony to determine the reasonableness of the amendments terms. The legislature has recently major legislation on medical malpractice. We should give it time to work. In 2003 the legislature spent more time on med mal than on any other issue in the past 20 years.

If any amendment acceptable, it might be a "Texas-style" amendment that allowed open-ended legislation regarding damages and fees.

Currently the "two learned professions are engaged in a Cuban missile crisis of tit-for-tat" [brinkmanship].

"Attorneys’ fees need to be considered as part of the big picture of health care, insurance, risk spreading, etc. It is not right to look at them in isolation." A coalition of interest groups ought to work for compromise in a legislative context. The legislature should take testimony under oath, which would be the key to the search for truth. Credibility is essential.

The FMA’s switch from an attack on general damages to one on attorney fees undermined its credibility.

In all the prior studies, legislative testimony, analyses and reports related to the medical liability crises, there has been no real discussion or focus on contingent fees.

Not all doctors support the amendment. For example, the Florida Hospital Association opposes it.

Query: Where did the percentages and dollar cut-offs in the proposed amendment come from? "Connie Mack’s son is anti-trial lawyer. He had a proposed amendment regarding attorney fees in personal injury actions. His was even more restrictive than current proposal. Business groups opposed it as going too far. The FMA did support it. He backed off, so FMA picked it up and adapted it to med mal cases."

Additional sources of information about Florida history regarding med mal:

Judiciary Committee reports from Florida House & Senate, including staff analysis.
Governor’s Task Force Report includes 61 recommendations for reform. None concerns contingency fees.

Diffenbach at Banking & Insurance Committee.
Adam Herbert, president of North Florida University report.
John Thrasher, former speaker of Florida House
Stephen Grimes at Holland & Knight. Sam Kelsey.

The chair thanked the guests for their contributions and reminded the members of the next scheduled meeting on August 5 in Atlanta. The meeting adjourned at 5:10 p.m.

Respectfully submitted,
Chris Wells, Reporter
RESOLVED, That the American Bar Association supports the substance of the following recommendations with respect to tort law and procedure as they relate to medical malpractice claims:

1. STATUTE OF LIMITATIONS

   (a) An action for medical malpractice should be commenced within two years from the time the incident which gave rise to the action occurred, or within one year from the time the existence of an actionable injury is discovered or in the exercise of reasonable care should have been discovered, whichever is longer. Except for cases involving a foreign object or fraudulent concealment, no action should be brought more than eight years after the occurrence of the incident which gave rise to the injury.

   (b) Where a foreign object has been left in the body, a patient should have one year after the object is discovered in which to bring an action.

   (c) Where fraudulent concealment of material facts by a health care provider has prevented the discovery of the injury or the alleged negligence, the patient should have one year after discovering that an actionable injury exists in which to bring suit.

   (d) The statute of limitations should be tolled during continuous treatment by the same health care provider for the same condition or for complications arising from the original treatment.

2. CEILINGS ON AWARDS

   No dollar limit on recoverable damages should be enacted which can operate to deny a plaintiff in a medical malpractice action full compensation.
beneals to award attorneys' fees to successful parties as costs in adversary proceedings would make the American legal system a more effective instrument of justice.

Concern is sometimes expressed about whether it would be prudent for the bar to support liberalization of the rule on awarding attorneys' fees to successful parties in more kinds of cases, and may vary in degree from modest to extreme departure from present practice. The choice does not lie, in other words, between the polar opposites represented by the American rule, on the one side, and the so-called British rule, on the other, accord­

Additional recommendations regarding immunity and confidentiality for medical disciplinary proceedings:

1. **Immunity for Medical Disciplinary Boards**—Absolute immunity from civil liability should be conferred on members of a medical disciplinary board and on individuals or organizations which file complaints with or provide information to it.

2. **Confidentiality**—Except as specifically authorized by law, the proceedings, records and findings of a medical disciplinary board should be confidential and not subject to discovery or introduction into evidence in a civil proceeding. No person attending a medical disciplinary board meeting should be permitted to testify as to the proceedings, actions or findings of the board.

*Recommendations I and III were approved as submitted. Recommendation II was amended, then approved. A substitute for Recommendation IV was approved. See page 63.*

**Note:** The Commission is very actively engaged, through seven subcommittees, in pursuing a number of approaches to the medical professional liability problem, as shown in the report problems vary widely from one category of claim to another, and from one location to another. The Commission has not yet prepared to make final recommendations. However, it does urge approval of these recommendations in the states as listed in the report. The concern principally effective of which the Commission has concluded should be dealt with at the outset for the reasons indicated in the report. With these preliminary matters out of the way, the Commission is turning to other more fundamental approaches.

The recommendations and report reflect the views of a substantial majority of the Commission members agree with. All Commission members agree with the following (or substantial majority of the Commission members agree with). Medical disciplinary boards of a State, county or other local association of health care professionals, and individual disciplinary committees or boards of a licensed health facility or health maintenance organization.
Resolved, That the American Bar Association, recognizing the need to make available to the public alternative claims resolution mechanisms, supports the following recommendations regarding the arbitration of medical malpractice disputes:

1. Arbitration should be entered into, if at all, on a voluntary basis with full knowledge that the arbitration panel's decision is final and binding; once entered into, arbitration should be final and binding.

2. All states which have not already done so should enact laws making arbitration agreements and awards enforceable in the courts under the Uniform Arbitration Act.

3. Arbitration panels in "small" claims cases should consist of one impartial arbitrator only. For claims above the small claims cut-off, there should be three arbitrators—an attorney, a physician, and a layman. All should be impartial and acceptable to both plaintiff and defendant.

III

Resolved, That the American Bar Association, recognizing that one aspect of the medical malpractice crisis is the actual or potential unavailability of insurance written voluntarily by commercial insurance companies, supports the following recommendation regarding the establishment of joint underwriting associations:

All states should adopt legislation permitting the establishment of a joint underwriting association (JUA) of some type to assure availability of insurance coverage in the event of a withdrawal by commercial insurance companies from the medical malpractice insurance market. JUAs, however, should only be regarded as temporary expedients and should be used in such a way as not to interfere with the availability of insurance from private sources.

IV

Resolved, That the American Bar Association, while recognizing that changes in tort law and procedure which are fair to injured patients may not lower medical malpractice insurance premiums significantly, but also recognizing that many proposed tort law changes are sound aside from any effect they might have on insurance premiums, supports the substance of the recommendations set forth in Exhibit III with respect to tort law and procedure as they relate to medical malpractice claims.

---

A General Perspective

Complaints by physicians and hospitals about large increases in insurance premiums and the difficulty in obtaining adequate insurance coverage are but symptoms of deeper problems in health care and in the current tort law-insurance system as it has been applied to medical malpractice claims. The extent of these symptoms varies from state to state, but it is safe to say that there has been some concern in most states about rising premium costs and insurance availability. And while efforts by state legislators and insurance departments to assure the availability of insurance are important, and while many of the tort law changes which have been enacted are appropriate and will result in more equitable proceedings and perhaps a dampening of premium increases, it is the Commission's considered opinion that focusing exclusively on insurance availability and tort law changes will not significantly affect premium levels or assure insurance availability in the long run. In those jurisdictions where premium costs have escalated to the point that the quality of medical care may be jeopardized, immediate attention should be given to spreading premium burdens more equally and implementing appropriate tort law changes which are likely to reduce premium levels. However, in the long run, wide consideration should be given to preventing negligently-caused injuries and to fashioning the kind of compensation system which will best serve the interests of all who are affected by it.

The particular causes which have led to the current crisis, as advanced by various persons and organizations, cannot be documented and may never be fully known. However, at least each of the following diverse factors played a part:

- Particularly in the last decade, the dramatic growth in medical technology and the more frequent use of complicated machines and procedures. Complex technology has resulted in striking gains in medical care, the extension of lives and greater expectations by patients, but it has also increased the risk of serious adverse results.

- The involvement of more professional and non-professional personnel in the treatment sequence, thus increasing the risk of communication and follow-up errors.

- The increased readiness of patients to question the quality of care given them and to ascribe responsibility for poor outcomes to health care providers. To some extent this may be attributable to unreasonable expectations as to the ability of medicine to cure; it may also reflect increased medical specialization and the resultant decrease in continuous physician-patient relationships; and it may reflect a greater litigiousness in the population.

- Inadequate efforts by hospitals to prevent the occurrence of adverse incidents.

- Inadequate medical discipline.

- Liberalization by appellate courts, at least in some states, of substantive and procedural rules of law so that a plaintiff has an easier time in proving entitlement to damages.

- A general growth in the last decade in the numbers of practicing attorneys, as well as some increase in the number of competent, experienced attorneys available to represent persons who feel they may have been injured through medical negligence.

- The rapid escalation, in cases of severe, permanent injury, in the amounts of damages awarded by juries, and the interrelated contingent fee method of compensating lawyers in this field.

- The impact on insurers of increased frequency and severity of claims, the greater cost and difficulty of administering medical malpractice insurance well as compared with other lines, the severe adverse effect of the recession on the surpluses of insurance companies, and the actuarial uncertainties.

- Lack of timely and adequate attention by insurers, hospitals, physicians and regulators to the burgeoning problem.

- Deficiencies in the regulation of medical malpractice insurance.

- Lack of readily available data for
analyzing the causes in the malpractice problem and for use in determining possible solutions.

While neither the Commission nor anyone else has sufficient data to assess the extent of various factors contributed to the crisis, it is clear that there are no villains against whom all the blame can be assessed. It is equally clear that there are no villains in the system, except perhaps some who are misjudging attempts to develop a system that will work.


events will be developed only if there are multi-faceted, long-term efforts which involve cooperation at different levels by attorneys, physicians, insurers, legislators, regulators and citizens.

Goals

The Commission, its staff and its consultants have spent a great deal of time in the last year identifying and dealing with problems in the tort system. As a result of the Commission's current work, recommendations relate to these, whether or not they are significant work, which looks toward more significant work which looks toward more of these proposals as seem worthwhile whether or not they are significant work which looks toward more significant work which looks toward more significant work which looks toward more significant work.

2. Encouragement of the prompt availability of remedial medical services to injured persons;
3. Compensation for persons who suffer from negligent medical treatment;
4. Payment of a victim of a compensable medical injury;
5. Providing for the prompt resolution of claims;
6. Insurance maximum predictability of outcome as an aid to planning by health care providers and insurers;
7. The maximum amount available for the injured person;
8. Claims and costs associated with claims;
9. The time during which the injury occurred;
10. The time during which the injury occurred;
11. The time during which the injury occurred;
12. The time during which the injury occurred;
13. The time during which the injury occurred;
14. The time during which the injury occurred;
15. The time during which the injury occurred;
16. The time during which the injury occurred;
17. The time during which the injury occurred;
18. The time during which the injury occurred;
19. The time during which the injury occurred;
20. The time during which the injury occurred;
21. The time during which the injury occurred;
22. The time during which the injury occurred;
23. The time during which the injury occurred;
24. The time during which the injury occurred;
25. The time during which the injury occurred;
26. The time during which the injury occurred;
27. The time during which the injury occurred;
28. The time during which the injury occurred;
29. The time during which the injury occurred;
30. The time during which the injury occurred;
31. The time during which the injury occurred;
32. The time during which the injury occurred;
33. The time during which the injury occurred;
34. The time during which the injury occurred;
35. The time during which the injury occurred;
36. The time during which the injury occurred;
37. The time during which the injury occurred;
38. The time during which the injury occurred;
39. The time during which the injury occurred;
40. The time during which the injury occurred;
41. The time during which the injury occurred;
42. The time during which the injury occurred;
43. The time during which the injury occurred;
44. The time during which the injury occurred;
45. The time during which the injury occurred;
46. The time during which the injury occurred;
47. The time during which the injury occurred;
48. The time during which the injury occurred;
49. The time during which the injury occurred;
50. The time during which the injury occurred;
51. The time during which the injury occurred;
52. The time during which the injury occurred;
53. The time during which the injury occurred;
54. The time during which the injury occurred;
55. The time during which the injury occurred;
56. The time during which the injury occurred;
57. The time during which the injury occurred;
58. The time during which the injury occurred;
59. The time during which the injury occurred;
60. The time during which the injury occurred;
61. The time during which the injury occurred;
62. The time during which the injury occurred;
63. The time during which the injury occurred;
64. The time during which the injury occurred;
65. The time during which the injury occurred;
66. The time during which the injury occurred;
67. The time during which the injury occurred;
68. The time during which the injury occurred;
69. The time during which the injury occurred;
70. The time during which the injury occurred;
71. The time during which the injury occurred;
72. The time during which the injury occurred;
73. The time during which the injury occurred;
74. The time during which the injury occurred;
75. The time during which the injury occurred;
76. The time during which the injury occurred;
77. The time during which the injury occurred;
78. The time during which the injury occurred;
79. The time during which the injury occurred;
80. The time during which the injury occurred;
81. The time during which the injury occurred;
82. The time during which the injury occurred;
83. The time during which the injury occurred;
84. The time during which the injury occurred;
85. The time during which the injury occurred;
86. The time during which the injury occurred;
87. The time during which the injury occurred;
88. The time during which the injury occurred;
89. The time during which the injury occurred;
90. The time during which the injury occurred;
91. The time during which the injury occurred;
92. The time during which the injury occurred;
93. The time during which the injury occurred;
94. The time during which the injury occurred;
95. The time during which the injury occurred;
96. The time during which the injury occurred;
97. The time during which the injury occurred;
98. The time during which the injury occurred;
99. The time during which the injury occurred;
100. The time during which the injury occurred.

Adverse Incidents — Most knowledgeable persons are of the opinion that only a small proportion of negligence-injured patients bring medical malpractice claims. The Commission is aware of only two empirical efforts to verify these observations, and both are not supposed to corroborate the observers' opinions. There is also a paucity of research as to the relationships between medical malpractice claims and allegations of negligent medical practice. Additional research in these areas is needed as a basis for prevention efforts and as a means to assess the probable economic impact of medical malpractice mechanisms.

Substantive Work of the Commission — The Commission is not aware of any study which attempts to evaluate the extent to which the tort system actually compensates persons with valid claims and refrains from compensating those with false claims. The Commission intends to conduct a pilot study to gain insight into this question from the perspective of health care providers.

1. A study done by the Temple University Institute for Survey Research for the HEW Secretary's Commission on Medical Malpractice indicates that only 34.3 per cent of a sample of persons who reported that they had received negligent care at some time during the previous ten years consulted a lawyer and one percent actually made a claim for compensation. In another HEW-sponsored study, projections from an examination of a sample of hospital records indicated that approximately six per cent of those with medical malpractice claims, in the judgment of the medical malpractice and medical malpractice, is important to satisfy health care providers that this is so, and that they are being treated fairly in this sense.

In order to gain insight into this important issue, the Commission's staff is developing a project which involves a careful study of the entire malpractice litigation system as it applies to all injury. The study will attempt to document, from the point of view of health care providers, (1) whether patients bringing malpractice actions have actually received
The extent to which individual physicians have actually delivered negligent medical care, and (2) how well the existing tort system performs, both in terms of compensating plaintiffs and assessing defendants.

The data source for the study will be all malpractice claims closed late in 1975 and all file will be evaluated by two or more evaluators, who will be matched closely in training experience to the defendants. The evaluators will be asked to determine whether a defendant was negligent or not, or whether he case report and to indicate reasons for each decision. Other data, such as processing time, costs, awards, and descriptive factors related to patients and defendants will also be abstracted from the files.

The Commission recognizes that a study confined to one jurisdiction, one insurance company, and claims closed in less than one year could be considered conclusive in any sense. However, it has authorized a pilot study in order to develop a methodology and possibly arrive at some tentative conclusions in this important area. When the results of the pilot study are available, the Commission will decide whether follow-up studies in other jurisdictions or with different kinds of evaluators might be useful.

**Prevention**

One certainty is that reduction in the frequency and severity of medical incidents which might lead to claims is of great importance, not only to patients, whose welfare depends on proper care, but also to providers and insurers. Since more than 80 percent of all medical malpractice claims are based on incidents which take place in hospitals, it is obvious that

As used in this report, a "medical incident" is defined as any event that occurs in a hospital resulting in injury which injures a patient. The incident may or may not have involved negligent care.

The AHA study indicates that 81.4 percent

The Commission is aware of the quality assurance programs of the Joint Commission on Accreditation of Hospitals ("JCAH") and of the developing Professional Standards Review Organizations which are assisting public and private organizations to assess the Social Security Act. Promising programs in several individual hospitals and a few organizations might be useful to the Commission's attention as exemplifying enlightened and progressive approaches to the problem. The American Hospital Association ("AHA") has also made materials and staff available to the Commission to describe various programs it has undertaken or is aware of.

Nonetheless, an enormous further effort will be required if the number of compensable incidents is to be reduced significantly. The Commission has summarized the present state of knowledge of quality assurance methodologies, identification of promising work in individual hospitals, and the need for research. It will also require the efforts of medical, legal and hospital administrative elements. The Commission has neither the inclination nor the capacity to tell hospitals how they should be run, but it does urge that a major national effort--perhaps under the leadership of the AHA--be mounted to provide expertise and technical assistance in prevention matters to hospital administrators and others.

During the next year, the Commission intends to hold discussions with hospitals and organizations in the light of the high percentage of a hospital's operating costs which are reimbursed by third party payers. The Commission will hold discussions with groups in the light of the high percentage of a hospital's operating costs which are reimbursed by third party payers. The Commission will hold discussions with groups aimed at developing recommendations in this area.

**Medical Discipline**

Although there is no necessary relationship between conduct which renders a physician liable for medical discipline and patient for medical malpractice, improved medical disciplinary procedures could improve programs to train, rehabilitate or eliminate from practice physicians who are grossly incompetent or unprofessional should help prevent malpractice. Through its Prevention Committee, the Commission has studied many of the programs inherent in developing effective disciplinary structures and programs and has made recommendations for improvements in the process of making preventive efforts by several states (notably Michigan) to address the problem legislatively. This research indicates that there are a myriad of issues and deficiencies, ranging from the lack of a comprehensive definition of misconduct in the enabling legislation of the state licensure board, to an overlapping and uncoordinated series of agencies, hospitals and medical societies, which all have some disciplinary authority. Moreover, proceeding of a medical disciplinary board that is more frequently challenged, often successfully, by the accused physician.

The Commission has reached agreement that the proceedings of a medical disciplinary board should be confidential, and that participants should be absolved from civil liability for participating in the work of such a board.

Committees of the American Medical Association and the National Conference of Commissioners on Uniform State Laws are addressing the problems, the Commission has limited itself (other than its 25 recommendations on insurance and confidentiality) to preparing an outline of the issues which should be resolved in drafting fair and effective state legislation. Copies of the outline, attached to this report as Exhibit II, have been sent to various organizations working on the problems. Copies of this draft outline is needed by medical representatives, lawyers and legislators in order to consider all of the medical and legal issues.

**Tort Law Changes**

During 1971, state legislatures considered a variety of bills designed to reduce the impact of the medical malpractice insurance crisis. Forty-four states enacted legislation on one or another aspect of the problem and 25 of them adopted tort law changes. Many
proposals in 1975. The overriding purpose, and as the stated expectation, of the many tort law changes that were adopted was to achieve a downward impact on insurance costs. While adequate insurance prices which providers can afford would again become available without resorting to such devices as joint underwriting associations.

In view of the emphasis which is being placed on tort law changes and the widespread belief that legislative modifications to the existing tort-law-insurance system are the key to resolving the crisis, the Commission gave initial priority to an evaluation of such changes. The Commission has examined a number of proposals, and has reached conclusions concerning 18 of them. The Commission believes that some of these tort law changes should be adopted to avoid either the enactment of new tort law provisions or the enactment of rules which might operate to discourage the use of an equitable system.

In concluding that legislative modifications to the tort law changes will not have a significant impact on insurance rate-making as developed by the insurance industry and the regulators would have to be placed on tort law changes and the widespread belief that legislative modifications to the existing tort-law-insurance system are the key to resolving the crisis, the Commission gave initial priority to an evaluation of such changes. The Commission has examined a number of proposals, and has reached conclusions concerning 18 of them. The Commission believes that some of these tort law changes should be adopted to avoid either the enactment of new tort law provisions or the enactment of rules which might operate to discourage the use of an equitable system.

The Commission's staff, with the help of an experienced consultant, estimated the possible savings which would accrue in a state which had enacted a ceiling of $100,000. However, since no savings would be made in a state which enacted a ceiling against a single defendant (e.g., the Idaho statutes) and had repealed the collateral source rule as to all major classes of collateral source payments (government, employment-related, individually-purchased and gratuitous benefits). After assembling available data as to collateral sources of payment and court costs, the Commission reached the conclusion that savings might be as much as 25 percent of the potential impact of shorter statutes of limitations. In any event, a number of the Commission's present recommendations would help to reduce the number of meritless claims entering the system and provide some insights. In any event, a number of the Commission's present recommendations would help to reduce the number of meritless claims entering the system and provide some insights.

The Commission has carefully considered the potential impact of shorter statutes of limitations on costs. However, in view of the findings of recent studies that approximately 98 percent of all claims are statistics contained in the recent AIA and NAIC closed claims studies, the staff reported that the savings might be as much as 25 percent reduction in premium costs (and in most states the reduction would probably be much less), and if frequency and severity continued to go up in that state by a combined total of 23.5 percent, then in a little more than three to four years the number of the Commission's present recommendations would help to reduce the number of meritless claims entering the system and provide some insights.

At the time this report was written, the Supreme Court of Illinois, in Wright v. Central DuPage Hospital Association, May 14, 1976, had declared the Illinois statutory ceiling on punitive damages unconstitutional. If, for example, the cumulative effect of tort law changes and the fact that the insurance system had to be as much as 25 percent reduction in premium costs (and in most states the reduction would probably be much less), and if frequency and severity continued to go up in that state by a combined total of 23.5 percent, then in a little more than three to four years the number of the Commission's present recommendations would help to reduce the number of meritless claims entering the system and provide some insights.

Lawyers' Professional Responsibilities

Many physicians and others involved in health care delivery allege that "frivolous" claims often enter the claims system and remain long after they should have been screened out. The Commission has found no data which indicate the number of such claims in a particular jurisdiction. This may be due to the fact that such claims are not to the courts.

The Commission recognizes, however, that limiting categories of tort law changes have a significant impact on premiums, if used frequently in cases involving large frequency and severity patterns.

Subject to the above qualifications, and for the reasons stated below, it nonetheless may be predicted with some confidence that the impact of the enacted tort law changes will not have a significant impact on frequency and severity of claims.

The need for a ceiling was found to be substantially less. They would be even less if the collateral source rule were retained with respect to some categories of third-party payments.

One other tort law change which could have a significant impact on premiums, if used in cases involving large frequency and severity patterns, is the periodic payment settlement or judgment. Experience with the use of periodic payments in California and elsewhere indicates that it is possible for an insurer to fund such a settlement or judgment for substantially less than it would cost to fund a comparable lump-sum award by purchasing a funding policy based on an actuarial standard life expectancy of the plaintiff. The staff did not attempt to quantify the potential savings. If, for example, the drafters have had enough experience with it and yet developed to give a reliable indication of the extent to which savings could be used and the actual savings which would result.

The impact of tort law changes on premiums is impossible to predict with any accuracy before experience has occurred. Even after a statistical base has accumulated, it is not clear whether projected trends in a state were accurate, it is very difficult to pinpoint the contribution made to achieving settlements more quickly.

The impact of specific tort law changes on premiums is impossible to predict with any accuracy before experience has occurred. Even after a statistical base has accumulated, it is not clear whether projected trends in a state were accurate, it is very difficult to pinpoint the contribution made to achieving settlements more quickly.


The staff for insurers to give prospective effect to tort law changes, the whole basis of rate-making as developed by the insurance industry and the regulators would have to be changed to permit factors other than historical data to be taken into account. premium costs based on an historical growth pattern from 1966-1971 of 23.5 percent per year in the frequency of claims and the average per claim ("severity"). In addition to the recommendation with respect to contingent fees, the proposal with respect to a mandatory notice period prior to the commencement of suit is based on the adoption of the act. defamation clause ought to reduce the number of non-meritorious claims.
The Commission has been working very closely with the American Arbitration Association which has obtained an HEW grant to study the use of arbitration in medical malpractice cases. The AAA has documented all obtainable arbitration procedures in use, or available for use, throughout the United States as a first step in appraising the worth of arbitration as an alternative to litigation for resolving medical malpractice cases. The Commission hopes that this work will lead to one or more "model" arbitration procedures geared particularly to medical malpractice claims, including a quick inexpensive procedure for small claims which are not often properly protected by the present tort system.

Unfortunately, because of the limited number of medical malpractice cases handled under existing arbitration plans, no firm conclusions can be drawn yet as to the relative merits of the various procedures.15 In December, the first legislation specifically providing for binding arbitration of medical malpractice claims by written agreement of the parties was not enacted until last year.16

Thus far the Commission has concluded that arbitration should be entered into, if at all, voluntarily and should be final and binding; that those states which have not yet adopted the Uniform Arbitration Act should

15Some interesting findings, however, are reported by Duane Heintz in his unpublished study, "A Comparative Study to Determine the Impact of Arbitration on the Cost of Hospital Malpractice Insurance Programs." A comparison of the experience of eight hospitals participating in the California Arbitration Program with a group of comparable hospitals not in the project shows that the arbitration group has experienced significantly fewer claims than the non-arbitration group, and has also resolved claims more expeditiously and at less cost than the comparable group of non-arbitration hospitals.

16The Michigan arbitration plan, for example, internalizes costs by requiring malpractice insurers to pay annual assessments, determined on a pro rata basis, to an arbitration fund. The yearly assessment is part of the cost of the judicial system, to be borne by the public. The justification would lie in savings of court time and expense and in the special public interest in improving the mechanism for dealing with medical malpractice claims. Another suggestion has been that health care providers assume all costs of arbitration, thus preserving medical malpractice cases of the medical arbitration panel. All states except Illinois, Louisiana, Michigan and Ohio have enacted legislation providing for the nonjudicial members of the medical review panel to exercise a judicial function in the case or clarify issues.

On the statutory side, fourteen states17 have enacted legislation providing for the nonjudicial members of the medical review panel to exercise a judicial function in the case or clarify issues.

17The Michigan arbitration plan, for example, internalizes costs by requiring malpractice insurers to pay annual assessments, determined on a pro rata basis, to an arbitration fund. The yearly assessment is part of the cost of the judicial system, to be borne by the public. The justification would lie in savings of court time and expense and in the special public interest in improving the mechanism for dealing with medical malpractice claims. Another suggestion has been that health care providers assume all costs of arbitration, thus preserving medical malpractice cases of the medical arbitration panel. All states except Illinois, Louisiana, Michigan and Ohio have enacted legislation providing for the nonjudicial members of the medical review panel to exercise a judicial function in the case or clarify issues.

On the statutory side, fourteen states17 have enacted legislation providing for the nonjudicial members of the medical review panel to exercise a judicial function in the case or clarify issues.

The second problem concerns the unequal bargaining positions of health care providers and patients. In many states, the hospitals and health care providers are perceived by most people as being in a position to dictate terms to patients, and patients will feel obligated to sign arbitration agreements in order to assure themselves of getting treatment. The second problem concerns the unequal bargaining positions of health care providers and patients. In many states, the hospitals and health care providers are perceived by most people as being in a position to dictate terms to patients, and patients will feel obligated to sign arbitration agreements in order to assure themselves of getting treatment.

A third problem is how to obtain qualified arbitrators at a reasonable cost. Local medical societies and bar associations have an important role to play in this area, participating in the preparation of the cases as a condition precedent to arbitration, and in all of the states except Illinois, Louisiana, Michigan and New Mexico, the state's medical malpractice review panel is composed solely of doctors or other health care providers; informed consumer (patient) representation on screening panels is vital, as is the use of prevention techniques; (2) an "ombudsman"; (3) an expert or panel of experts to advise all concerned as to the medical merit of each complaint; and (4) an arbitration or court procedure only as the ultimate resort.

It is hoped that the AAA will develop a demonstration model of this sort which, if successful, might be followed by at least some health care centers.

There is no doubt that, in addition to increased emphasis on the prevention of incidents, most hospitals badly need better systems for hearing and dealing with patient complaints. Hospitals should promptly and fairly take care of meritorious claims (as well as damage caused by incidents for the (Illinois) Constitution." Wright v. Central DuPage Hospital Association.

In Florida, the state's highest court reversed a lower court decision which declared the Florida mediation panel procedure to be unconstitutional. Carter v. Spencer (Fla. Sup. Ct., May 5, 1976).

In New York, a lower court rejected a challenge to the state's medical malpractice panel procedure, specifically concluding that the provision calling for the introduction into evidence of a panel's findings is constitutional. On May 14, 1976, the New York Supreme Court struck down the statutory medical review panel procedure on the ground that "the physician and lawyers selected as a (the applicable substantive law) over the dissent of the circuit judge."

The Court held that this would "empower the panel proceeding may become a costly and time-consuming "mini-trial.""

"continuoum" - The Commission is particularly interested in the concept of a "continuum" at health care institutions that would enable a series of mechanisms for dealing with patient complaints, for example (1) the use of prevention techniques; (2) an "ombudsman"; (3) an expert or panel of experts to advise all concerned as to the medical merit of each complaint; and (4) an arbitration or court procedure only as the ultimate resort.

It is hoped that the AAA will develop a demonstration model of this sort which, if successful, might be followed by at least some health care centers.

There is no doubt that, in addition to increased emphasis on the prevention of incidents, most hospitals badly need better systems for hearing and dealing with patient complaints. Hospitals should promptly and fairly take care of meritorious claims (as well as damage caused by incidents for the (Illinois) Constitution." Wright v. Central DuPage Hospital Association.

In Florida, the state's highest court reversed a lower court decision which declared the Florida mediation panel procedure to be unconstitutional. Carter v. Spencer (Fla. Sup. Ct., May 5, 1976).

In New York, a lower court rejected a challenge to the state's medical malpractice panel procedure, specifically concluding that the provision calling for the introduction into evidence of a panel's findings is constitutional. On May 14, 1976, the New York Supreme Court struck down the statutory medical review panel procedure on the ground that "the physician and lawyers selected as a (the applicable substantive law) over the dissent of the circuit judge."

The Court held that this would "empower the panel proceeding may become a costly and time-consuming "mini-trial.""
The Commission is considering a variety of insurance-related issues, since a viable risk-spreading mechanism is critical for proving the quality of medical care, precluding medical accidents, and improving relationships between patients and health care providers.

**Insurance Issues**

The Commission is considering a variety of insurance-related issues, since a viable risk-spreading mechanism is critical for proving the quality of medical care, precluding medical accidents, and improving relationships between patients and health care providers.

The first order of business for those who are responsible at the state level is to ensure that adequate insurance coverage is available to all health care providers who are exposed to liability. Accordingly, many states have authorized the creation of joint underwriting associations ("IUAs") to provide those financially able to respond to medical malpractice judgments or settlements which are entered against them. This is in addition to more profitable means of insuring the injured patients who obtain a settlement or a judgment cannot be that this will be paid, and those who are unable to make a claim, where the burden of the joint underwriting association is that they are not responsible. If the allegations are true (and the Commission has no evidence to this effect) that a few physicians are transferring assets for the purpose of avoiding financial responsibility, then this course of conduct is wholly inconsistent with professional responsibility. In that regard, the Commission wishes to assure availability of insurance coverage to those who are responsible.

The Commission of course recognizes that insurance innovations must be economically and actuarially sound, and should be carefully observed in operation by the regulator. The Commission is not suggesting that hospitals, health maintenance organizations, and other providers which are self-insured under appropriate regulatory controls and accounting procedures may not be financially responsible.

**Allocating risks**

The causes of the large increases in premiums in most states and the withdrawal of many insurers from the market are complex and difficult to ascertain. Statistical information. However, from what the Commission has been able to learn to date, it appears that many factors have been involved, including:

- Insurers and regulators did not perceive the trend towards greater frequency and severity of claims, and rates turned out to be inadequate.
- A serious downturn in the stock market resulted in reduced company surpluses against which premiums could be written, and those who are responsible.
- An increased rate of claims has been made after his retirement, unless he buys a supplemental indemnity policy at a price to be determined by his age and retirement date.

During the next year, the Commission intends to make major efforts, with the aid of the staff and consultants will explore these mechanisms, so that it can determine the potential impact on patients, such as Medicare, Medicaid, Blue Cross and Blue Shield. It is important to document the extent of the "pass through," the time and amounts encountered, and the degree to which increases in premiums, or difficulties in passing costs, induce health care providers to engage in more vigorous prevention efforts. A team of consultants from the Wharton School at the University of Pennsylvania is currently working on these issues.
Innovative Alternatives

The Commission has concluded that changes in the present tort system will not have a significant impact on premium levels in the foreseeable future. For one thing, and also because the present system seems deficient in several respects when measured against the Commission's indicia of an equitable compensation system, the Commission has explored a number of alternative ways to measure the extent of compensation for persons who are entitled to recover. Among the kinds of alternatives explored by the Commission, there is a proposal to compensate patients for all medically-caused injuries which occur in a hospital; a "workmen's compensation-like" mechanism which would provide scheduled benefits to negligently-injured patients; and two proposals which would define specifically the circumstances under which compensation would be paid.

Although the Commission has not endorsed any alternative, it has concluded that the notion of pre-defining compensable events by reference to objective criteria has merit and has authorized the staff to work with leading scholars and others in the insurance and medical communities to see if a pilot program can be developed and implemented in order to assess the workability and costs of such an approach.\(^{(\text{9})}\)

\(^{(\text{9})}\)Some of the alleged deficiencies of the tort system are: (a) largely due to the difficulty of determining on a case-by-case basis whether negligence was involved in these highly complex cases, the process takes too long; (b) involves inordinate expense which subtracts from amounts available for patient compensation, and causes antagonisms which adversely affect doctor-patient relationships; (c) the system discourages prompt remedial and rehabilitative care and contributes to the prevalence of "defensive medicine"; and (d) a large percentage (maybe as much as 90 percent) of the patients with potentially valid claims, especially small ones, are, as a practical matter, unrecognized under this slow, expensive, cumbersome system.

The hope is that by pre-defining as many compensable events as possible, at least in the major diagnostic and surgical areas which tend to lead to malpractice claims, a definition would be carried out by medical specialty organizations working with attorne
Subcommittee III.
Panels.

Subcommittee I. Investigation as to what standard of care is applied in medical malpractice cases.

CHAIRMAN:
Chief Justice Weintraub

MEMBERS:
Dr. Courey
Mr. Donaldson
Mr. Walker

Subcommittee II. Suggestions regarding improvements in the tort system.

CHAIRMAN:
Mr. Ludlam

MEMBERS:
Dr. Donaldson
Mr. Markus
Mr. Walker

Subcommittee III. Use of Arbitration Panels.

CHAIRMAN:

Subcommittee IV. Innovative Alternatives.

CHAIRMAN:
Mr. Janofsky

MEMBERS:
Dr. Cooper
Dr. Courey
Mr. Hollis
Mr. Senger

Subcommittee V. Insurance Problems. (Rating, Funding, Channeling, Consent, etc.).

CHAIRMAN:
Mr. Rawis

MEMBERS:
Mr. Markus
Mr. Senger

Subcommittee VI. Prevention.

CO-CHAIRMEN:
Dr. Donaldson
Dr. Cooper

MEMBERS:
Ms. Capps
Mr. Deacon
Mr. Ludlam
Judge Weintraub

Subcommittee VII. Lawyers' Professional Responsibility.

CHAIRMAN:
Mr. Markus

MEMBERS:
Dr. Coury
Mr. Markus
Mr. Rawis
Judge Weintraub

EXHIBIT II

Statement of Issues to be Addressed in Developing a State Medical Disciplinary System

1. State Boards

In all but three states, the same state agency is responsible for licensing and disciplining physicians. In California, New York and Washington, separate disciplinary agencies have been created. A threshold issue, therefore, is whether it is better to separate the two functions organizationally.

Regardless of whether the decision is for a single agency or separate agencies, issues of composition, jurisdiction and sanctioning authority of the disciplinary agency (or sub-agency) must be addressed:

(a) Composition—Should the decision-making entity (presumably a board) be made up entirely of doctors? If not, what other professions, organizations or interests should be represented? What sub-groupings, if any, within the medical profession should be represented?

(b) Regional Boards—Should regional boards be created? If so, how many and with what authority?

(c) Appointment—Should the Governor be the sole appointing authority? Should appointments be for a term or at the pleasure of the appointing authority? What screening mechanism, if any, should be employed?

(d) Jurisdiction—How broad should the state board's jurisdiction be, both in terms of professional groups and in terms of substantive grounds for disciplinary action?

(e) Sanctions—What sanctions should the board be able to impose? To what extent should sanctions be spelled out by legislation?

(f) Staff—Should the board have its own professional staff? What qualifications should the staff director have and how should he be selected? What investigative and other authority should the staff have?

2. Reporting Relationships of Medical Society and Hospital Boards to One Another and to the State Board

In each state, there are a number of disciplinary bodies operating quite independently of one another and for different purposes. Virtually all hospitals have disciplin ary committees, and state and county medical societies have machinery to regulate the removal or suspension of doctors from membership. Since these boards relate to medical society membership or hospital privileges, they are exercising discrete functions which are quite different from one another and from a state board's authority to suspend or revoke a license to practice medicine. Nevertheless, the findings and conclusions of one board may be very relevant to the decisions of another hospital or medical society. For example, if a doctor is denied privileges at X Hospital for repeated acts of gross negligence, this information will be of considerable interest to another hospital which is contemplating employing him or granting him privileges.

Several questions arise: Should a board be required to report all disciplinary actions to the state board?—to the disciplinary board of any organization or institution with which the doctor is currently affiliated? If so, what information should be reported; what protections should be given to doctors who must report; and what sanctions (if any) should there be for non-compliance with reporting requirements? One possible procedure would be to designate the state board as the recipient of all discipline-related information from medical society and hospital sources. The board would then have an obligation to make such information available to authorized persons upon inquiry.

3. Issues Relating to All Disciplinary Boards

(a) Due Process—To what extent should hearing and cross-examination rights, evidentiary rules and the like be spelled out by legislation? Should informal grievance committee proceedings, as opposed to formal board proceedings, be regulated at all by legislation?

(b) Trial De Novo or Appeal—Should a doctor who has had an adverse result before a medical disciplinary board be able to claim a complete trial in a court, or should the court's role be limited to reviewing issues of law or basic fairness in the administrative proceeding?
Informed Consent

Explicitly authorized. Should such a duty be battery but rather as an action in negligence, the physician should disclose those risks which consent should not be treated as an action in

findings or actions of the board except as

 immunity extend to witnesses?

disciplinary proceedings may wish to dis­

Should there be immunity, administrative mechanisms. Should this issue be

Interlocutory Appeals— Whether or not further administrative remedies are available, a physician who is subject to disciplinary proceedings may wish to dis­

Privilege— In some jurisdictions, a patient has a sufficient interest in physician or hospital records concerning his treatment that they cannot be disclosed, even to a disci­

Irregular exercising a patient and obtaining his consent should not be included in legislation.

Statute of Limitations

a. An action for medical malpractice should be commenced within two years from the time the incident which gave rise to the action occurred, or within one year from the time the existence of an actionable injury is discovered or in the exercise of reason­ably diligence, if it seems that the same period of time is longer. Except for cases in­

Exhibit III

Proposals Regarding Tort Law

Informed Consent

A cause of action for lack of informed consent should not be treated as an action in battery but rather as an action in negligence, unless the complainant alleges that the physician acted with intent to harm or to deceive the patient.

a. In obtaining a patient’s consent, the physician should disclose those risks which

EXHIBIT III

Proposals Regarding Tort Law

Informed Consent

A cause of action for lack of informed consent should not be treated as an action in battery but rather as an action in negligence, unless the complainant alleges that the physician acted with intent to harm or to deceive the patient.

b. In obtaining a patient’s consent, the physician should disclose those risks which

a reasonable physician in the same or a similar locality would disclose, provided that a patient who asks for additional information has a right to be further informed by the physician, and a patient who asks not to be told of risks has a right not to be informed.

c. Where informed consent is not ob­

Itemized Verdicts

Jurisdictions which do not permit a special verdict or a general verdict with inter­rogatories should enact legislation patterned on Rule 47(a) and (b) of the Federal Rules of Civil Procedure in order to permit such verdicts in the discretion of the trial judge.
Ceilings on Awards
a. Economic Loss: No dollar limit on recoverable damages should be enacted which can operate to deny a plaintiff in a medical malpractice action full compensation for economic loss.
b. Non-Economic Loss: The Commission takes no position on whether it is appropriate to place a ceiling on the recovery of non-economic loss.

Collateral Source Rule
Recovery of damages should be reduced by collateral source payments received by the plaintiff as a result of governmental, employment-related, individually-purchased or gratuitously-conferred benefits. (The Commission has not yet taken a position on the reduction of any position on subrogation as to wage and salary benefits.)

Non-Taxable Status of Awards
A jury should be instructed that an award for lost earnings is not subject to income tax.

EXHIBIT IV
REASONS FOR THE COMMISSION'S RECOMMENDATIONS

I Recommendations Regarding Immunity and Confidentiality for Medical Disciplinary Proceedings
The Commission believes that an effective system of medical discipline can only exist if the members of a medical disciplinary board are entirely protected from civil liability arising out of the performance of legitimate board functions. If absolute immunity is not conferred on board members and their practice is reviewed by court order, provided that such schedule should not be so restrictive, particularly with respect to small to moderate recoveries, that it hampers the ability of injured patients to obtain legal representation.

Non-Taxable Status of Awards
A jury should be instructed that an award for lost earnings is not subject to income tax.

Pre-Judgment Interest
It should be left to each jurisdiction to decide whether or not to allow pre-judgment interest.

Punitive Damages
Punitive damages should not be allowed in a medical discipline cases. Rather, the medical discipline system, hospital licensure statutes and the criminal justice system should be relied on for such punitive action against an offending physician as may be justified.

Periodic Payments
Legislation should be enacted in all states to permit the payment of future damages in periodic installments.

Contingent Fees
A decreasing maximum schedule for contingency fees should be set by court order, provided that such schedule should not be so restrictive, particularly with respect to small to moderate recoveries, that it hampers the ability of injured patients to obtain legal representation.

II Recommendations with Respect to Arbitration of Medical Malpractice Disputes
Arbitration is a private mechanism for the final resolution of disputes. In this sense, it is a true alternative to court adjudication of disputes. Arbitration, unlike the jury, utilizes persons with expert credentials and experience in the disputed issues as the decision makers. The Commission has tentatively concluded that binding arbitration,...
liability, the patient should show that due to
the physician's negligent failure to disclose a
material risk, an informed consent was not
obtained, and that if he had been adequately
informed, he would not have undergone the
procedure. Even though there is no error in the
decisions in a few jurisdictions that the pa-
tient should be told everything which he rea-
sionably needs to know in order to make an
informed choice, the Commission is per-
无法对逝者及其家属进行适当
致，无法按照逝者的遗愿安排
丧事，也无法为家属提供适当的
支持。在这种情况下，为逝者安排
适当的丧事变得异常困难，因为逝者
的生前愿望已经无法得到实现。

此外，逝者家属可能感到痛苦和
悲伤，因为他们失去了所爱的人。

因此，逝者家属可能寻求法律帮助，
以确保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者的生前愿望得到实现，并
为逝者安排适当的丧事。这种情况下，
逝者家属可能寻求法律帮助，以确
保逝者
Ad Damnum Clauses

Except where a general allegation of an amount claimed is necessary to establish a court's jurisdiction (i.e., "over $5,000.") the inclusion of a specific dollar amount claimed serves no useful purpose in medical malpractice litigation. In addition, as the ad damnum clause is often an inflated guess at the plaintiff's damages, particularly in a serious case, there is a risk that the statement of an amount that will create inflammatory publicity and decrease the likelihood of a settlement. If the ad damnum clause is eliminated, however, a defendant should be afforded a reasonable opportunity to ascertain what the plaintiff is actually claiming.

Exchange of Experts' Reports

The requirement that experts' reports be exchanged and that the identity of experts for each party be disclosed prior to trial has been criticized for being too preparatory for trial and should improve the quality of expert testimony by insuring informed cross-examination. Such an exchange would also lead to informed discussions among the parties more often and the earlier determination, the defendant should be afforded a reasonable opportunity to ascertain what the plaintiff is actually claiming.

Guarantees of Results

Concerns that the inclusion of a specific dollar amount claimed serves no useful purpose in medical malpractice litigation. In addition, as the ad damnum clause is often an inflated guess at the plaintiff's damages, particularly in a serious case, there is a risk that the statement of an amount that will create inflammatory publicity and decrease the likelihood of a settlement. If the ad damnum clause is eliminated, however, a defendant should be afforded a reasonable opportunity to ascertain what the plaintiff is actually claiming.

Exchange of Experts' Reports

The requirement that experts' reports be exchanged and that the identity of experts for each party be disclosed prior to trial has been criticized for being too preparatory for trial and should improve the quality of expert testimony by insuring informed cross-examination. Such an exchange would also lead to informed discussions among the parties more often and the earlier determination, the defendant should be afforded a reasonable opportunity to ascertain what the plaintiff is actually claiming.

Guarantees of Results

Concerns that the inclusion of a specific dollar amount claimed serves no useful purpose in medical malpractice litigation. In addition, as the ad damnum clause is often an inflated guess at the plaintiff's damages, particularly in a serious case, there is a risk that the statement of an amount that will create inflammatory publicity and decrease the likelihood of a settlement. If the ad damnum clause is eliminated, however, a defendant should be afforded a reasonable opportunity to ascertain what the plaintiff is actually claiming.

Experts' Reports

The requirement that experts' reports be exchanged and that the identity of experts for each party be disclosed prior to trial has been criticized for being too preparatory for trial and should improve the quality of expert testimony by insuring informed cross-examination. Such an exchange would also lead to informed discussions among the parties more often and the earlier determination, the defendant should be afforded a reasonable opportunity to ascertain what the plaintiff is actually claiming.

Collateral Source Rule

The idea of a windfall runs counter to the basic aim of the tort law, which is to permit the plaintiff to enjoy whichever collateral benefits and receive full tort compensation from available sources, no more.

The argument for allowing the plaintiff to retain collateral benefits and receive full tort compensation is strongest where the plaintiff has purchased an individual health insurance in the hope of a double recovery. One does not purchase accident insurance to insure against harm in the event of loss, regardless of whether the cause of injury or illness is due to anyone's fault or whether one's injury or illness is due to anyone's fault. Furthermore, the security of prompt and guaranteed payments in the event of loss, regardless of whether the cause of injury or illness is due to anyone's fault or whether one is likely to recover damages by pursuing litigation, is an important reason for making payment from an accident or health insurer.
what be bargained for, and there is no reason a defendant should duplicate the plaintiff’s recovery from this source.

Assuming that the collateral source rule is repealed, the next question is whether collateral insurers which have made payments to the plaintiff should be entitled to be made whole through subrogation. The Commission recognizes that subrogation rights vary from jurisdiction to jurisdiction, and that the Commission has not made different policies with respect to enforcing contractual or statutory indemnification and subrogation rights. However, since accident and health insurers are generally more efficient than liability insurers in making a higher percentage of premium dollars available to claimants, and since shifting losses from the former to the latter source costs money, the Commission has concluded that there is a strong argument for denying subrogation. In effect, denying subrogation would tend to make the more efficient, high volume accident and health insurers the primary insurers for malpractice losses and the liability insurers the secondary or excess layer insurers.

Because of possible legal and business complications in connection with such collateral sources as wage, disability and provider’s compensation payments, the Commission has not made a final decision on subrogation in these areas. It sees no reason, however, why subrogation should ever be allowed with respect to government or private health insurance payments.

The set-off of collateral source payments should be mandated as a matter of law rather than left to the jury’s discretion. Moreover, the Commission should require that the trial judge deduct all collateral source payments from the jury’s award before entering judgment. The jury should be instructed to resolve any dispute as to the amount of a collateral source payment.

Non-Taxable Status of Awards

Section 104(a)(2) of the Internal Revenue Code of 1954 excludes from gross income “the amount of any damages received (whether in money or kind or otherwise) for such personal injuries or sickness.” In most jurisdictions, losses of past and future earnings are based on the basis of the gross amounts the plaintiff would have earned but for the injury. Also, in most jurisdictions the jury is told that the plaintiff’s award is tax-free, so that the plaintiff is benefited to the extent that the tort recovery for lost wages does not reflect a deduction of the income taxes that would have been paid on actual earnings. Admittedly, the tax on future earnings cannot be computed with certainty, but at least the jury should be made aware of the situation. The Commissión has not looked into the extent of comparable provisions in state or local income tax legislation, any such provisions also confer an additional tax benefit on the plaintiff. Therefore, the jury should also be informed of these exemptions.

Pre-Judgment Interest

The aim of allowing pre-judgment interest is to create an incentive to the defendant to resolve claims without unnecessary delay. However, delays in settlement and adjustment may be as much the fault of the plaintiff as the defendant. In any event, since the Commission can find no compelling reason for distinguishing medical malpractice cases from other torts as far as pre-judgment interest is concerned, the rule of each jurisdiction should govern the time at which interest begins to run on an award.

Punitive Damages

The basic policy behind allowing the plaintiff to recover punitive damages is the feeling that the defendant who has been guilty of gross misconduct should be punished. In medical malpractice cases, however, there is a medical disciplinary system and in a particularly flagrant case a physician may also face criminal penalties. Medical practitioners should not be subject to the same type of punishment as are other practitioners. If the insurance mechanism has broken down completely, that condition results from potential liabilities of those same providers which exceed their reasonable ability to pay for those risks as they are now spread among the population. However, the Interim Report recommends changes in the tort system unless they are peculiarly applicable to medical malpractice litigation and needlessly complicate settlement negotiations.

Periodic Payments

In most states, the trier of fact can only return a lump-sum award. Thus, the present value at all future loss must be estimated on the basis of the plaintiff’s life expectancy or value of the plaintiff’s actual lifetime or period of disability. If a judgment is for periodic payments, however, the installments will be paid over the plaintiff’s actual lifetime or period of disability—no more and no less. In this way, there can be no windfall to the beneficiaries of the plaintiff, who dies sooner than expected, and installments will always be available for their intended purpose. Moreover, arrangements are possible under which a periodic payment judgment can be funded by the insurer with no reasonable security to the plaintiff, and yet at a significantly lower cost to the insurer than an equivalent lump-sum payment.

Periodic payments judgments constitute a generally sensible and flexible way of compensating those whose disabilities are long-term and substantial. Appropriate enabling legislation should be enacted in those states which do not now permit such judgments.

Contingent Fees

The contingent fee system should be retained, since at present it is the only means by which all except well-to-do patients can afford legal representation in medical malpractice cases. In addition, it acts as a check on frivolous actions by encouraging lawyers to screen out cases which have little or no chance of success. However, in order to relate the attorney’s fee more to the amount of legal work and expense involved is handling a medical malpractice case, under the compensation system of the plaintiff’s economic status and degree of injury, a decreasing maximum schedule of attorney’s fees, reasonably generous in the lower recovery ranges and thus unlikely to deny potential plaintiffs access to legal representation, should be set on a state-by-state basis. Because the regulation of legal practice is regarded almost universally as the responsibility of the judicial branch of government, it is preferable that any regulation of contingent fees be accomplished by court order rather than legislative enactment.

Proposed Tort Law Changes Still Under Consideration

Locality Rule
Verification of Pleadings

EXHIBIT V

Separate Statement of Richard M. Markus

Although the Commission’s Report is described as an “Interim Report,” its contents and recommendations call for action at this time. Therefore, I feel obliged to express dissent from the resolutions to adopt recommendations generally, as well as certain specific recommendations.

The problem—where it exists—is professional negligence. There clearly is a need for distinguishing between the public interest and those of any segment of the public. The problem is where it exists is prejudicial to the public. The Interim Report recommends changes in the tort law system unless they are peculiarly applicable to medical malpractice litigation and needlessly complicate settlement negotiations.

There is no justification for any proposal by this Commission to make changes in the tort system unless they are peculiarly applicable to medical malpractice litigation and needlessly complicate settlement negotiations.
cable to the medical negligence situation, unless they provide greater equity among the parties, and unless they produce a real saving in professional insurance costs. In several instances, the Commission has bypassed such guidelines by making proposals for tort changes without finding a real distinction from other situations of legal liability and without any solid evidence that such tort changes would reduce costs in any meaningful manner. To that extent, the Commission is making the same mistakes that too many state legislatures have already begun to make.

The Commission has not yet obtained data which will help us to know what per cent of physicians in various geographical areas are paying more than ten percent of their income for professional liability insurance—or more than five percent of their income for professional liability insurance. However, we define "in oppressive burden," and if we failed to determine the problem of the number as well as the geography of the problem. Until we do that, this report is subject to the criticism that the Commission proposes to reduce patients' rights (no matter how slightly) without demonstrating an adequate justification for such a step. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The term "collateral source rule"—which is now applied in most jurisdictions—has been in medical negligence cases than in any other negligence cases. Jurors are trained to the subject to the criticism that the Commission proposes to reduce patients' rights (no matter how slightly) without demonstrating an adequate justification for such a step. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

Collateral Source Rule—The Commission proposes to abolish the "collateral source rule"—which is now applied in most jurisdictions—for medical negligence cases. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The Commission argues that other disciplinary mechanisms should suffice. But those disciplinary mechanisms have not produced either a just and equitable or an efficient way to deal with the problem of medical negligence cases. Where the total amounts involved are much smaller, there is no real justification for the adoption of a different rule in medical negligence cases where the total amounts involved are much smaller.

Jurors Instructions About Taxes—The Commission argues that other disciplinary mechanisms should suffice. But those disciplinary mechanisms have not produced either a just and equitable or an efficient way to deal with the problem of medical negligence cases. Where the total amounts involved are much smaller, there is no real justification for the adoption of a different rule in medical negligence cases where the total amounts involved are much smaller.

The Commission has not yet obtained data which will help us to know what per cent of physicians in various geographical areas are paying more than ten percent of their income for professional liability insurance—or more than five percent of their income for professional liability insurance. However, we define "in oppressive burden," and if we failed to determine the problem of the number as well as the geography of the problem. Until we do that, this report is subject to the criticism that the Commission proposes to reduce patients' rights (no matter how slightly) without demonstrating an adequate justification for such a step. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The Commission argues that other disciplinary mechanisms should suffice. But those disciplinary mechanisms have not produced either a just and equitable or an efficient way to deal with the problem of medical negligence cases. Where the total amounts involved are much smaller, there is no real justification for the adoption of a different rule in medical negligence cases where the total amounts involved are much smaller.

Collateral Source Rule—The Commission proposes to abolish the "collateral source rule"—which is now applied in most jurisdictions—for medical negligence cases. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The Commission places the burden of proof on the plaintiff in medical negligence cases. This is an alternative funding mechanism in such limited geographical areas. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The Commission argues that other disciplinary mechanisms should suffice. But those disciplinary mechanisms have not produced either a just and equitable or an efficient way to deal with the problem of medical negligence cases. Where the total amounts involved are much smaller, there is no real justification for the adoption of a different rule in medical negligence cases where the total amounts involved are much smaller.

Collateral Source Rule—The Commission proposes to abolish the "collateral source rule"—which is now applied in most jurisdictions—for medical negligence cases. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The Commission argues that other disciplinary mechanisms should suffice. But those disciplinary mechanisms have not produced either a just and equitable or an efficient way to deal with the problem of medical negligence cases. Where the total amounts involved are much smaller, there is no real justification for the adoption of a different rule in medical negligence cases where the total amounts involved are much smaller.

Collateral Source Rule—The Commission proposes to abolish the "collateral source rule"—which is now applied in most jurisdictions—for medical negligence cases. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The Commission argues that other disciplinary mechanisms should suffice. But those disciplinary mechanisms have not produced either a just and equitable or an efficient way to deal with the problem of medical negligence cases. Where the total amounts involved are much smaller, there is no real justification for the adoption of a different rule in medical negligence cases where the total amounts involved are much smaller.

Collateral Source Rule—The Commission proposes to abolish the "collateral source rule"—which is now applied in most jurisdictions—for medical negligence cases. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The Commission argues that other disciplinary mechanisms should suffice. But those disciplinary mechanisms have not produced either a just and equitable or an efficient way to deal with the problem of medical negligence cases. Where the total amounts involved are much smaller, there is no real justification for the adoption of a different rule in medical negligence cases where the total amounts involved are much smaller.

Collateral Source Rule—The Commission proposes to abolish the "collateral source rule"—which is now applied in most jurisdictions—for medical negligence cases. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The Commission argues that other disciplinary mechanisms should suffice. But those disciplinary mechanisms have not produced either a just and equitable or an efficient way to deal with the problem of medical negligence cases. Where the total amounts involved are much smaller, there is no real justification for the adoption of a different rule in medical negligence cases where the total amounts involved are much smaller.

Collateral Source Rule—The Commission proposes to abolish the "collateral source rule"—which is now applied in most jurisdictions—for medical negligence cases. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The Commission argues that other disciplinary mechanisms should suffice. But those disciplinary mechanisms have not produced either a just and equitable or an efficient way to deal with the problem of medical negligence cases. Where the total amounts involved are much smaller, there is no real justification for the adoption of a different rule in medical negligence cases where the total amounts involved are much smaller.

Collateral Source Rule—The Commission proposes to abolish the "collateral source rule"—which is now applied in most jurisdictions—for medical negligence cases. It seems more than a coincidence that virtually every state has already held that a child's right to assert almost all other tort or contract claims will not be barred before it attains legal capacity at the age of majority. The Commission's proposal to truncate the rights of children in this area may well violate both due process and equal protection guarantees. This is the first step toward eliminating the rights of children in this area, and may well be the first step in the process of extinguishing the life of tort as such a tort.

The Commission argues that other disciplinary mechanisms should suffice. But those disciplinary mechanisms have not produced either a just and equitable or an efficient way to deal with the problem of medical negligence cases. Where the total amounts involved are much smaller, there is no real justification for the adoption of a different rule in medical negligence cases where the total amounts involved are much smaller.
ages are small. Yet such an action adds the private remedy to the armamentarium of the public in preventing horrendous misconduct.

Installment Verdicts—The Commission recommendations call for legislation which apparently mandates installment verdicts, or allows the trial court to order installment verdicts in its unfettered discretion. Such a procedural device is foreign to most jurisdictions which have no methodology for enforcing such judgments by maintaining continuing jurisdiction. Cf. Slater v. Mexican National Railway, 194 U.S. 120, 24 S. Ct. 581 (1904).

While such a procedural technique might seem sensible at first review, there is good reason why almost all courts have refused to adopt it. A fixed annuity totally ignores changing values of money. Thus, a verdict that $20,000 per year is appropriate compensation for future medical care, future lost wages, and future general damages (disability, disfigurement, dismemberment, pain, anguish, etc.) might well have lost one-half its purchasing power ten years later. One might suggest that the verdict would “automatically” be adjusted by some cost-of-living factor, but this would mean that (a) actuarial predictions as to the cost of losses would be even more difficult to make and insurance would be even less attractive to sell, and (b) the victim’s adjusted payments would always be adjusted after the cost of living change so that he would always be receiving less than the intended compensation level.

In addition to these inflationary considerations, the fixed annuity ignores changes in the earning power of money. A substantial fund can produce a 10% return in some years, a 15% return in other years, and a 5% return in still other years. If the funds properly belong to the successful litigant-victim (rather than to the unsuccessful insurer), it seems only right that the litigant-victim have the right to benefit from the management of the funds.

A rule requiring periodic payment verdicts might well produce higher total aggregate payments than lump sum general verdicts. Counsel opposing use of so-called “per diem” arguments (that the jury should consider a proposed sum for each future day, month or year) have often expressed the view that a “per diem” argument produces much larger verdicts. It may well be easier for a jury to find that $50,000 per year is proper compensation for the 10 year old victim than to find that the victim should receive an actuarially equivalent lump sum approximately $2,270,000.

Settlements which include periodic installment payments might well be appropriate in certain cases, when counsel and the parties in such cases take into account all the inherent uncertainties. But risks taken in arm’s length negotiations by informed parties may be totally minimal to a trial procedure. Thus, some cases are resolved by settlement (not judicial order) when a party moves, or takes new employment, or simply apologizes. This potential “can of worms” is no realistic solution to a special malpractice problem. No one has projected a reduction of premiums if such a procedure is adopted. No one can assure in that virtually all courts are equitably wrong in their refusal to use such procedures.

Conclusion—There are realistic solutions to a malpractice insurance problem, if that is the goal we seek to accomplish. All information received by the Commission establishes that the total cost of medical liability insurance represents roughly 2 percent to 3 percent of health care costs. The real problem is the difficulty in filtering these costs through the relatively small number of health care providers, since those costs would be virtually unnoticeable if they were spread over the total population.

Better insurance mechanisms (or public payment methods) would distribute those costs without any significant trauma in those areas where oppressive premiums afflict some providers. The Commission intends to consider such matters during the remainder of its life. I submit that endorsement of the present partial analysis, much of which is questionable, only detracts from the much more important considerations which will hopefully result from the Commission’s further study.

If the Commission fails to devise more satisfactory means for spreading the cost, then adoption of the present recommendations would be even more harmful, since it would imply that these recommendations do something worthwhile to solve the problem. The bar, the medical profession, and the public should not be misled into believing that this Interim Report is more than an introduction to the study of much more important issues.

I recommend that the House of Delegates adopt only the following resolution:

Resolved, That the Interim Report and Recommendations of the Commission on Medical Professional Liability are accepted by the House of Delegates of the American Bar Association as a report of the Commission’s progress and recommendations to date, and the Commission is authorized to distribute them as an interim report and recommendations of the Commission, with the express statement on each copy that the recommendations have not been acted upon in any way by the House of Delegates.
REPORT OF THE
SPECIAL COMMITTEE ON
MEDICAL PROFESSIONAL LIABILITY

RECOMMENDATIONS*

Be It Resolved, That the American Bar Association adopts the following principles:

1. The regulation of medical professional liability is a matter for state consideration; and federal involvement in that area is inappropriate.
2. There should be rigorous enforcement of professional disciplinary code provisions which proscribe lawyers from filing frivolous suits and defenses; and sanctions should be imposed when those provisions are violated.
3. There should be more effective procedures and increased funding to strengthen medical licensing and disciplinary boards at the state level; and efforts should be increased to establish effective risk management programs in the delivery of health care services.
4. No justification exists for exempting medical malpractice actions from the rules of punitive damages applied in tort litigation to deter gross misconduct.
5. No disclosure of financial worth by a defendant in a tort action should be required unless there is a showing by evidence in the record or proffered by the plaintiff that would provide a legal basis for recovery of punitive damages.
6. Notices of intent to sue, screening panels and affidavits of non-involvement are unnecessary in medical malpractice actions.
7. No justification exists for a special rule governing malicious prosecution actions brought by health care providers against persons who sued them for malpractice.
8. Trial courts should scrutinize carefully the qualifications of persons presented as experts to assure that only those persons are permitted to testify who, by knowledge, skill, experience, training or education, qualify as experts.
9. The collateral source rule should be retained; and third parties who have furnished monetary benefits to plaintiffs should be permitted to seek reimbursement out of the recovery.
10. Contingent fees provide access to the courts; and no justification exists for imposing special restrictions on contingent fees in medical malpractice actions.
11. The use of structured settlements should be encouraged.
12. Collection and study of data on the cost and causes of professional liability claims should be undertaken to evaluate and develop effective loss prevention programs.

*The recommendation was approved as amended. See page 46.
REPORT

Introduction

The American Bar Association Special Committee on Medical Professional Liability was appointed by ABA President William W. Falsgraf in September 1985 to study current legislative initiatives in the medical malpractice area and develop ABA policy proposals for the House of Delegates to consider. Specifically, this committee was charged with studying the initiatives in the Action Plan of the American Medical Association Special Task Force on Professional Liability and Insurance.

Two ABA groups have previously studied the medical malpractice issue. The Commission on Medical Liability studied the issue over a five-year period in the late 1970s, publishing its major report in 1977. In that report, the commission said that the tort liability system, while experiencing some defects in operation, "is conceptually correct as applied to medical claims and should not be abandoned in favor of an absolute liability or social compensation system unless research clearly indicates that an adequate liability system is impossible to attain." Most current ABA policy relating to medical malpractice (summarized in relevant portions of this report) stems from recommendations made by that commission. In late 1984, the ABA Special Committee on the Tort Liability System released a report (entitled "Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law") based on its wide-ranging five-year study of tort law issues, including medical malpractice. The special committee, while recognizing the need for some changes, concluded that the tort system is generally effective in its present form.

After conducting its work, this committee agrees with the basic findings of these two earlier ABA groups that the tort law system in its present form is the appropriate vehicle for the resolution of disputes over medical professional liability.

In reaching that conclusion, this committee recognizes that some tort law changes could improve the way medical malpractice claims, as well as other tort cases, are handled by the legal system. This committee has made some policy recommendations that it believes will foster such improvements. This committee also recognizes that affordability of medical malpractice insurance is of great concern to the medical profession.

However, the medical profession's perception that the medical malpractice insurance issue has reached a "crisis" stage that merits major changes in tort law and procedure appears to be unjustified. This report will outline the general bases for this committee's determination that the tort law system in its present form is the appropriate mechanism for dealing with medical malpractice claims.

Federal Legislation (Resolution Paragraph 1)

AMA Proposal: The Action Plan of the AMA Special Task Force on Professional Liability and Insurance recommends endorsement of federal legislation providing financial incentives to states that adopt certain tort law changes.

Proposed legislation prepared by the AMA was modified and submitted in the Senate by Orrin Hatch (R-Utah) on Oct. 29, 1985. The tort law changes identified in the bill as targets for change are periodic payment of damage awards over $100,000; elimination of the collateral source rule; limiting noneconomic damages (pain and suffering) to $250,000; and limiting attorneys' contingent fees. (Bills filed in Congress and other federal activities relating to medical malpractice insurance issues are briefly summarized in Appendix A to this report.)

Discussion: In other contexts, the American Bar Association has expressed its position that changes in tort law should be considered and implemented at the state level. This position reflects the view that state courts and legislatures are constantly working to improve tort law and that this effort makes federal intrusion into this field, with some narrow exceptions, inappropriate.

In both 1981 and 1983, the House of Delegates stated its opposition to broad federal legislative enactments in the field of product liability. There have also been studies by other ABA groups regarding federal legislation in the medical malpractice field.

In its 1977 report, the Commission on Medical Professional Liability concluded, at pages 16-17, "The emphasis in study and reform should be at the state level."

The ABA Special Committee on the Tort Liability System noted in its 1984 report:

"Our working premise is that state common law is generally the preferred process for solution of injury disputes.... The tort system is a working organism whose watchword is change. That system is currently in a healthy state of evolution, and it has shown considerable resilience in the face of dramatic social and economic developments. Section 13, pages 8-9"

At Section 11, pages 40-41, that committee had these comments on federal legislation relating to product liability:

Proposals for federal legislation. At the vortex of current arguments over products liability have been proposals for a comprehensive federal statute which would preempt state legislation and case law. We conclude that ... the enactment of such a statute would have unfortunate effects on the development of the law. We believe, moreover, that a general federal statute would be unjustified in light of traditional — and wise — views of federal-state relationships and, to an extent, of the historic division of lawmaking functions between courts and legislatures.

These ABA policies in the product liability area and the findings of two major study groups regarding federal intervention support the view of this committee that consideration of any changes in the tort law system in relation to medical malpractice should occur at the state level.

The report of the AMA Special Task Force on Professional Liability and Insurance recognizes the great amount of attention that states have given to medical malpractice issues. At page 13, the report acknowledges that since the mid-1970s, "every state in the union,
except West Virginia, enacted some reform proposals. The problem, the medical profession complains, is that measures adopted at the state level have not produced the desired results and many of the measures have failed to survive constitutional challenges. Now the medical profession hopes that federal incentive legislation might bring results that earlier state legislation has not brought.

The sponsor of S. 1804 recognizes the difficulties raised by federal legislation in this area. In introducing the bill, Sen. Hatch said:

First, I long have doubted in other contexts the wisdom of using Federal dollars to persuade State governments to alter their laws to reflect some grand Federal design. Those doubts persist here. Many of these reforms have already been considered and adopted by a number of States. The benefit from these reforms is yet to be realized, but when they have gone into effect, the current "crisis" may be less evident.

This leads to another issue: The most recent information available to me indicates that one or another of the listed provisions has been invalidated under State constitutions in five States. Since it would certainly not be our intention to try to preempt State constitutions, there would be at least five States which, from the start, may have no possibility of participating under this proposal. There are pending constitutional challenges in many other States where reforms have been adopted, as well, and the number of invalidations and ineligible States will likely rise. Finally, the individual tort law reforms raise not only constitutional issues but issues of equity and policy. Congressional Record, Oct. 29, 1985, S14356.

Although it may be argued that legislation such as S. 1804 would not replace state tort law with federal rules, it is clear that S. 1804 and other bills now in Congress would in effect mandate or artificially encourage specific changes at the state level. The result may be little different than imposing federal rules directly on the states.

In summary, this committee believes that federal legislation addressing tort law issues relating to medical malpractice is inappropriate and that the issue should continue to be addressed as a matter of state law and legislation.

Frivolous Suits (Resolution Paragraphs 2, 6, 7)

AMA Proposal: The AMA Action Plan proposes measures that would allegedly restrain the filing of frivolous medical malpractice suits: require plaintiffs to file a notice of intent to sue; implement mandatory pre-trial screening panels; permit physicians to recover costs of defending frivolous suits; permit medical care providers to file affidavits of non-involvement in suits naming multiple defendants; and eliminate the rule requiring that a physician demonstrate "special injury" before counter-suing a plaintiff in a malicious prosecution action.

Discussion: Procedures and sanctions, where necessary, already exist to accomplish the goals sought by the medical profession. The American Bar Association strongly discourages the filing of frivolous lawsuits against medical care providers and any other defendants as well as the use of frivolous defenses. The fact that a suit is not ultimately successful does not, however, establish that it was frivolous any more than the fact that a defense was unsuccessful establishes that it was frivolous. Rule 3.1 of the ABA Model Rules of Professional Conduct, the Association’s suggested guidelines for lawyer conduct adopted in 1984, provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

The law imposes sanctions against lawyers who pursue frivolous claims or defenses:

When a lawyer takes part in instituting a frivolous lawsuit, that lawyer is not only jeopardizing the reputation of the legal profession and the judicial system, but is placing him or herself in jeopardy as well. By instituting such a suit, the lawyer may be subject to disciplinary action, imposition of costs, and, in some cases, damages. Annotated Model Rules of Professional Conduct 200 (1984).

This committee commends the judiciary in its imposition of sanctions on attorneys who file frivolous suits, but cautions that those concerned about frivolous suits or defenses be careful to not label all suits or defenses except those filed in good faith as frivolous.

To do so would severely hamper individuals who pursue justice in the face of long, but not insurmountable, odds.

In light of available sanctions, this committee sees no need for implementing proposals suggested by the AMA in this area:

1. Notice of intent to sue. Once before, in August 1977, the ABA House of Delegates rejected the concept of requiring that plaintiffs file a notice of intent to sue in medical malpractice cases. We see no reason to change that position at this time. Requiring a notice of intent to sue is not necessary to accomplish the goal of allowing defendants to evaluate claims.

2. Screening panels. In determining that pre-trial screening panels are unnecessary in medical malpractice cases, this committee notes concerns expressed about their overall effectiveness in contributing to dispute resolution. The ABA Commission on Medical Professional Liability said, at page 46 of its report, “All panel procedures should, to the extent possible, be designed to resolve disputes quickly, at minimal cost to the parties, and in a manner which is fair and acceptable to all sides.”

A study prepared in 1985 for the Florida Medical Association, entitled the “Medical Malpractice Policy Guidebook” (the “Florida Medical Association study”), questioned the practical value of pre-trial screening panels:

Proponents of panels hoped that an early review of cases by an informal panel of experts would facilitate fair and speedy disposition. But theory and evidence
suggest that the panel model, which interjects another non-binding step in the dispute resolution process, may be fatally flawed. Panels designed as voluntary, pre-complaint hearings with limited formal power do not appear to be used very often. On the other hand, mandatory panels with formal hearings and real power to discourage resort to jury trial run the risk of incurring some of the same costs and delays as a real trial, as well as inviting constitutional challenge. Page 187.

This committee finds those comments to be persuasive, and, on that basis, does not recommend that screening panels be endorsed at this time for medical malpractice cases.

3. Affidavits of Non-Involvement. Concerns of medical care providers about the possibility that a plaintiff will join in a suit all providers who might conceivably have had any responsibility for the plaintiff’s injury have been recognized not only by this committee, but by the ABA Commission on Medical Professional Liability, which previously studied the question. The commission determined that nearly half of all medical malpractice suits, especially those stemming from surgical procedures, involve more than one defendant. As the commission pointed out, the problem can be of equal concern to the plaintiff’s attorney, who faces the risk of not joining all persons who have apparently had contact with the injured patient, then finding later that a person who was partially or totally responsible in law for the injury had gone undetected and is now protected from liability by the running of the statute of limitations. In its 1977 report, at page 54, the commission observed, “The main cause of the prevalence of multiple defendant lawsuits (other than legitimate grounds for shared liability among two or more parties) is the limited opportunity for the conscientious attorney to become adequately informed about the case prior to the entry of suit and the use of discovery.”

Allowing defendants to file affidavits of non-involvement cannot defeat existing procedures which provide due process and allow a plaintiff to develop the facts on the extent of a defendant’s involvement. Therefore, this proposal adds nothing to the present procedures of motions to dismiss, motions to strike and motions for summary judgment.

4. Malicious Prosecution. This action is available generally to defendants in medical malpractice cases who feel they have been sued maliciously, just as it is available in connection with other forms of malicious filings. This committee sees no basis for changing the rules covering malicious prosecution actions to create exemptions for medical malpractice cases.

In their efforts to sue lawyers for malicious prosecution, physicians have argued that they suffer unique harm because of the effect on their reputation, their insurance premiums, their time out of the office and other factors. The courts have uniformly rejected arguments that there is justification for distinguishing physicians from any other professional group because of the nature of medical malpractice litigation; see e.g., Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1979); Berlin v. Nathan, 381 N.E.2d 1367 (1978); Ammerman v. Newman, 384 A.2d 637 (D.C. 1978); Friedman v. Doctor, 312 N.W.2d 585 (1981).

Risk Management and Quality Review (Resolution Paragraph 3)

AMA Proposal: The AMA Action Plan calls for a series of steps to improve the medical profession’s efforts to identify causes of negligence with the profession and to develop stronger risk management and disciplinary procedures to deal with them.

ABA Policy: In recognition of the desire within the medical profession for certain legal protections in professional disciplinary proceedings, the ABA House of Delegates in August 1976 approved a resolution containing two recommendations regarding medical disciplinary proceedings:

1. Immunity for Medical Disciplinary Boards — Absolute immunity from civil liability should be conferred on members of a medical disciplinary board and on individuals or organizations which file complaints with or provide information to it.

2. Confidentiality — Except as specifically authorized by law, the proceedings, records, and findings of a medical disciplinary board should be confidential and not subject to discovery or introduction into evidence in a civil proceeding. No person attending a medical disciplinary board meeting should be permitted to testify as to the proceedings, actions or findings of the board.

Discussion: This committee believes the ABA should endorse the concept of strengthening professional discipline and risk management mechanisms in all the professions.

Within any profession, risk management and professional discipline procedures play a key role in helping to maintain the quality of services to consumers and eliminating causes of professional negligence. To be effective, those procedures must be as strong as possible. This committee recognizes that efforts must be made within all professions to enforce disciplinary standards and maintain effective risk management programs. The ABA should be lauded for identifying shortcomings in the discipline systems for physicians at the state level and proposing initiatives to make improvements and obtain adequate resources to support discipline and quality control efforts.

Punitive Damages (Resolution Paragraphs 4, 5)

AMA Proposal: The AMA Action Plan recommends that punitive damages not be allowed in medical malpractice cases.

Discussion: The purpose of punitive damages is to deter gross wrongful conduct. There has been no justification shown for eliminating those damages when the gross misconduct occurs in the delivery of health care services and, therefore, this committee opposes treating medical malpractice defendants differently than any other wrongdoer accused of acts of gross misconduct.

This committee recognizes that its posture is contrary to that taken by the ABA Commission on Medical Professional Liability in its 1977 report. The rationale for that commis-
sion's majority recommendation to disallow punitive damages in medical malpractice cases was its statement, at page 149, that "the medical discipline system, hospital licensure statutes and criminal justice system should be relied on for such punitive action against an offending physician as may be justified." In support of its recommendation, the commission majority emphasized the availability of punitive sanctions against physicians through medical disciplinary action and possible criminal penalties in particularly flagrant cases of malpractice.

However, this committee believes that experience has demonstrated that such sanctions are insufficiently used and that, in any event, they do not provide an appropriate alternative to punitive damages, which act not only as a deterrent but provide a remedy to the person actually injured by the wrongdoer's gross misconduct.

This committee finds more persuasive and realistic the position of the commission minority, which argued, at page 156 of the commission's report, that:

[T]hose disciplinary functions have not been totally effective, for whatever reason, and the litigant's private remedy is the broadest method for curtailing unconscionable acts. ... [T]here is no good reason for treating medical negligence cases differently from all other tort matters. Indeed, the availability of exemplary damages may be the only realistic incentive for a medical liability case which involves smaller compensatory damages and extraordinarily wrongful misconduct.

This committee emphasizes that punitive or exemplary damages are reserved for the rare situation in which a physician — or any other defendant in a tort action — has committed willful wrongs of such a heinous nature that the punishment is appropriate.

As to the medical profession's concern with the high cost of insurance premiums, punitive damages have minimal, if any, relationship to insurance since such damages are generally not insurable.

Pragmatically, the number of cases involving allegations of punitive damages is insignificant, and there is no basis for contending that physicians are more vulnerable to such claims than other professionals or any other defendants. Therefore, it is clear these types of claims have a minimal economic impact.

This committee does, however, endorse procedural measures in claims for punitive damages which would require that a prima facie evidentiary showing be made before discovery of financial condition is permitted. Such information is unnecessary to trying issues of negligence and liability. Therefore, discovery of financial condition should only be allowed when punitive damages are at issue.

Standards for Expert Witnesses
(Resolution Paragraph 8)

AMA Proposal: The AMA Action Plan calls for fair and appropriate standards for expert witnesses who are familiar with the standard of practice in the locality where the medical malpractice action arose when the incident occurred and who practice in the same specialty as the defendant.

ABA Policy: In August 1977, the ABA House of Delegates adopted this policy:

RESOLVED, That the American Bar Association supports the substance of the following recommendations with respect to tort law and procedure as they relate to medical malpractice claims:

2. Panels of Experts. Professional medical societies should encourage physicians to cooperate fully in medical malpractice actions and should establish pools from which plaintiffs' and defendants' counsel can obtain expert consultants.

Discussion: This committee believes that the medical community has been properly involved in medical malpractice cases through the testimony of expert witnesses to establish the standard of care. The privilege of establishing the standard of care, however, necessarily carries with it a duty of the medical profession to make itself available to the courts and to parties to litigation, and to give honest and impartial testimony as to what the applicable standard is in a particular case.

This committee shares the interest of the AMA in having qualified experts participate in medical malpractice cases. In nearly all cases, the expert testimony of physicians is vital to assist the court in establishing the applicable standard of care.

It is in the interest of all parties that these experts be of the highest quality and integrity. However, that level of expertise is not always available to attorneys in medical malpractice cases.

The ABA Special Committee on the Tort Liability System, in noting the fact that the involvement of expert witnesses in litigation is becoming a business, said, at pages 140-41 of Section 5 of its 1984 report:

Issues involving the use and qualifications of experts, and the quality of their testimony, tie in closely with the increasing technical sophistication of various areas of professional practice, and of other activities as well. In that connection, it must be noted that providing experts for litigation has become a business, with the advertising one would associate with any business....

The employment of experts is a natural outgrowth of the adversary process in tort litigation. The incentives of the experts to please their employing attorneys have prompted the criticism that certain witnesses will "provide whatever opinion a lawyer wants," as one account summarizes the apprehension of judges and lawyers. However, the adversary system provides built in checks on chicanery. The editor of a trial lawyers' publication, while sardonically declaring that "[t]here are liars, damned liars, and experts," asserted that few lawyers will use an expert who will "prostitute" himself, because opposing lawyers will "smell fresh meat and cut him up on cross examination."

In concluding its report on this subject, that committee stated, at pages 142-43 of Section 5:

Nowhere are the tensions we have described at a higher point than in the area of medical malpractice. On the one hand, those claiming medical torts must confront the problem labeled as the "conspiracy of silence" — the
unwillingness of physicians to testify against fellow professionals even in meritorious cases. On the other hand, some argue that many medical and surgical mishaps involved questions beyond the ken of the most intelligent lay persons. Resultant concern is that without expert testimony, lay juries may be prone to sympathetic but erroneous conclusions which, judicially affirmed, would skew medical judgment and ultimately distort the allocation of medical resources.

In addition, this committee notes that part of the cost of medical malpractice litigation is the fee paid to expert witnesses. There is no question that expert witnesses are entitled to be compensated for their expertise, for the time they devote to studying the records so they can formulate their opinions and for testifying to those opinions. However, this committee urges all expert witnesses to consider the reasonableness of this fee in light of present concerns about the rising costs of litigation.

This committee urges members of the medical profession to participate when called on in appropriate cases. A failure to do so makes it difficult to assure that only those members of their profession who are of the highest quality and integrity testify.

Collateral Source Rule
(Resolution Paragraph 9)

AMA Proposal: The AMA Action Plan proposes eliminating the collateral source rule, a common law doctrine that prohibits evidence that a plaintiff has received monetary benefits, such as private health or disability insurance, from third parties.

Discussion: This committee finds that, without empirical data to justify offsetting the goal of fairness and deterrence on which the collateral source rule is based, there is no reason to eliminate it from application in medical malpractice cases. However, this committee also believes that third parties who have furnished monetary benefits to plaintiffs should be permitted to seek repayment by way of subrogation.

Two ABA groups have made recommendations regarding the collateral source rule within the past 10 years. The Commission on Medical Professional Liability recommended in its 1977 report that recovery of damages should be reduced by collateral source payments received by plaintiffs as the result of "government, employment-related, individually-purchased and gratuitously-conferred benefits." The commission also recommended that, if the collateral source rule is eliminated, subrogation should be denied to collateral insurers. In contrast, the 1984 report of the Special Committee on the Tort Liability System, at Section 5, page 206, called the collateral source rule:

... on balance, a just one. The present operation of the rule brings home the full cost of accidents to tortfeasors, thus enhancing deterrence through private enforcement ... The rule essentially represents a simple confirmation of contracts between two parties for payments for the consequences of acts by third persons who are typically strangers ... [U]nless specifical-

ly prohibited from doing so, an insurer may always avoid the general application of the rule by contractual subrogation provisions.

That committee opposed abolishing the collateral source rule because to do so would permit a tortfeasor to mitigate damages by insurance payments purchased by the plaintiff before he has incurred any injury. Thus putting the plaintiff in a position inferior to that of having bought no insurance at all. That committee also said defendants should not be able to avoid payment of full compensation merely because victims had the foresight to insure themselves. The committee concluded, at Section 13, page 6, "[T]o allow defendants to deduct collateral sources from tort judgments would clash with prevailing concepts of fairness and individual responsibility and would undermine socially valuable incentives for self-protection."

The primary goal of efforts to eliminate the collateral source rule has been to reduce the amount of awards payable by medical malpractice defendants as a means of helping to reduce medical malpractice premiums. However, a 1985 study in Pennsylvania sponsored by medical and legal groups in that state, entitled "Medical Malpractice Insurance in Pennsylvania" ("the Pennsylvania study"), points out, at pages 93-94, that the collateral source rule, as well as other suggested modifications in the tort law system, would merely be a cost-shifting device that partially shifts the costs of medical malpractice "from health care providers and their insurers to other forms of insurance, to state programs (taxpayers), and/or to medical professionals themselves" without saving money in the aggregate.

Eliminating the collateral source rule would also tend to diffuse the deterrent function of tort law in the medical malpractice area, the Pennsylvania study determined, by "reducing the cost impact of malpractice on health care providers and actually induce increased malpractice incidence and cost in providing reduced incentives to avoid malpractice." Instead, any benefits obtained by eliminating the collateral source rule could be achieved by giving all private health and disability insurers subrogation rights. This, the committee concludes, advances the deterrence objective by transferring the cost of injuries to the parties responsible.

This committee believes that the collateral source rule's essential fairness and its role in deterring incidents of medical malpractice merit its retention on public policy grounds.

Contingent Fees (Resolution Paragraph 10)

AMA Proposal: The AMA Action Plan, while not recommending that the contingent fee system be abolished in personal injury cases, including medical malpractice actions, recommends sliding scales on contingent fees for attorneys in medical malpractice cases.

Discussion: The ABA has long accepted the contingent fee arrangement as a proper and reasonable method of establishing plaintiffs' attorneys' fees in personal injury actions. The current ABA position on contingent fees, contained in Rule 1.5 of the Model Rules of Profes-
Rather, the AMA task force argues that limiting attorneys’ fees “may lead to a more equitable allocation of awards among plaintiffs and their attorneys.”

But this statement is an oversimplification that fails to recognize the benefits victims of medical malpractice cases receive — in terms of both compensation and quality of services — through the operation of the contingent fee system. The key issue is whether the total net recovery a plaintiff is likely to receive under a restricted fee arrangement is less than the net recovery under a contingent fee arrangement which attracts highly competent attorneys.

Rule 1.1 of the Model Rules of Professional Conduct states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Thus, lawyers are charged with the responsibility of supplying the public with high quality legal services. Like any other profession, lawyers should refuse to become involved in areas in which their experience, training and proficiency may well prevent them from providing proper representation.

Of course, the fees that can be earned in handling any litigation case in which a contingent fee is appropriate, including medical malpractice litigation, are a consideration when a lawyer accepts a contingent fee arrangement. It is also a factor in lawyers’ efforts to develop profitable practice that will justify taking on cases in which fees are not guaranteed. Without that opportunity, lawyers at the peak of their skills may opt to handle matters which promise more certain opportunities for payment of professional fees, leaving contingent fee cases to less experienced members of the profession.

As a result, a sliding scale for contingency fees in medical malpractice litigation may very well reduce total awards for patient-victims by depriving them of representation by a trial lawyer sufficiently skilled at obtaining the highest appropriate award. Mandatory sliding scale systems could also inhibit claimants’ access to the court system by limiting availability of counsel. And imposing sliding scales only on medical malpractice cases would, in effect, create a different level of skills among available counsel for plaintiffs in medical malpractice cases from those available to claimants in other tort cases. This arbitrary distinction — and its discriminatory effect — should not be compartmentalized by legislation establishing sliding scales for medical malpractice cases.

Moreover, the Pennsylvania study observes, at page 97, that the available empirical evidence indicates that, averaging over cases won and lost, the effective hourly earnings of attorneys paid on a contingent basis are similar to the hourly earnings of defense attorneys paid by the hour.

This committee, like the previous ABA groups that have studied the question, acknowledges the need to review attorneys’ fees, including contingent fees. However, such review should be exercised by the courts. As the Medical Professional Liability Commission noted, at pages 150-51 of its 1977 report, “Because the regulation of legal practice is regarded almost universally as the responsibility of the judicial branch of government … any regulation of contingent fees [should] be accomplished by court order rather than legislative enactment.”

This committee believes judges should use their powers to review fee agreements and modify those that do not meet standards of reasonableness.

This committee concludes that the current structure of the contingent fee system should be retained and that mandatory sliding scales for contingent fees should not be established.

Structured Settlements (Resolution Paragraph 11)

AMA Proposal: The AMA Action Plan recommends that structured settlements with periodic payments terminating on the death of the plaintiff should be permitted and encouraged.

Discussion: In recommending that the ABA House of Delegates endorse the concept of structured settlements, this committee recognizes potential benefits of periodic payments where the settlement is voluntary and terms and conditions can be tailored to suit the needs and desires of both parties. First, the injured party can secure an arrangement of payments to coincide with the timing of that party’s needs during his expected lifespan. Second, the defendant may be able to achieve a settlement that will require a smaller immediate and, possibly, smaller total, cash outlay than a lump-sum total payment if the plaintiff should reach his anticipated life expectancy.

However, serious practical obstacles are present where a court or legislature mandates that structured or periodic payments be made in all cases reaching an itemized ver-
dict and judgment or in cases where the judgment exceeds a certain amount. The reason is that a myriad of considerations will dramatically vary from case to case. For example, an initial decision would have to be made concerning a monetary amount beyond which such payments would be mandated. It would be obviously impractical to apply this rule to all cases, requiring the courts to monitor the periodic payments as they do in some domestic and trusts and estates cases. There would be a correlative increase in legal expense attendant to representation at such hearings.

In conclusion, this committee sees much value in the voluntary adoption of structured settlements by parties in medical malpractice cases.

At the same time, setting the threshold amount too high would render the rule applicable to so few cases that the impact on the system would be negligible.

A second decision would have to be made concerning whether all future damages would be subject to periodic payments. If they are not, some types of damages, such as non-economic, future lost earnings or loss of earning capacity and future medical expenses, must be differentiated in order to specify which damages would be subject to periodic payments.

An additional question is whether it is fair to reduce to present money value any future losses for which present lump-sum payments would not be made. If future medical expenses are substantial and not reduced to present money value, the award for damages would be greatly increased. This also raises questions of how plaintiff's attorney fees would be computed on a contingent basis, whether those fees would be structured and, if not, the source of funding for immediate payment of the fees.

Other important questions are raised as well: whether a periodic payment plan should permit variations in awards according to changes in extrinsic circumstances, such as inflation rates or changes in the physical condition of the victim; what the manner of structuring the future payments should be when many devices, such as annuities and trusts, are available as structuring tools; and how future payments would be adequately secured through such vehicles as bonds, guarantees or other mechanisms.

Several studies of the medical malpractice insurance issue have been undertaken. The results of those reports lead to the conclusion that not enough data yet exists to address the issues definitively or to assess proposed solutions with full confidence. When representatives of several groups interested in the medical malpractice insurance issues met in September 1985 at a conference sponsored by the ABA, one of the few matters on which they could generally agree was the lack of data on which to base evaluations of the issues.

Other studies are now underway. Among them are a major research effort by the General Accounting Office, which expects to release several reports over the next few years; a study by the Rand Institute for Civil Justice, which is following up work done by its researchers in this area over the past few years; and a report by the Association of Trial Lawyers of America on the insurance industry role in the medical malpractice insurance issue, which is expected to be issued by early 1986.

While these efforts promise to be beneficial, none of them fulfills the need for an intensive look into the issue of malpractice liability and insurance as it relates to all professional groups. The need for this study is clear. Malpractice litigation involving accountants, architects, attorneys, engineers, insurance agents, professional officers and directors, real estate brokers and securities brokers is beginning to generate the same kinds of concern from those professional groups that the medical profession is expressing in its own field.

The ABA is already at the forefront of efforts to address the legal malpractice issue. Several sections and committees are working in that area, and the Association maintains a data center on legal malpractice. If the Association lends its resources to an effort to address the issues on a broader scale, existing problems can be more accurately measured and proposed solutions can be more precisely tailored to address those problems.

We do not here address the questions of how such a study would be organized, its specific scope or the funding that would be necessary. The immediate purpose of our recommendation is to initiate discussion among the ABA and other interested professional associations about the need for it.

Other Issues

In addition to the issues discussed above, the ABA Special Committee on Medical Professional Liability has considered several other tort law questions raised by the medical malpractice insurance issue. While this committee makes no recommendations to the House...
of Delegates on the issues addressed below, it offers these comments:

**Itemized Verdicts**

**AMA Proposal:** The AMA Action Plan calls for juries to be required to specify the amount of an award attributed to medical expenses, lost earnings, non-economic damages and other items.

**ABA Policy:** In 1977, the ABA House of Delegates adopted this resolution at the recommendation of the Commission on Medical Professional Liability:

**6. Itemized Verdicts** Jurisdictions which do not permit a special verdict or a general verdict with interrogatories should enact legislation patterned on Rule 49(a) and (b) of the Federal Rules of Civil Procedure in order to permit such verdicts in the discretion of the trial judge.

**Discussion:** This committee recommends no change in existing ABA policy on this subject. The itemized verdict concept seems to reflect an attempt to help focus the jury's attention on the different elements of the total verdict and on identifying the amount of the award with respect to each. This is not a new subject for lawyers. Rule 49 of the Federal Rules of Civil Procedure has permitted special interrogatories to juries for many years. "Itemized verdicts" is simply another term for describing special interrogatories to the jury.

In Appendix B to its 1977 report, the ABA Commission on Medical Professional Liability explained its policy recommendation:

Many times there are circumstances in which it is wise for the trial judge to inquire into the basis for a general verdict through interrogatories, or even occasionally to ask for a special verdict in which the jury is instructed to find on particular questions of fact or categories of damages. It is often particularly important in serious, complicated medical malpractice cases to ascertain the amount awarded for particular elements of the plaintiff's past and future loss. However, since circumstances will vary from case to case, it would seem appropriate to leave the use of interrogatories or a special verdict in the sound discretion of the trial judge. Where such procedures are unavailable, legislation should be enacted to make them available.

In conclusion, this committee does not favor legislation which requires itemized verdicts and takes discretion away from the trial judge.

**Patient Compensation Funds**

**Discussion:** According to the October 1984 report of the AMA Special Task Force on Professional Liability Insurance, 17 states have adopted patient compensation funds, state-operated programs that pay a portion of any settlement or judgment against a health care provider in excess of a statutory defined amount; fourteen states have funds which remain in operation and have not been found unconstitutional. This committee believes that further study of this concept is warranted.

The ABA Tort and Insurance Practice Section is studying the patient compensation fund concept. That study, undoubtedly, will include an analysis of the financial stability of the funds and the ability of the funds, through their particular structures, to keep themselves financially whole in the event of unanticipated losses.

In studying this concept, it is important to ascertain whether reports of financial difficulties of patient compensation funds reflect only a temporary perception based on recent surges of claims. The Pennsylvania study included an in-depth analysis of that state's patient compensation fund, refuting reports that the fund is in financial difficulty and suggesting that it will be able to handle its claims. It may well be that in the long run, the recent surge of claims will not have a destructive effect on the fund because they have built-in abilities to increase their funding and to defer payment of claims.

Finally, an analysis is needed of the costs of operating a patient compensation fund. Those costs should be compared to the costs of funding payment of professional liability claims through other sources. Patient compensation funds should replace professional liability insurance (provided on a competitive basis by commercial insurance companies or by companies or groups of companies organized by health care providers) only when the net cost to society is found to be less.

The ABA should remain neutral on the subject of patient compensation funds until an adequate study can be conducted to determine the economic feasibility of using them to fund awards for medical malpractice.

**Arbitration**

**AMA Proposal:** The AMA Action Plan calls for a system of voluntary binding arbitration to be available to parties in medical malpractice cases.

**ABA Policy:** In August 1976, the ABA House of Delegates, at the recommendation of the Commission on Medical Professional Liability, adopted this resolution regarding arbitration of medical malpractice disputes:

1. Arbitration should be entered into, if at all, on a voluntary basis with full knowledge that the arbitration panel's decision is final and binding; once entered into, arbitration should be final and binding. The question of the time at which an arbitration agreement should be entered into is not concluded hereby and shall be considered at a later date.

2. All states which have not already done so should enact laws making arbitration agreements and awards enforceable in the courts under the Uniform Arbitration Act.

3. Arbitration panels in "small" claims cases should consist of one impartial arbitrator only. For claims above the small claims cut-off there should be three arbitrators—an attorney, a physician and a layman. All should be impartial and acceptable to both plaintiff and defendant.

In August 1977, the House adopted the position that arbitration agreements in medical malpractice cases should be entered into "only after a dispute has arisen."
Discussions: Over the years, the ABA has been a firm advocate of improvements in the civil justice system. Efforts to improve the quality and reduce the costs of civil litigation, including medical malpractice, have involved the Association’s officers, sections, committees and commissions. Reflecting this commitment, the ABA House of Delegates in August 1981 stated two of its long-range goals to be improvements in the American system of justice and in the delivery of legal services.

Among the ABA’s recent efforts in this area was the five-year project of the Action Commission to Reduce Court Costs and Delay. Created in 1979 by ABA President Leonard S. Janofsky, who later served as its chairman, the commission studied the effectiveness of a variety of methods in making litigation more efficient and less costly, particularly for middle-income Americans. In its final report, entitled “Attacking Litigation Costs and Delay,” issued in August 1984, the commission called, at pages 76-77, for continuing efforts in this area:

Bringing about constructive change in the court system is demanding work. Strenuous efforts and valuable time are required. Success is difficult to achieve. But our courts are one of our most treasured institutions, and every effort must be made to aid them in functioning effectively without unreasonable delay and cost.

Significant work in this area has also been done by the ABA Special Committee on Dispute Resolution, which has studied new and existing dispute resolution techniques. In its publications and conferences, the committee has raised the interest of the bar, bench and public in alternative dispute resolution approaches. Among the newest ABA entities studying issues relating to the quality of the justice system and the lawyers serving it is the Commission on Professionalism, which recently began a major study of a number of key issues facing the profession today, including alternative dispute resolution.

This committee agrees that alternatives to litigation of medical malpractice claims, or any other tort claim, should only be used if they do not impinge on access to the court system. This concern was a key factor in the statement by the ABA Commission on Medical Professional Liability in its 1977 report, at page 40, that it:

... only favors the use of arbitration if certain threshold problems are recognized and dealt with. A basic problem is the necessity for a voluntary agreement to arbitrate disputes. The courts are particularly concerned that some patients will feel obligated to sign arbitration agreements in order to assure themselves of getting proper medical care....

The Commission agrees that to be enforceable, arbitration must be freely chosen with the knowledge that a right to determination of the issues by a jury has been waived.

The commission also identified two other problems of arbitration: First, ways should be sought to resolve how arbitration would be funded, especially costs that would fall on patient-clients. Second, the commission said, at page 41 of its report, “There is the problem of finding qualified arbitrators. Both legal and medical professions have been effective in obtaining volunteer arbitrators, but these sources cannot be expected to suffice if the use of arbitration becomes widespread.”

This committee is confident the American Bar Association will continue to play a leading role in efforts to seek improvements in the justice system, including the civil litigation processes through which medical malpractice claims, among others, are handled.

In light of these efforts, and in recognition of existing ABA policy, this committee concludes that it is unnecessary at this time to recommend additional policy resolutions on arbitration of medical malpractice disputes.

Statutes of Limitations

AMA Proposal: The AMA Action Plan calls for what would be, in effect, shorter statutory periods for filing medical malpractice actions, particularly in cases involving minors injured by medical treatment.

ABA Policy: At the recommendation of the ABA Commission on Medical Professional Liability, the House of Delegates in 1977 adopted this resolution:

RESOLVED, That the American Bar Association supports the substance of the following recommendations with respect to tort law and procedure as they relate to medical malpractice claims:

1. STATUTE OF LIMITATIONS
   (a) An action for medical malpractice should be commenced within two years from the time the existence of an actionable injury is discovered or in the exercise of reasonable care should have been discovered, whichever is longer. Except for cases involving a foreign object or fraudulent concealment, no action should be brought more than eight years after the occurrence of the incident which gave rise to the injury.

   (b) Where a foreign object has been left in the body, a patient should have one year after the object is discovered in which to bring an action.

   (c) Where fraudulent concealment of material facts by a health care provider has prevented the discovery of the injury or the alleged negligence, the patient should have one year after discovering that an actionable injury exists in which to bring suit.

   (d) The statute of limitations should be tolled during continuous treatment by the same healthcare provider for the same condition or for complications arising from the original treatment.
mence a suit, regardless of how many years earlier the cause of action accrued.” The commission did not later resubmit the measures back to the House, so the resolution as adopted stands as present ABA policy.

Discussion: This committee has reviewed informal comments of the Tort and Insurance Practice Section appearing to favor adoption of a limitation such as that contained in subparagraph (e). We have also reviewed the 1984 report of the ABA Special Committee on the Tort Liability System, at page 13-14, which manifests concern with statutes of repose and the problems engendered by “injuries which occur or become evident many years after defendant’s last tortious act,” particularly those arising in connection with substances whose long-term effects “can be perceived only dimly.”

There are several issues raised by statutes of limitation and repose, and we commend those issues for further study.

General Commentary

For the second time in a decade, the medical profession has made malpractice insurance the subject of debate. When the issue was first raised in the mid-1970s, it involved problems of medical malpractice insurance availability as well as increasing premium costs. Now, the medical profession’s primary focus is on affordability.

One element, however, has not changed. Now, as 10 years ago, the tort law system is being unjustifiably depicted as the primary cause of problems in medical professional liability insurance. In response to the medical profession’s calls for changes in the tort law system in the mid-70s, legislatures in nearly every state passed some form of legislation. Among the legislative provisions adopted in various states were new statutes of limitations applicable only to medical malpractice claims; prohibitions against stating specific dollar amounts in the ad damnum clause of complaints; elimination of the collateral source rule; limitations on plaintiffs’ attorneys’ fees; creation of pre-trial screening panels; limitations on plaintiffs’ recoveries; creation of patient compensation funds; and imposition of rules for structured payments. See J. Blumstein and D. Randolph Smith, Constitutional Attacks on Medical Malpractice Laws, in Legal Liability and Quality Assurance in Newborn Screening 167, American Bar Foundation (L. Andrews ed. 1985); Medical Malpractice Policy Guidebook, Florida Medical Association, 53 (H. Manne ed. 1985).

Recently, the medical profession, after concluding that the first wave of legislation failed to bring the results it sought, issued new calls for changes in the tort law system. In early 1985, the AMA Special Task Force on Professional Liability and Insurance issued an Action Plan proposing legislative change of the tort law system as its primary solution to the issue. The AMA Action Plan also proposes an extensive public information program to explain the medical profession’s position on medical malpractice; better efforts by the medical profession to coordinate efforts to defend against malpractice lawsuits; and improved risk control and quality review activities within the medical profession.

The AMA Action Plan proposes these changes in how the tort system deals with medical malpractice cases: imposing caps on non-economic damages; eliminating punitive damages; requiring itemized verdicts; permitting structured payments; establishing patient compensation funds; eliminating the collateral source rule; restricting contingent fees; creating mandatory pre-trial screening panels; establishing standards for expert witnesses; shortening statutes of limitations, especially for injuries involving children; allowing defendants to file affidavits of non-involvement; establishing minimum standards to be met in filing suit and imposing penalties for filing frivolous suits; making available a system of binding, voluntary arbitration.

The medical profession’s latest calls for “reform” of the tort system have fostered action in many state legislatures and in Congress. According to the Alliance of American Insurers, medical malpractice bills were filed in 43 of the 50 states during 1985. The 246 separate pieces of medical malpractice legislation filed during the year reflect a 47 percent increase over the amount of legislation filed in 1984, the Alliance found. At the federal level, six bills addressing medical malpractice are before Congress, including S. 1804, which would establish monetary incentives to encourage states to adopt, among other measures, key tort law changes being sought by the medical profession. The bill, introduced in October by Sen. Orrin Hatch (R-Utah), is based on proposed legislation drafted by the AMA. More legislative efforts aimed at “reforming” the tort law system can be expected in 1986. State bar organizations are finding themselves increasingly on the defensive in responding to intensive lobbying efforts by the medical profession.

This committee acknowledges the concerns being expressed by physicians and other health care providers about rising malpractice insurance rates, but we do not accept the contention that the tort law system as it relates to medical malpractice insurance is the primary cause of malpractice insurance rate increases. Nor do we believe that implementing major tort law changes will resolve the medical profession’s perceived problems. These are the bases for this committee’s determinations:

1. While there is cause for the medical profession’s concern about medical malpractice insurance, the issue does not appear to be in a state of crisis.

By definition, the term “crisis” denotes a crucial, unstable condition in which abrupt, drastic change is impending. This committee believes that although there is a problem in the area of medical malpractice insurance, the term “crisis” is an overstatement.

This committee believes that available data does not demonstrate a crisis in medical malpractice insurance. Two of the most recent reports prepared on the issue support this view, “Medical Malpractice Insurance in Pennsylvania” (the “Pennsylvania study”) was prepared in 1985 under joint sponsorship of several medical and legal organizations in that state, including the Hospital Association of Pennsylvania, the Pennsylvania Medical Society, the Pennsylvania Bar and Trial Lawyers associations and the Pennsylvania Defense Institute. The second study, the “Medical Malpractice Policy
Guidebook” (the “Florida Medical Association study”), was also prepared in 1985 for the Florida Medical Association. Some key findings of these two reports, as well as other studies, are summarized below:

— The costs of medical malpractice insurance and litigation are not significant elements of total health care costs in the United States. According to the Pennsylvania study, as of 1983, the nationwide cost of medical malpractice insurance was $1.5 billion, less than one-half of one percent of the nation’s $355.4 billion in spending on total health care costs. These estimates are also cited by Patricia M. Danzon, a professor in the Health Care Systems Department of the University of Pennsylvania in Philadelphia and a leading researcher in this field. In her 1984 paper entitled “The Frequency and Severity of Medical Malpractice Claims: Analysis of Contributing Factors,” Professor Danzon notes that “between 1975 and 1982 malpractice insurance premiums rose roughly 73 percent, while the cost of physicians’ services rose 92 percent and the cost of a hospital room rose 130 percent.” In discussing these statistics, the Pennsylvania study says, at pages 91-92:

Since the cost of the tort law system is a fraction of this $1.5 billion estimate, it represents an even smaller proportion of total health care costs. The clear implication is that the cost of malpractice insurance is an insignificant contributor to total health care costs. In fact, it is hard to believe that even if medical malpractice liability were completely eliminated that there would result any reduction in the cost of health care. On the other hand, the cost of medical malpractice injuries based solely on the presence of malpractice has been estimated at $24 billion nationwide. If the tort law system provides incentives which result in the prevention of additional 10 percent in malpractice costs that would be incurred in its absence, the benefits of the tort law system, i.e., $2.4 billion in reduced malpractice costs, would clearly outweigh the costs of less than $1.5 billion.

— The amount of physicians’ income consumed by malpractice insurance has not increased substantially in recent years. As of 1983, physicians overall were estimated to have spent only about 2.3 percent of their gross income on malpractice premiums. According to Danzon, the percentages ranged from one to two percent of gross income for general practitioners to as much as six percent for some high risk surgical specialties. She also found that these percentages have increased only slightly since 1970. While malpractice premiums can total several thousand dollars, the physicians paying them generally earn substantial incomes. For example, according to the October 27, 1985 issue of Long Island’s Newsday, New York’s medical malpractice insurance premiums are estimated to be the nation’s highest, at about 10 percent, of the average physician’s gross income. The gross income of the average New York physician is $168,300, and much higher for some specialties. Moreover, the newspaper noted, since malpractice insurance premiums are tax-deductible, their financial impact is softened by the resultant tax savings. The Florida Medical Association’s report concluded that “when viewed from a variety of perspectives, it is apparent that, at least as of 1983, aggregate premium contributions were not a reason for a crisis in health care.” The Pennsylvania study, acknowledging recent premium increases, points out, at page 33, that there has been “relatively modest growth in premiums for many risk classes in light of the rhetoric of the crisis.”

— Only a small percentage of potential malpractice claims reach the legal system. According to the 1984 report of the ABA Special Committee on the Tort Liability System, data indicate that only about one in six malpractice incidents detected in hospital records results in a claim. Danzon’s 1984 paper indicates that only about one in 10 negligent injuries results in a claim. Moreover, according to Danzon, only about 40 percent of the claims that are made result in payments to claimants. In other words, she observed, “at most one in 25 negligent injuries resulted in compensation through the malpractice system.” On the basis of these statistics, Danzon concluded:

The evidence clearly refutes the common allegation that malpractice is simply a problem of litigious patients, that the number of claims exceeds the number of negligent injuries. On the contrary, the full social cost of injuries due to malpractice is probably sever times greater than the more visible cost of malpractice claims.

— Of the medical malpractice claims that do reach the legal system, only a small percentage go all the way to a verdict. That was one of the findings of a study conducted in 1983 by Danzon and Lee A. Lillard for the Rand Institute for Civil Justice in Santa Monica, California. Their report, entitled “The Resolution of Medical Malpractice Claims: Research Results and Policy Implications,” determined that, of about 6,000 claims closed in the mid-1970s that they analyzed, plaintiffs dropped or lost about half of the cases brought. Claims went through to a final verdict in only 13 percent of the cases. The researchers also determined, “Although half of the dollars paid to plaintiffs were concentrated in only 3% of the total number of claims (or 5% of all claims that involved some payment), this heavy concentration is a reasonably accurate reflection of the concentration of injury severity and measurable economic damage in those claims.”

— Insurance procedures for setting premiums may be contributing to distortions in the premiums charged to health care providers. On the basis of its investigation into how medical malpractice insurers establish premium rates, the Pennsylvania study suggests that by relying on broad class ratings, insurers are failing to take into account the effect that claims experience of individual practitioners and hospitals have on overall rates. In a summary of their findings, the researchers observe, “Extending malpractice insurance coverage to a health care provider under conditions of incomplete or totally unavailable information regarding health care provider’s past malpractice experience is patently absurd, and yet it happens quite frequently. Indeed, there exists no comprehensive database containing...
the malpractice experience of individual health care providers." Because this database is lacking, insurers rely on broad class ratings, which treat large groups of medical care providers from different fields and different rates of malpractice experience as though they were similar. The report's summary states:

In terms of physicians, one of the major deficiencies of the current malpractice insurance delivery system is its inability, because of the lack of reliable information on malpractice experience, to effectively evaluate insurer exposure by individual insured. The current system of employing class rating would be improved to some extent by moving to medical specialty rating, but even under specialty rating, malpractice costs are not efficiently allocated.

To illustrate their point, the researchers analyzed Pennsylvania physicians paying insurance surcharges to the Pennsylvania Medical Professional Liability Catastrophe Loss (CAT) Fund, which provides excess claim coverage above primary carrier limits and full coverage for claims reported more than four years from occurrence. Their analysis reveals that 228 Pennsylvania physicians, or one percent of all state physicians who pay CAT Fund surcharge premiums, were responsible for more than 25 percent of all CAT Fund loss payments on claims reported to the fund since its inception. Broken down by specialty, 10 percent of neurosurgeons, for example, accounted for 47 percent of CAT Fund loss payments on behalf of neurosurgeons and four percent of orthopedic surgeons accounted for 45 percent of CAT Fund loss payments on behalf of their specialty.

The study found similar patterns for hospitals in the state, determining that:

If only the ten worst hospitals in Pennsylvania, in terms of departure from...defined "normal" CAT Fund medical malpractice losses attributable to claims against malpractice experience, could improve their malpractice experience to just "normal," CAT Fund medical malpractice losses attributable to claims against hospitals would be reduced by 20 percent. In other words, it can indeed be inferred from the data that excessive offenders are responsible for a high proportion of CAT Fund malpractice losses attributable to hospitals.

The report concludes, at page 84, that:

Experience rating as opposed to class or even specialty rating would not only permit reduced medical malpractice insurance premiums for quality physicians in terms of eliminating the problem of intra-class or intra-specialty subsidization, i.e., non or single offenders subsidizing multiple offenders of the same class, but would also provide economic incentive to reduce malpractice incidence overall. If physicians could expect prompt adjustment of their malpractice insurance premium rates based on their individual malpractice experience, it is evident that strong economic incentive could be brought to bear on the problem of malpractice.

States in which physicians have expressed great concern about medical malpractice insurance are not experiencing shortages of medical practitioners. In New York, for example, Newsday reported that, despite concerns about the state's high premiums, "physicians are not leaving the state in droves, as medical organizations have been predicting" (Oct. 27, 1985). Instead, the number of licensed physicians rose 24 percent between 1975 and 1983, a period during which the state's overall population remained stable.

Indeed, state health officials express concern about a growing 'doctor glut,'" the newspaper added. In Florida, the medical association study acknowledges, at page 45, that "at least through the early 1980s, physicians in high-risk specialties were 'pouring into' the state."

In conclusion, this committee recognizes that medical practitioners are concerned about their recent malpractice insurance experience, and agrees that those concerns should be addressed. However, there is no basis for discussing the issue through the rhetoric of "crisis," which fosters misunderstanding and inappropriate responses instead of helping to resolve the issue.

2. Available data does not support contentions that changes in tort law would significantly reduce medical malpractice premium rates.

During the medical profession's period of concern over medical professional liability insurance in the mid-1970s, the profession campaigned vigorously for state legislation to change the way tort law and procedure were applied to medical malpractice cases. The medical profession reasoned that the number of malpractice suits filed against health care providers and the amounts of damages awarded to plaintiffs making those claims were the primary causes of allegedly high premiums and lack of available coverage. A decade later, that campaign is being repeated. But is there evidence to support assumptions that major changes in tort law and procedure will resolve the insurance issue? Recent reports suggest the answer to that question is "no."

— The Pennsylvania study states emphatically:

Many suggested modifications to the tort law system, e.g., caps on malpractice awards, reductions in the statute of limitations applicable to malpractice claims, or elimination of the collateral source rule, are merely cost shifting devices that partially shift the costs of medical malpractice from health care providers and their insurers to other forms of insurance, to state programs (taxpayers), and/or to malpractice victims themselves. They do not save money in the aggregate! In addition, such reforms diffuse the incentives to reduce malpractice incidence by reducing the cost impact of malpractice on health care providers and actually induce increased malpractice incidence and cost in providing reduced incentives to avoid malpractice...

The basis for the current criticism and suggested modifications of the tort law undoubtedly lies in the false perceptions of health care providers as to the roots of the developing malpractice crisis in Pennsylvania. The recent surge in malpractice premium rates has
erroneously led health providers to the conclusion that insurers and/or attorneys are “milking” the system at their expense. Insurers have been effective in defending themselves to some extent by erroneously citing rising ... frequency and severity of claims as the basis for rising premium rates. This result has left the tort law system as the convenient public “whipping boy”.... However, no group of system participants can be given complete, or even major, responsibility for the current crisis. Pages 93-94.

— In its evaluation of studies assessing the impact of tort law changes on medical malpractice insurance, the Florida Medical Association study observes:

Very few studies have been conducted to assess effects of specific legislative changes designed to deal with a malpractice insurance crisis .... [H]owever, no group of system participants can be given complete, or even major, responsibility for the current crisis. Pages 93-94.

— The American Medical Association has concluded in its own reports that the effectiveness of tort "reforms" adopted by states in the mid-70s is unclear at best. The AMA Special Task Force on Professional Liability and Insurance acknowledged in its second report that while the medical profession's efforts in the 1970s to change tort law succeeded in obtaining legislative change in nearly every state, "in another sense, the campaign appears to have failed" because the hoped-for reductions in frequency and severity of claims have not occurred. The task force observed, at page 13, "[T]he impact of the wave of tort reforms of the late 1970s on medical liability costs is unclear. Yet it is undeniable that these reforms have not had the effect that their supporters hoped, or at least not yet."

Despite results from earlier legislation that even the AMA acknowledges are "unclear" at best, the medical profession now is repeating demands for further upheaval in tort law on the grounds that, somehow, malpractice liability insurance premiums will go down. Tort law, like all other areas of the law, is continually evolving. Because of the important role that tort law plays in society and in the lives of individuals — particularly in resolving medical malpractice and other personal injury claims — changes should not be made without strong evidentiary justification.

This committee concludes that the available evidence does not support assumptions that major tort law changes being sought by the profession will answer its concerns about medical professional liability insurance. However, as one of our resolutions indicates, this committee endorses the collection and study of data on how tort law, as well as other factors, affect all types of professional liability insurance.

3. The tort system fulfills important legal and social goals in dealing with malpractice liability claims.

As it applies to claims of medical malpractice, tort law performs a seemingly simple function: By applying legal standards that have evolved over centuries through the common law and legislation, it determines, within the adversarial context of trial, first, whether a patient was injured in the course of receiving medical care; second, whether the injuries were caused by the negligent conduct of a medical care provider; and third, the compensatory measure of those injuries.

In making those determinations in medical malpractice cases, tort law serves the same two important social goals that it serves in all other areas of negligence: to compensate persons injured by the wrongful acts of others and to deter negligent activities that give rise to injuries.

The first question, then, is whether the tort system sufficiently compensates victims for the injuries they suffer as a result of medical negligence. According to the studies by researcher Patricia Danzon cited above, the tort system is apparently not efficient enough in producing compensation for victims of medical negligence because only a small fraction of malpractice incidents result in claims.

Regarding damages for economic losses resulting from medical negligence, there appears to be general agreement that successful plaintiffs do receive adequate compensation. Two issues of how that compensation is awarded — whether the collateral source rule should be eliminated and how extensively structured payments should be used — were discussed in more detail above.

Another important issue involves non-economic damages, primarily damages for pain and suffering, in medical negligence cases.

The AMA Action Plan recommends that non-economic damages be limited. S. 1804, the federal incentives bill based on AMA draft proposals, calls for states to impose a $250,000 cap on non-economic damages.

This committee believes strongly that no caps should be imposed on non-economic damages. No resolution to this effect is necessary, however, because ABA policy already states this position clearly. In February 1978, the ABA House of Delegates approved a resolution stating that "No dollar limit on recoverable damages should be enacted which can operate to deny a plaintiff in a medical malpractice action full compensation."

State appellate courts have disagreed on the constitutionality of caps on non-economic damages. Some courts have ruled that caps on damages violated constitutional equal protection clauses because they unreasonably discriminated against the most seriously injured malpractice victims without giving them a quid pro quo for their lost right of recovery. Some other courts, however, have found caps on damages constitutional on grounds that they had a rational relationship to the interest of states in medical care cost and service levels. The U.S. Supreme Court declined to rule on this issue. No. 85-19; 46 CCH S.Ct. Bull. P. B96 (Oct. 15, 1985); Fein v. Permanente Medical Group, 211 Cal. Rptr. 368 (1985).

However, whether caps on non-economic damages are constitu-
tional does not settle the issue. The key question is whether public policy grounds justify those caps. This committee suggests that any limit on the ability of persons injured through medical negligence to recover the full extent of their damages undermines the public interest.

Caps on damages have been proposed as a way of holding down costs of medical malpractice insurance. However, this committee seriously questions whether savings in premiums paid by medical care providers would justify providing less than full compensation for an arbitrarily selected class of persons, including many of those most seriously injured by medical malpractice. Professor Danzon examined the issue in her 1982 Rand study on frequency and severity of claims. At page 37, she estimated that caps on recoveries would reduce the severity of payments on claims, but points out that caps raise serious policy questions of how damages are distributed to plaintiffs in the aggregate because “caps on recoveries affect exclusively the few severely injured patients.” This observation led Danzon to conclude, “The policy implications of these ... measures to reduce awards are important topics for future research.”

To summarize, this committee affirms existing ABA policy that “no dollar limit on recoverable damages should be enacted which can operate to deny a plaintiff in a medical malpractice action full compensation.”

Regarding the general question of compensation, this committee concludes that the tort system in its present form provides successful claimants with adequate compensation for their injuries caused by negligence of medical care providers. Is the tort system also effective in fulfilling its second goal, deterring negligent behavior by medical care providers? This committee concludes that the tort system is an effective stimulus to careful conduct.

In her 1984 paper, Professor Danzon outlined the important deterrent role tort law plays in relation to medical negligence. In practice, the consumer’s ability to make informed choices is much more limited in medical care than in most other areas. Medical providers therefore have considerable discretion. The physician who skimps on the time and attention allocated to each patient can see more patients and hence enjoy more income or more leisure. This increases the risk of injury to the patient. If the patient were aware of the risks, he could react by transferring to another physician, thereby signalling to the negligent physician his preferred quality of care. Thus if patients were well informed, market forces would eliminate practitioners whose quality of care fell short of that preferred by patients. But if patients are not well informed, physicians face inadequate incentives to practice with care. The tort system of liability for negligence, in principle, corrects this distortion in incentives by “internalising” to the physician the costs of injuries due to negligence. A precise definition of the legal standard of negligence was formulated by Judge Learned Hand in U.S. v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). By this definition, negligence occurs if there is a failure to take preventive measures that cost less than their expected benefit, i.e. the reduction in the probability of an injury times the damages suffered if it occurs.... Thus negligence is failure to take cost-effective precautions. If found negligent, the tort-feasor is liable for a “fine” equal to the damages suffered by the victim. Ideally, this liability rule transfers from the patient to the physician the expected costs of injuries which the patient would be willing to pay to prevent. It thereby creates incentives for the physician to provide the efficient quality of care.

In assessing the tort system’s success at deterrence in cost-effectiveness terms, Danzon stated:

The deterrence benefits of the malpractice system — the injuries that are avoided because the threat of liability makes physicians and hospitals more careful — are difficult to measure. But one can make some rough calculations of the amount of deterrence necessary to justify the additional costs of litigating over fault. Ignoring defensive medicine ... if the incidence of negligent injury would be at least 4% higher, were it not for the threat of liability, the malpractice system pays for itself. The extra costs of litigation are offset by the savings in injuries prevented. Even if we triple the estimate of cost to allow for defensive medicine, only a 12% reduction in the incidence of negligent injury is required to justify the tort system. If such estimates do not seem implausible, the fault-based liability system is worth retaining.

Danzon observed, “The advantage of the tort system is that it provides a continual, ongoing system of ‘regulation by incentives.’ And it does not rely on enforcement by the medical profession which, like any other profession, is notoriously reluctant to police its own members.”

A primary contention of the medical profession is that medical care providers engage in costly “defensive medicine” — medical procedures implemented primarily to avoid litigation — in the face of the allegedly increasing threat of malpractice suits. The American Medical Association contends that the cost of defensive medicine has added about $15 billion to the nation’s annual total medical care bill.

However, recent studies point out that defining defensive medicine is not simple, that its costs are very uncertain and that its effects are not all bad. Summarizing these findings, the Pennsylvania study states, at page 92:

The notion of “defensive medicine” has severe definitional problems in that different health care providers can obviously mean very different things in reporting what they think constitutes defensive medicine. In one sense, the practice of defensive medicine implies the use of “extra care” in order to avoid the performance of malpractice. It is very difficult to construe defensive medicine in this context as unnecessary or not cost justified in that very few patients would be unwilling to pay such costs. Indeed, the existence of defensive medicine practiced on this basis is indicative of the effectiveness of malpractice insurance costs in providing incentive to reduce malpractice. It is also evident that the use of “extra care”
by health care providers can contribute substantial cost savings in early detection of medical conditions, use of correct procedures, etc. Thus, while many health care providers as well as patients may include “extra care” in their personal definition of defensive medicine, no one would include the use of “extra care” induced by the tort law system as a liability of that system.

Moreover, the use of what the medical profession calls “defensive medicine” really does little to prevent malpractice litigation because the standard applied in medical negligence litigation is the ordinary standard of care. As discussed above, that standard is established through expert testimony, in the way it customarily provides medical treatment. If a medical care provider meets that standard, no negligence exists. If the standard is not met, no amount of superfluous procedures will eliminate the negligence that did occur. Thus, the medical community, not the law, may be responsible for making unnecessary procedures not previously considered customary treatment an element of a new level of care.

As to costs, the Pennsylvania study states:

The costs of defensive medicine, however, defined, are substantially smaller (roughly 10% in Pennsylvania) than the costs of malpractice insurance and thus represent an even smaller proportion of overall health care costs. It is likely that the combined costs of malpractice insurance and defensive medicine are less than one-half of one percent of health care costs. It is inconceivable that any patient would forego the opportunity of paying $201 for every $200 worth of health care purchased to provide his health care providers with strong additional incentive through the tort law system to avoid malpractice and to perform all procedures required by the relevant standard of care. The apparently widespread belief that large amounts of defensive medicine are practiced as the result of the existence of the tort law is a tribute to its efficiency and not a detraction. The surprising aspect is how cost effective the tort law system really is in providing incentives to reduce medical malpractice. Page 24.

This committee concludes that the tort law system in its current form plays an important role in efforts to deter medical negligence. Major changes being sought by the medical community would seriously undermine that crucial function of the system.

The medical profession’s efforts to change tort law rules and procedures as they apply to medical care providers would result in a waiver from the negligence rules of tort law that constrain the rest of society.

Basic to the operation of tort law is the concept that all individuals should be liable for their negligence that injures others. No groups or individuals should be exempt from these reasonable standards of behavior, which are designed to assure that individuals act in a manner that will not cause harm to others.

This committee recognizes the reluctance of physicians to enter into litigation that brings their conduct into issue, but most individuals, both plaintiffs and defendants, have similar feelings about litigation. However, over the centuries, the litigation process is the format that our society has developed for resolving disputes over the conduct of one person that may have injured another person. To remove one group from the jurisdiction of that system or to give one group special treatment by that system, would unduly impair its effectiveness.

The law does not impose unreasonable standards of behavior on medical care providers. Tort law applies the same rules of negligence to medical care providers as to members of any other professional group. They must conform to the standards of the profession in observing the duties of all members of society to refrain from negligent acts that injure others. The elements necessary for a negligence cause of action are:

1. A duty to conform to a reasonable standard of conduct, to protect others against unreasonable risks of harm.
2. A failure by the actor to conform to that standard.
3. A close causal connection between the conduct and the injury, known legally as proximate cause.

In applying this formula to medical malpractice claims, the standard of care applied to medical care providers is a standard that reflects the skills, judgments, training and knowledge common to the medical community.

The law imposes a standard of conduct on medical care providers that is no greater than the standards the medical profession imposes on itself.

The cumulative effect of all of these rules has meant that the standard of conduct becomes one of “good medical practice,” which is to say, what is customary and usual in the profession. It has been pointed out often enough that this gives the medical profession the privilege, which is usually emphatically denied to other groups, of setting their own legal standards of conduct, merely by adopting their own practices. Prosser, at 165 (footnotes deleted).

This committee believes that changing tort law rules and procedures to give special status to any specific professional group or groups would be both inappropriate and unjustified — inappropriate in relation to the way tort law treats malpractice cases involving those groups in comparison to other cases of professional negligence and unjustified in light of the social goals furthered by the tort system.

In summary, the major changes being sought in the tort system would seriously impair its ability to fulfill the social goals of providing full compensation to persons injured by medical negligence and of deterring other incidents of medical negligence.

4. The tort law system in its current form is an integral element of the American system of justice.

The tort law system is based on fundamental precepts of the American justice system. In particular,
the tort system is based on the jurisprudential concept that every individual who suffers injuries caused by the wrongful acts of another person is entitled to bring a claim to the courts, to have that claim heard and ruled on after a trial before a jury of fellow citizens and to be awarded the damages necessary to provide full compensation for the injuries. The sources of these concepts are not only deeply woven into the fabric of the nation's legal system but are an integral element of society in general.

The American tort system is evolving and will continue to evolve. However, this committee is concerned that some tort changes proposed by the medical profession in relation to the issue of medical professional liability insurance do not reflect a full appreciation of the special nature of tort law within this nation's legal system or the process by which that law evolves.

In examining this issue, we have found no evidence that the public interest demands vast restructuring of the tort law system. Nor do we believe that, to ease the concerns of one segment of society, the rights of all citizens to seek full recovery through the courts for their injuries caused by members of that group should be limited.

When rights of individuals are threatened, it is the duty of the legal profession to speak for their protection. Protecting individual rights and serving the public interest in the fair and effective operation of the legal system is one of the most vital responsibilities of the legal profession. It is important that the American Bar Association, as the single entity that speaks for the entire legal profession, address this issue.

Simply put, this committee believes that the medical profession, in seeking changes in the tort law system, has shown a willingness to trade away the rights of individuals in the hope of easing a perceived burden on itself. No single group in society should receive such special treatment under the law, and it is a responsibility of the legal profession to work to balance all interests while preserving the traditional foundation on which the American justice system is based.

Respectfully Submitted,

TALBOT S. D'ALEMBERTE, Chairman
WALTER H. BECKHAM, JR.
PHILIP H. CORBOY
BETTY W. ELLERIN
MILES C. GERBERDING
RONALD E. MALLER
FRANCIS H. MILLER
R. HARRISON PLEDGER, JR.
MILES J. ZAREMSKI

February, 1986

In addition to S. 1804, other bills addressing medical malpractice have been introduced in Congress. Here is a summary of those bills:

H.R. 3084. Reps. Henson Moore (R-La) and Richard Gephardt (R-Mo) reintroduced the Medical Offer and Recovery Act of 1985 on July 25, 1985. Basically, the bill would establish procedures under which a health care provider, within 180 days of an occurrence, would have the option of making a commitment to pay the patient's net economic loss. Once the provider agreed to compensate an injured patient, the patient's right to sue for malpractice under the conventional tort system would be foreclosed except in cases where intentional tortious conduct is alleged. Payments from collateral sources would offset the amount owed by the provider and would occur periodically unless a lump-sum settlement is agreed to and approved by the court. This bill purports to protect patients by: 1) requiring physicians to carry sufficient malpractice insurance; 2) permitting patients to request binding arbitration in the event a health care provider refuses to commit himself to payment; and 3) establishing procedures for health care facilities to report to state licensing authorities any adverse actions taken with respect to the privileges of a health care provider. H.R. 3084 is intended as model legislation for state legislatures to consider. In the event a state legislature did not enact a similar or better program for compensating medical malpractice victims by January 1988, the benefits of the bill would apply to all beneficiaries of federal health programs, including Medicare, Medicaid, Federal Employee Health Benefits, Veterans Administration and CHAMPUS. The bill was referred jointly to the Committee on Ways and Means, Energy and Commerce, Armed Services, Veterans' Affairs and Post Office and Civil Service. It has not received attention this session.

S. 175. The Health Care Protection Act of 1985 was introduced at the start of this Congress by Sen. Daniel Inouye (D-Hawaii). It would provide money to states which establish medical malpractice screening panels and health care facility risk management programs meeting specified minimum standards. The screening panels would be required to consist of at least three members: one health care provider, one lawyer and one lay person. Each panel would have original and exclusive jurisdiction in the state to hear and decide any claim for damages resulting from alleged malpractice. If a panel finds compensable injury, it would determine the amount of damages and structure payment of any amount over $100,000. Any party to a claim decided by a panel would be entitled to a trial de novo in an appropriate state court. If a panel or court finds malpractice, it would be required to transmit its findings to the state insurance commissioner and state licensing or certification board. Insurance companies would be authorized to charge higher rates to health care providers guilty of malpractice. The legislation would also require each licensed hospital, outpatient facility or residential health care organization to employ a risk management program to investigate all known or suspected incidents of
malpractice. These reports would be made available to the patient and health care facility and would be used to identify and reduce the risk of further incidents of malpractice. The bill was referred to the House Committee on Labor and Human Resources where no action is expected.

H.R. 2659. Rep. Robert Mrazek (D-N.Y.) introduced the Medical Malpractice Reform Act in June 1985. It is based largely on S. 175. H.R. 2659 was referred jointly to the Committees on the Judiciary and Energy and Commerce. Although moderate interest has been expressed by committee chairs, no commitments have been made to hold hearings.

H.R. 3174. Originally introduced by Rep. Barney Frank (D-Mass.) as H.R. 1169, this bill would permit claims against the United States under the Federal Tort Claims Act for personal injury or death of a member of the armed forces serving on active duty when the claim arises out of medical or dental care furnished by a Department of Defense medical treatment facility. If enacted, it would overrule the Feres doctrine, which states that a member of the armed services cannot sue the federal government, other members of the armed forces or a federal government employee for injuries received and treated in the course of military service. The bill passed the House on October 7 and is now pending before the Senate Judiciary Subcommittee on Administrative Practices.

In addition to these bills, Rep. Ronald Wyden (D-Ore.) has prepared a draft proposal for medical malpractice reform. This proposal would structure awards of future damages exceeding $250,000; require collateral source payments to offset the amount of an award; establish methodology for collecting information on malpractice occurrences; and require the reporting of information on medical malpractice judgments against physicians to hospitals with which they are associated. This legislation was still being revised and circulated to interested groups at the end of 1985.

Also, the U.S. General Accounting Office (GAO) is conducting a survey of the views of medical and legal groups, consumers, and insurers on the medical malpractice issue. The results of the survey were expected to be released when Congress reconvened in January. The survey is one of four reports on medical malpractice that the GAO expects to issue over the next year and a half. The other reports will address the economic costs of medical malpractice insurance for community hospitals; the variation in premiums charged doctors from specialty to specialty and from state to state; and the characteristics of closed claims. The final report is also expected to draw overall conclusions and make recommendations to Congress.

Appendix B

Listed below are selected reference materials on medical professional liability. This committee recommends these materials as starting points for further research in this area:

- Association of Trial Lawyers of America, “Response to Questionnaire of the U.S. General Accounting Office Regarding Medical Malpractice” (November 1985).
- Association of Trial Lawyers of America, “The American Medical Association is Wrong — There Is No Medical Malpractice Insurance Crisis” (1985).


REPORT OF THE
ACTION COMMISSION TO
IMPROVE THE TORT LIABILITY SYSTEM

RECOMMENDATIONS*

BE IT RESOLVED, That the American Bar Association adopts the following recommendations:

A. Insurance
1. The American Bar Association should establish a commission to study and recommend ways to improve the liability insurance system as it affects the tort system.

B. Pain and Suffering Damages
2. There should be no ceilings on pain and suffering damages, but instead trial and appellate courts should make greater use of the power of remittitur or additur with reference to verdicts which are either so excessive or inadequate as to be clearly disproportionate to community expectations by setting aside such verdicts unless the affected parties agree to the modification.

3. One or more tort award commissions should be established, which would be empowered to review tort awards during the preceding year, publish information on trends, and suggest guidelines for future trial court reference.

4. Options should be explored to provide more guidance to the jury on the appropriate range of damages to be awarded for pain and suffering in a particular case.

C. Punitive Damages
5. The scope of punitive damages in cases involving damage to person or property should be narrowed through the following measures:

a. The standard of conduct. Punitive damages should be allowed only in cases where the defendant's conduct indicates substantially greater indifference to the safety of others than ordinary negligence, such as intentional action or conduct in conscious disregard of the rights or safety of others.

b. The standard of proof. The standard of proof in awarding punitive damages should be higher than in awarding compensatory damages. The standard should be proof by "clear and convincing evidence."

c. The process of decision.
(1) Appropriate pre-trial procedures should be routinely utilized to weed out frivolous claims for punitive damages prior to trial, with a savings mechanism available for late discovery of misconduct meeting the standard of liability.

(2) Evidence of net worth and any other evidence relevant only to the question of punitive damages ordinarily should be introduced only after the defendant's liability for compensatory damages and the amount of those damages have been determined.

d. Multiple judgment torts. While the total amount of any punitive damages awarded should be adequate to accomplish the purposes of punitive damages, appropriate safeguards should be put in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.

e. To whom award should be paid. After deducting costs and expenses, the court should determine what is a reasonable portion of the punitive damages award to compensate the plaintiff and counsel for bringing the action and prosecuting the punitive damages claim, with the balance of that award allocated to public purposes.

D. Joint-and-Several Liability
6. The doctrine of joint-and-several liability should be modified to recognize that defendants whose responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff are to be held liable for only their equitable share of the plaintiff's non-economic loss, while remaining liable for the plaintiff's full economic loss. A defendant's responsibility should be regarded as "substantially disproportionate" when it is significantly less than any of the other defendants; for example, when one of two defendants is determined to be less than 25% responsible for the plaintiff's injury.

E. Attorneys' Fees
7. Fee arrangements with each party in tort cases should be set forth in a written agreement that clearly identifies the basis on which the fee is to be calculated. In addition, because many plaintiffs may not be familiar with the various ways that contingency fees may be calculated, there should be a requirement that the contingency fee information form be given to each plaintiff a reasonably time before a contingency fee agreement is signed. The content of the information form should be specified in each jurisdiction and should include at least the maximum fee percentage, if any, in the jurisdiction, the option of using different fee percentages depending on the amount of work the attorney has done in obtaining a recovery, and the option of using fee percentages that decrease as the size

---

*The recommendations were divided by capital lettered section for debate and amendment, and a separate vote was taken on each. In some instances the recommendations were presented as amended. In lieu of section C, a substitute offered by the Section of Litigation and the Section of Torts and Insurance Practice was approved. See pages 2, 29, 31, 34, 37, 39, 41, 43, and 44.
of a recovery increases. The form should be written in plain English, and, where appropriate, other languages.

8. Courts should prohibit the practice of taking a percentage fee out of the gross amount of any judgment or settlement. Contingent fees should be based only on the net amount recovered after litigation disbursements such as filing fees, deposition costs, trial transcripts, travel, expert witness fees, and other expenses necessary to conduct the litigation.

9. Whenever judgment is entered in a tort case, fee arrangements with each party and the fee amount billed should be submitted in camera to the court, which should have the authority to disallow, after a hearing, any portion of a fee found to be “plainly excessive” in light of prevailing rates and practices.

F. Secrecy and Coercive Agreements

10. Where information obtained under secrecy agreements (a) indicates risk of hazards to other persons, or (b) reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information.

11. No protective order should contain any provision that requires an attorney for a plaintiff in a tort action to destroy information or records furnished pursuant to such order, including the attorney’s notes and other work product, unless the attorney for a plaintiff refuses to agree to be bound by the order after the case has been concluded. An attorney for plaintiff should only be required to return copies of documents obtained from the defendant on condition that defendant agrees not to destroy any such documents so that they will be available, under appropriate circumstances, to government agencies or to other litigants in future cases.

12. Any provision in a settlement or other agreement that prohibits an attorney from representing any other claimant in a similar action against the defendant should be void and of no effect. An attorney should not be permitted to sign such an agreement or request another attorney to do so.

G. Streamlining the Litigation Process: Frivolous Claims and Unnecessary Delay

13. A “fast track” system should be adopted for the trial of tort cases. In recommending such a system, we endorse a policy of active judicial management of the pre-trial phases of tort litigation. We anticipate a system that sets up a rigorous pre-trial schedule with a series of deadlines intended to ensure that tort cases are ready to be placed on the trial calendar within a specified time after filing and tried promptly thereafter. The courts should enforce a firm policy against continuances.

14. Steps should be taken by the courts of the various states to adopt procedures for the control and limitation of the scope and duration of discovery in tort cases. The courts should consider, among other initiatives:

(a) At an early scheduling conference, limiting the number of interrogatories any party may serve, and establishing the number and time of depositions according to a firm schedule. Additional discovery could be allowed upon a showing of good cause.

(b) When appropriate, sanctioning attorneys and other persons for abuse of discovery procedures.

15. Standards should be adopted substantially similar to those set forth in Rule 11 of the Federal Rules of Civil Procedure as a means of discouraging dilatory motions practice and frivolous claims and defenses.

16. Trial judges should carefully examine, on a case-by-case basis, whether liability and damage issues can or should be tried separately.

17. Non-unanimous jury verdicts should be permitted in tort cases, such as verdicts by five of six or ten of twelve jurors.

18. Use of the various alternative dispute resolution mechanisms should be encouraged by federal and state legislatures, by federal and state courts, and by all parties who are likely to, or do become involved in tort disputes with others.

H. Injury Prevention/Reduction

19. Increased attention should be paid to the disciplining of licensed professionals through the following measures:

(a) A commitment to impose discipline, where warranted, and a substantial increase in the funding of full-time staff for disciplinary authorities. Discipline should be lodged in the hands of a state body, and not controlled by the profession itself, although professionals should have a substantial role in the process.

(b) In every case in which a claim of negligence is made against a licensed professional, and a judgment for the plaintiff is entered or a settlement paid to an injured person, the insurance carrier, or in the absence of a carrier, the plaintiff’s attorney, should report the fact and the amount of payment to the licensing authority. Any agreement to withhold such information and/or to close the files from the disciplinary authorities should be unenforceable as contrary to public policy.

I. Mass Tort

20. The American Bar Association should establish a commission as soon as feasible, including members with expertise in tort law, insurance, environmental policy, civil procedure, and regulatory design, to undertake a comprehensive study of the mass tort problem with the goal of offering a set of concrete proposals for dealing in a fair and efficient manner with these cases.

J. Concluding Recommendation

21. After publication of the report, the ABA Action Commission to Improve the Tort Liability System should be discharged of its assignment.
PREFACE

For more than a decade the American Bar Association has been moving toward development of policies relating to the tort liability system, particularly in connection with the principles and practices of law that regulate the tort system.

In 1981, as reaffirmed in 1983, it may have been enough to oppose current product liability proposals for federal regulation. And in February 1986 it was appropriate to resist special rules for the medical profession. However, it has long been apparent that it is not enough to advance reasons for not acting, however cogent they may be. In that spirit, a committee was established to review more broadly the entire structure of the tort liability system. Griffin B. Bell, former Attorney General of the United States, chaired that body, which reported in early 1985 with a book-length report, Towards a Jurisprudence of Injury. That report, with Professor Marshall Shapo as the principal author, comprehensively analyzed the principles that control the system and identified a number of problem areas.

The Bell Report was the subject of wide discussion and comment, including a conference convened by the Tort and Insurance Practice Section in the spring of 1985. From that meeting emerged a consensus in favor of building upon the Bell report to develop specific action recommendations to be considered by the Board of Governors and the House of Delegates. With that objective in mind, then-president William W. Falsgraf appointed the present Action Commission to Improve the Tort Liability System, which was announced at a news conference in New York City in November 1985. The Commission was charged with examination of all aspects of the tort liability system.

Robert B. McKay was designated as chair of the 14-member Commission. The members brought to the work of the Commission helpfully diverse backgrounds of experience with the tort liability system. The members include two federal judges and one state supreme court justice; attorneys with wide experience as plaintiffs’ and defense counsel; corporate counsel, including those with insurance experience; three academics; and two consumer and civil rights advocates. The current Commission members are identified in Appendix E to the Report. In addition, Jane Barrett served as a member of the Commission from November 1985-August 1986. During that period and thereafter she made many valuable contributions to the work of the Commission.

The Commission was especially fortunate to have Professor Robert L. Rabin of the Stanford Law School as our Reporter. His extensive knowledge and great dedication enabled him to produce multiple drafts under a very tight schedule. We particularly marveled at his ability to translate often inchoate ideas into workable solutions, his skill at producing language that is fair to all viewpoints, and his lucid writing that, we hope, makes this report understandable to all who read it.

The Commission held eight meetings between November 1985 and December 1986. In addition to the expertise within the Commission itself, vast amounts of material were reviewed by the Reporter and the Commission members. Throughout we had the financial
support and the intellectual and practical advice of the Tort and Insurance Practice Section, including often the in-person counsel of T. Richard Kennedy, the Section Chair in 1985-86, and Keith L. Davidson, his successor in 1986-87.

In a matter as volatile as this, we make no claim that each member is equally satisfied with every aspect of the Report. The essential point is the collective effort to deliver a package that in sum was acceptable to a solid majority, even though requiring some compromise of ultimate preferences by individual Commission members.

Each member participated in an individual capacity, and each member is identified by profession for purposes of information only, not for lending the name or authority of the member's office, law firm or employer to the Report.

By providing insights gleaned from their diverse backgrounds, the members hope to contribute to the improvement of the tort system and the administration of justice. Given their various backgrounds, responsibilities and professional roles, each member of the Commission remains free to express views on specific aspects of the tort liability system that are not necessarily consistent with specific recommendations in the Report.

Our earnest request to those who review the recommendations that follow is that you approach the report in that same spirit of seeking to improve the system as a whole. The proposal is in delicate balance as it stands. We believe that we present a comprehensive and balanced set of recommendations, which are now offered as an integrated package.

Respectfully submitted,

Hon. Shirley S. Abrahamson
Dean Guido Calabresi
Thomas S. Chittenden
Don M. Jackson
Robert B. McKay, Chairperson
Stephen B. Middlebrook
Henry G. Miller
Alan B. Morrison
Hon. Jon O. Newman
John R. Subak
Hon. Jim R. Carrigan dissents
Leonard Decof dissents
Elaine R. Jones dissents
Thomas Lambert dissents

February, 1987

I. Introduction

In November 1984, the Special Committee on the Tort Liability System of the American Bar Association completed a broad-ranging, five-year study of the tort system, Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law (the Bell Committee Report). The study examined the network of substantive and remedial tort rules, explored the underlying goals of the system, and analyzed its institutional structure.

Although the Bell Committee Report included a chapter of recommendations, its principal purpose was to conduct a systematic review and evaluation of the existing tort system. As its sweeping mandate and expansive time-frame suggest, the Committee was not expected to focus primarily on the details of change in the existing system.

The present Action Commission to Improve the Tort Liability System, established in November 1985, was set up by the ABA as a successor group to the earlier committee. Prompted both by a desire to build on the foundation established by the Bell Committee and to respond to current calls for tort reform, the ABA charged the Action Commission as follows:

1. Consider recommendations for improving methods and procedures for compensating persons injured as the result of the tortious conduct of other persons;
2. Recommend means of implementing at the earliest possible date those improvements that the Commission finds to be most desirable or necessary to serve the best interests of the public;
3. Recommend any further studies or actions by the American Bar Association that the Commission deems necessary or appropriate to improve methods and procedures for compensating persons injured as the result of the tortious conduct of other persons.

In our deliberations, the Commission has ranged widely over the principal areas of personal injury law, discussing current developments in the fields of medical malpractice, municipal liability, defective products, auto accidents and environmental harm. We have examined the basic goals of the tort system, the processes by which those goals are implemented, and the major recent proposals for tort reform. In addition, we have assessed the limited empirical data on the actual operation of the tort system. In short, we have taken the view that an action commission can fully discharge its responsibility to recommend changes in the present system only after it has conducted a broad examination of the strengths and weaknesses of the tort law in operation.

A truly comprehensive analysis of the tort system must, of necessity, range even beyond liability rules and the litigation process in tort cases. Since midcentury, there has been a dramatic growth in the influence of insurance on the tort system. In virtually every major area where personal injury occurs—in auto accidents, workplace injuries, products liability, medical malpractice, and municipal liability—

---

1 A summary of the Bell Committee's recommendations can be found in Appendix A.
liability insurance is the rule rather than the exception. As a consequence, the institution of insurance has had a pervasive impact on tort doctrine. Consider, as illustrative, the abolition of governmental, intrafamily and charitable immunity; the development of strict liability for defective products; the liberalization of medical malpractice doctrine (e.g. the abolition of the "same locality" rule); the expansion of landowners' liability; and the rejection of the absolute defense of contributory negligence. Although the dynamic growth of insurance coverage has not been the doctrinal developments, it has tangibly affected by personal injury law.

Just as insurance has altered the landscape of liability rules, it has also affected the allocation of injury costs to insured parties. For the drug manufacturer or gynecologist, premium costs of insurance and policy limitations on coverage are frequently critical questions, along with the likelihood of legal liability. The availability and affordability of liability insurance, in other words, has become an important element in measuring the efficacy of the tort system for a considerable number of those most tangibly affected by personal injury law.

Nonetheless, it does not follow that fluctuations in the costs of liability insurance are a direct reflection of corresponding changes in the tort claims system. Other factors affect these trends. Insurers earn income on premium dollars through investment practices that are carried on separately from underwriting and claims activities, and that reflect different economic trends. Moreover, insurers' experience rating practices are influenced by internal administrative considerations which reflect other factors besides the risk-related performance of insured parties. And, to complicate matters still further, insurability in particular lines of activity is partially determined by a reinsurance market that operates, in part, outside the United States economy, subject to its own constraints.

In sum, analysis of the need for tort reform is complicated by the fact that the business practices of the liability insurance industry reflect a wide range of economic factors in addition to the performance of the tort system. The analysis is made more difficult by the current atmosphere of heated debate about whether the problems of the tort liability system are attributable to the performance of the tort system, the insurance mechanism, or both. The debate has focused on the recent phenomenon of steeply rising insurance costs—indeed, in some cases the unavailability of insurance—faced by service providers such as doctors and daycare centers, manufacturers of a variety of products, and municipalities engaged in their traditional public functions.

Those concerned about the performance of the tort system argue that large legal fees and other administrative costs, sharp rises in the magnitude of tort claims, and the unpredictable nature of the system, require drastic revisions in tort law. By contrast, critics of the insurance industry contend that tight regulation of industry competition and insurers' ratemaking practices is the only sure way to bring the costs of liability insurance under control. Clearly, a comprehensive study of the tort system must be sensitive to the contentions on both sides. Yet, the expertise required to undertake an in-depth analysis of the dynamics of the liability insurance system is distinct from professional experience in dealing with tort conflicts.

In our view, this threshold problem is not insoluble. At present, a number of groups, such as the New York Advisory Commission on Liability Insurance, have assessed the performance of the liability insurance system. The New York commission report concluded: "No simple, uni-dimensional theory of causation suffices to explain the behavior of today's liability insurance market. The disorder is driven by two largely independent processes: the industry's distinctive business cycle, which generates an erratic but essentially repetitive pattern revolving around the relative profitability of underwriting and investment activities and the worldwide ebb and flow of capital into and out of insurance; and the long term surge in civil liability costs that principally reflects the form and application of the law of torts. Each process would have had major consequences even if the other did not exist."

The New York study, along with other continuing pressures for better understanding of the practices of liability insurers, will undoubtedly trigger further efforts to document the extent to which insurance practices independently contribute to the steady growth in costs of the tort system. Our focus in this report on reforms aimed at the tort system itself should be understood to reflect the expertise of this commission (as well as the time and data constraints under which we operate), rather than a disregard for the importance of these parallel reform initiatives.3

There are also encouraging signs that the efficacy of the tort system itself will come to be evaluated on the basis of systematic empirical study rather than anecdotal evidence. In particular, the Rand Institute for Civil Justice has generated a continuing series of studies on claims, compensation and administrative costs in the tort system.4 The work of Rand is complemented by studies undertaken by the National Center for State Courts, the American Bar Foundation, and other policy groups and academics that have contributed to an emerging view of the central characteristics of the tort system.5

---

3Recommendation No. 1 and the accompanying Comments express in greater detail our conviction that insurance issues deserve further study.
4For a useful summary of its work, see Institute for Civil Justice, An Overview of the First Six Program Years, April 1980-March 1986 (Rand, 1986) ("ICI Overview"). The most recent findings published by the Institute, drawing on accident cost and compensation data from 1985, is J. Kakalik and N. Pace, Costs and Compensation Paid in Tort Litigation (December 1986) ("1986 ICI study").
5See, e.g., National Center for State Courts, A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 1978, 1981, and 1984. The National Center for State Courts published a much-cited study in April 1986, indicating that the rate of growth in tort filings during recent years has been roughly proportionate to population growth in the same period (1978-84). This study does not provide a specific breakdown, however, of tort filings by types of cases. The American Bar Foundation is engaged in a major ongoing study of punitive damages in tort cases which appears to find that such awards remain relatively infrequent outside the intentional tort area. See ABA Study Shows Punitive
Although the studies in the aggregate cast doubt on the existence of a tort “litigation explosion,” there is reason to believe that substantial recent growth has occurred in the size of tort recoveries at the upper end of the compensation continuum. In addition, the emerging empirical findings suggest that the legal fees and associated administrative expenses of handling tort claims constitute a disturbingly high proportion of the overall costs of the system. These findings, in themselves, indicate the need for continuing reassessment of the existing system for compensating accident victims.

Moreover, when critics point out that tort doctrine has steadily evolved towards a more expansive system of compensation, they are clearly correct. These expansive tendencies are alluded to above, and spelled out in detail in the Bell report. Traditional immunities to compensation per claim (settlements, as well as court awards) of 12 percent in auto cases and 17 percent in non-auto accident cases over the five year period, 1981-85. The Consumer Price Index rose by an average of only 7 percent during the same period.

On the growth in number of filings, the 1986 ICJ data support the National Center for State Court’s conclusion, supra note 5, that there is no indication of a litigation explosion. The 1986 ICJ study finds an average annual increase of 3.9 percent since 1981, or about 3 percent on a per capita basis. The rise in product liability filings in the federal courts has been significantly higher, but this result may be skewed by a limited number of mass tort cases such as the asbestos litigation, as well as the increasing tendency of defendants to seek removal of products liability cases to federal court.

The 1986 ICJ study, supra note 4, indicates that about one-half (46 percent) of an estimated $29.2-$35.6 billion spent on tort suits during 1985 was received by plaintiffs in auto cases and 43 percent in all other accident cases. The study estimates that the legal fees and expenses of injury victims constitute about 33 percent of the total compensation paid to plaintiffs, and that defendants’ legal fees and expenses average about 16 percent of the total compensation paid to plaintiffs in auto cases and 28 percent in non-auto cases during the past five years. Trend data are not available for plaintiffs’ legal fees and expenses.

In the case of no-fault auto legislation, however, the compensation plans only partially displaced the tort system, with wide variance from state to state in the extent of coverage. See U.S. Dept. of Transportation, Compensating Auto Victims (1985).

The Commission of the view that it would be highly desirable to have accurate data indicating the extent to which the tort system and the array of medical and wage loss insurance systems fail to provide substantial levels of compensation for seriously disabled accident victims such as those suffering from brain damage, paraplegia, or comparably incapacitating conditions. If a substantial number of accident victims fell within the gaps in the overall reparations network, there is clearly a strong need for further initiatives addressing the problem.
tem. This Commission was consciously selected to represent a wide spectrum of views on the efficacy of tort law, and the members decided at the outset that such a diverse group could make a positive contribution to the current reassessment of the tort system only by an effort to find common ground among most of its members.

There are, in fact, members of the Commission who hold the view that meaningful improvement in the system of compensating injury victims can better be achieved by adopting a social insurance or no-fault recovery scheme that assures compensation of basic economic loss to every accident victim and promotes incentives to greater safety by through contributions to the funding of the reparation scheme, utilization of criminal and administrative sanctions, or a combination of these strategies. Nonetheless, these members joined in the effort to devise reforms aimed at improving the present system because they clearly prefer an improved tort law to the status quo. At the same time, there are members of the Commission who believe that our present tort system promotes a range of values, particularly individualized compensation, deterrence, and a vent for community discontent, more effectively than would be likely under any alternative system. These members accept the notion that a package of tort revisions—in some instances venturing beyond their own predilections—worth supporting as long as it remains consistent with the fundamental premises of the present system.

The Commission also eschewed detailed analysis of the case for tort replacement schemes out of a sense that it could not otherwise fulfill its mandate. It would be extraordinarily presumptuous to think that the full panoply of philosophical and practical issues underlying the compensation, deterrence, and administrative mechanisms of a comprehensive no-fault scheme could be explored along with the enormous range of middle-level reform issues that the Commission was clearly expected to address within the brief time span of less than twelve months. Significantly, when universal no-fault proposals have been seriously considered in other common law countries such as New Zealand, Australia and England, it has been by commissions established with that primary purpose in mind.

A question of federalism also deserves preliminary mention. With the possible exception of the mass tort recommendation, the proposals in this report can be implemented without recourse to federal action. This is in keeping with the Commission's view that the tradition of state-fashions tort principles remains fundamentally sound. Apart from products liability, we detect no significant need for federal intervention in the major fields of accidental injury—auto accidents, premises liability, professional malpractice, and municipal liability—that would dictate imposing a body of nationally applicable doctrine on the state judiciary. Moreover, as the continuing difficulties in framing a federal substantive law of products liability suggest, there is anything but general assent to a single set of governing accident law principles.

On the contrary, at a time when a principal reason for the dynamic character of tort law is sharp disagreement over principles of liability and rules of damages, it seems advisable to encourage independent efforts at the state level to enhance the fairness and efficiency of the system. These preliminary considerations aside, there are a host of identifiable problems in tort law that need to be addressed if the system is to function with a greater degree of fairness and efficiency. The recommendations that follow are a package that ultimately won the agreement of individuals with widely divergent views. Many accepted some proposals only because of the virtues of the package as a whole. Obviously we cannot limit the manner in which this set of recommendations is assessed and implemented by others, whether in advisory or legislative roles. Nevertheless, we strongly urge all who assess these recommendations to resist the temptation to adjust any one proposal to make it more palatable to a narrow interest. It is our judgment that useful initiatives for change require a cooperative effort to achieve a comprehensive and balanced set of recommendations. We have conscientiously made that effort and offer the following recommendations as an integrated package.

II. Discussion and Recommendations

A. Insurance

The tort system and the liability insurance system undeniably influence each other in significant ways. As the introductory section to this report indicates, the Commission decided to draw on the strength of our present membership and concentrate on an analysis of the tort system. Every member of the Commission agreed to join together in a collegial effort to make the tort system better, and our report deals almost exclusively with recommendations which we hope will improve the system.

In making this conscious choice, we decided that we lacked the capacity to undertake a thorough review of changes to be made in the insurance system. Such an analysis is crucially needed in view of the criticisms that have been leveled at the operation of the system. The General Accounting Office of the United States, to cite one example, has concluded that insurance companies during the period of 1980 interest rates "used a pricing strategy which sacrificed underwriting profit margins in order to generate cash for investment purposes."

The GAO concluded that the loss cycle "bottomed out in 1985 and that the cycle has now turned upward." The agency also reported "available industry estimates show that over the next five years the industry expects substantial net gains.

For discussion, see G. Palmer, Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia (1979).

12 Again, however, we would underscore the need to take an open-minded approach to this question in the mass tort area. See Recommendation No. 20.
At the same time, it has been reported that there have been large increases in premiums for those able to obtain liability insurance with a simultaneous lessening of the coverage given to the insureds. These actions have occurred in a period when many state legislatures have been curtailing the tort remedies of those injured.

The Commission takes no stand as to the validity of these observations but notes that proposals for change are being made in a number of quarters. Many state legislatures, as well as key committees of the Congress, have undertaken major studies of the range of questions about insurance practices and performance that are spelled out below in the Comment to Recommendation No. 1.

While we deliberately refrain from taking a position on these points, we believe they merit as much study as the present commission has given to the tort system. We do this in the spirit of believing that a healthy and profitable system of insurance contributes to the well-being of not only the nation's economic health but also the tort system.

We agree with the conclusion of the Advisory Commission on Liability Insurance in New York that both elements, the insurance component and the tort component, must be addressed if significant improvement in the present system is to be achieved.

Recommendation No. 1

The American Bar Association should establish a commission to study and recommend ways to improve the liability insurance system as it affects the tort system.

Comments

The insurance commission should consider the following issues, among others:

1. The system of ratings for premiums. Should there be prior approval of rates? Or, as the Advisory Commission in New York suggests, should there be a flex system wherein a Superintendent of Insurance mandates a high and low limit within which an insurer may adjust its rates without prior approval, and in which approval is otherwise necessary? In the alternative, should rate structures be left to open competition in the market? This inquiry addresses the issue of an insurer's ability to raise premiums and reduce coverage in a largely unrestrained manner.

2. A method to control the cancellation and non-renewal of insurance. Insurance in our society has been analogized by some to an electrical utility. Because various sectors in our complex society cannot function effectively without insurance, the question arises whether mandatory limitations on cancellation and non-renewal are warranted under some circumstances.

3. The capacity of insureds to group together to insure themselves or form captive insurance companies. How widespread is this phenomenon and what have been its principal consequences? Should the laws and regulations be modified so as to facilitate the creation and appropriate regulation of group self-insurance mechanisms?

4. The role of state and federal government. Should the states set up their own insurance companies to cover areas where insurance is otherwise unavailable or too expensive? Should the federal government monitor national and international aspects of the insurance market? Should there be federal regulation of some or all aspects of insurance markets? Should the federal government engage in underwriting of insurance or re-insurance directly as it presently does in an area such as flood insurance?

5. The antitrust exemption under the McCarran-Ferguson Act. Should it be repealed or modified?

6. A sunshine law. Should information and data about the insurance industry and its experience be available to the public beyond that which is now available from insurance and public sources?

7. The term and coverage provisions of standard form policies. Consider, for example, the claims-made policy. Should its use be extended? If so, in what manner?

8. Data collection. Can better means be developed for gathering reliable and comprehensive data on the costs of the tort liability system? What data are needed and which agencies should be involved in the collection process?

We take no position on any of these issues but believe it would be appropriate for such questions to be studied in greater detail. The main purpose of such a study should be to achieve balance among the competing interests of those who are injured and those who insure parties liable for tortious conduct, as well as policy-holders and the public at large.

B. Pain and Suffering Damages

From the earliest development of the fault system, compensation for intangible loss has been a fundamental tenet of damages. There has been a general understanding that serious injury results not only in out-of-pocket loss but in a measure of pain and suffering that is real despite its intangible character. Indeed, even prior to the Industrial Revolution, when redress for civil tortious wrong was simply a loosely connected set of actions in the form of trespass, assault, false imprisonment, and the like, the medieval common law courts recognized the legitimacy of claims for damage based on mental distress or personal outrage without requiring any attendant outlays for actual economic loss.

As the negligence system evolved, the common law of damages recognized an individualized form of redress in which the plaintiff presented evidence of the tangible and intangible loss suffered in the immediate case. Perhaps the clearest expression of this view is in the so-called "thin-skulled plaintiff" rule which has always been understood to mean that, once liability has been established, the defendant takes his victim as he finds him. The injured pedestrian who is so traumatized by the defendant's negligent driving that he suffers recurrent nightmares and neuroses after his body has mended can legitimately claim damages beyond that suffered by a less sensitive accident victim. More generally, the ordinary claims of an accident victim to recover for pain suffered...
during a period of rehabilitation—
and in an appropriate case the esti-
ated continuing pain and sense of
humiliation associated with his inju-
ries—is recompensed without any
fixed limit. Tort law aims to make
the victim whole.

Reservations about compensat-
ing for intangible loss are not new.
There has been long-standing crit-
cism about the seemingly insur-
mountable problem of translating
suffering into dollar-and-cents
terms. Moreover, pain and suffering
is subjective in the added sense that
it varies tremendously from one in-
dividual to another. Amputation of
a limb, for example, may be psy-
chologically devastating to one in-
jury victim, while another quite
successfully comes to terms with the
handicap. These uncertainties of
measurement carry a number of
implications: (1) any figure, in a
case of serious injury, may appear
speculative; (2) damages may ap-
ppear, to the outside observer at
least, to have very little “compensa-
tory” effect; and (3) awards inev-
itably vary greatly from case to
case—raising questions about
whether like cases are being treat-
ed in like fashion.

Traditionally, the response to
these objections has been the intu-
itively appealing argument that no
matter how arbitrary the precise
dollar valuation of pain and suf-
ferring may appear in a particular
case, there is clearly a real element
of loss associated with a serious in-
jury, above and beyond the doctor’s
bills and lost income. If the costs of
torts are to be properly measured,
both from a compensation and a de-
terrence perspective, intangible loss
must be taken into account. More-
over, the argument goes, there is
good reason to think that money
does have a salutary effect—that it
addresses, to some extent, the vic-
tim’s feelings of outrage and in-
dignation, and that it provides the
means of purchasing some materi-
al relief from sustained suffering.

Recently, the arguments for eli-
minating or controlling the amount
of compensation for pain and suf-
ferring have taken a somewhat dif-
ferent form. To begin with, it is
pointed out that no-fault systems
for industrial injuries and auto ac-
cidents invariably involve a trade-
of reduced recovery, if any, for
intangible loss, in return for wide-
spread coverage of injury victims.
While medical malpractice, pro-
ducts liability, and claims against
municipalities have not been in-
corporated into no-fault schemes,
the substantial doctrinal extensions
of liability in these areas have led
some critics to call for tax-offs
in the form of limits on non-
economic loss to maintain a lid on
the overall costs of liability
associated with these activities.

Another variant of this criticism
relies on the recent empirical data
on claims and costs of the tort sys-
tem. As mentioned earlier, there is
considerable evidence that the av-
ge size of tort awards (in con-
trast to the median size) has
increased substantially in recent
years—and reason to believe that
this increase is due to a signifi-
cant growth in the upper range of recov-
eries in serious injury cases.18 These
data, the doctrinal extensions re-
ferred to above, and the claims ex-
perience of insurers have led some
critics to argue that the tort system
is out of control, and that runaway
costs will be effectively checked
only when limitations are placed on
intangible damage recoveries.

The Commission has given care-
ful consideration to the arguments
and concluded that legislative caps
on non-economic loss are unwar-
ranted, but limited judicial controls
are advisable. In the Commission’s
view, there are two major reasons
for opposing any ceiling on non-
economic loss. As a matter of prin-
ciple, many members of the
Commission believe that it is sim-
ply unjust to discriminate against
the relatively small number of ac-
cident victims who suffer the most
devastating physical and psycho-
logical injuries. Clearly, the lower
the ceiling the more drastic is the
discrimination against the most
grievously injured accident victims.

The Commission’s related objec-
tion is aimed at the setting of any
particular cut-off point. The entire
commission regards the setting of a
cap on non-economic loss at
$100,000 or $250,000 as unaccept-
able, but even if a low cap
seemed desirable the related ques-
tion is how a rational choice could
possibly be made between these
figures. Correlatively, as one moves
to the higher range of caps—in the
$1 million neighborhood—where
concern for the plight of the most
seriously injured would be dimin-
ished, the question arises whether a
cap any longer accomplishes sig-
nificant gains that warrant its large-
ly symbolic effect. In light of these
considerations, there is substantial
agreement on the Commission that
the ceiling has not been made for a
ceiling on intangible loss without
far better evidence that the occa-
sional multimillion dollar verdict
is creating havoc in the tort/insur-
ance system.19

Some Commission members
would support a ceiling on non-
economic loss if a compensation
plan for catastrophic injury victims
were adopted which featured uni-
versal coverage. In other words, if
a social insurance scheme were put
in place which assured every cata-
strophic injury victim full compen-
sation for economic loss—and not
just those who are fortunate enough
to recover under the restrictive
criteria of the tort system—then a
moderate ceiling on recovery of
non-economic loss might well be
warranted. Those sharing this view
would emphasize their concern that
the most serious problem of acci-
dental injury existing in our society
today is the treatment and rehabil-
itation of the singularly unfortunate
accident victim who has been to-
tally or gravely disabled for life.

Even if a ceiling on pain and suf-
ferring is regarded as objectionable,
it does not follow that there is no
merit to the concerns about the rise
in the size of tort awards in more
serious cases and the lack of uni-
formity in redressing apparently
similar injuries. The Commission
believes, however, that these con-
cerns can be addressed through the
exercise of greater controls on the
non-economic component of dam-
age awards without altering the
fundamental discretionary authori-
ty of juries in personal injury cases.
If, however, credible evidence
emerges in the future that the aver-
age size of verdicts is continuing
to rise at an excessive rate and that
relatively few large verdicts are
consuming an increasingly large
proportion of the total amount

18See Note 6, supra.

19Even then, the current discussion is lim-
ited to the non-economic increment of dam-
ages. The Commission would not limit tort

relief to less than full recovery of eco-

nomic loss—defined to include estimated future
medical expense and wage loss—under any

circumstances.
awarded in tort cases, some members of the Commission think that a case for ceilings might well be made out.

The following recommendations are offered to accomplish a greater degree of uniformity and consistency in awards of pain and suffering damages.

*****

Recommendation No. 2

There should be no ceilings on pain and suffering damages, but instead trial and appellate courts should make greater use of the power of remittitur or additur with reference to verdicts which are either so excessive or inadequate as to be clearly disproportionate to community expectations by setting aside such verdicts unless the affected parties agree to the modification.

Comments

(a) The recommended standard for remittitur builds upon the experience in the state courts of New York. Although the extent of an award in a personal injury case is primarily a question of fact for a jury, the amount of the award should bear a proper relation to the character of the injury and the suffering endured. In New York, the courts have not been timid in modifying an award found to be disproportionate to community standards and directing a new trial, normally limited to damages, unless the party affected accepts the reduction.

A recent example is illustrative. In Korman v. Public Service Truck Renting, Inc., 116 AD2d 631, 497 NYS2d 480 (1986), the trial judge in a death action modified the jury's verdict, including a reduction of the $500,000 award for conscious pain and suffering to $50,000. The reduction, sustained by the appellate court, was based upon an evaluation that the proof would not support the amount of the jury's verdict.

The standard which is applied in New York is the same standard for remittitur applied in all common law jurisdictions: Does the verdict shock the conscience of the court? But the New York courts are not reluctant to act in a case where the award is disproportionate to community expectations. The guiding philosophy has been summed up in the dissenting opinion of Judge Hopkins of the Appellate Division of the New York Supreme Court, Second Judicial Department, in Miner v. Long Island Lighting Co., 47 AD2d 842, 847, 365 NYS2d 873 (1975), rev'd on other grounds, 40 NY2d 372, as follows:

The amount of damage is peculiarly a matter for the trier of fact, and the rule perhaps was calculated to restrain the power of the Court to modify the verdict in the exercise of a discretion unfettered by standards. Yet, where a verdict awarded by a jury is so large, as in this case, the question of excessiveness is not so much whether the size of the verdict outrages the Court's conscience, but whether the verdict is clearly beyond what ought to be reasonable compensation to the plaintiff in terms of uniformity and community expectations. In short, the Court should not allow verdicts which are far above the average in similar cases to stand. . . . [The Court, as an exercise of public policy, must control verdicts within flexible limits, but limits there must be....

(b) The detailed attention to remittitur in the preceding Comment addresses the current concern about excessive verdicts. Abuse of discretion is a two-sided coin, however. It remains possible that in a given case a tort award would appear to be arbitrarily low, rather than arbitrarily excessive. As the Commission recommends, under such circumstances courts should exercise the traditional power of additur, where constitutionally permissible, to safeguard the plaintiff's interest in receiving fair compensation.

Recommendation No. 3

One or more tort award commissions should be established, which would be empowered to review tort awards during the preceding year, publish information on trends, and suggest guidelines for future trial court reference.

Comments

(a) The recommended tort award commission could be either a national body or a group of state commissions. Its central purpose would be to gather information and to educate judges and attorneys on patterns and trends in tort awards, so that a reasonable degree of consistency in damage assessments might be achieved. Once such a body established credibility in the courts, the information it compiled might be useful in the framing of jury instructions, the exercise of the power of additur and remittitur, and the process of settling cases. The commission should be an independent body whose function is purely advisory.

(b) To the extent feasible, it would be useful for any such tort commission to compile reliable information on patterns of settlements as well as court awards.

Recommendation No. 4

Options should be explored to provide more guidance to the jury on the appropriate range of damages to be awarded for pain and suffering in a particular case.

Comment

The Commission recognizes the need for greater uniformity in the award of damages for pain and suffering. To achieve that end, greater guidance to juries on the appropriate range of damages for pain and suffering may be helpful, including reliance on data generated by a tort award commission established pursuant to the preceding Recommendation. The Commission recommends that options to provide more information and guidance to juries be explored in order to achieve the goal of greater consistency in court awards.

Recommendation No. 4 may be implemented in a number of ways. Some on the Commission would have the trial judge suggest an advisory but non-binding range of high and low awards for pain and suffering on the basis of experience in prior similar cases (and after the liability issue has been tried). A number of members of the Commission, however, were concerned about the grant of such substantial power to the trial judiciary and expressed reservations about influencing jury decisions to such an extent.

C. Punitive Damages

Since the main purpose of tort law is to provide compensation to injury victims rather than vindicate a public sense of indignation, punitive damages have always been
sometimewhat of an anomaly in the tort system. Nonetheless, recourse to punitive damages has a long history in common law tort actions, associated for the most part with intentional wrongdoing.

In the classic cases of intentional harm, the justification for punitive damages is twofold: From the standpoint of tort theory, punitive damages express the full measure of societal outrage and assure the appropriate deterrent effect in cases where a defendant’s conduct is outside the bounds of civilized behavior. Frequently in such cases, recovery limited to the plaintiff’s actual harm—the indignity of being spat upon in the courtroom by a disappointed suitor, defamed by an adversary, or bloodied in combat to very little. Typically, there is no effective criminal remedy to complement civil redress in such cases. Although an occasional criminal prosecution for assault and battery may occur, most tortious intentional harms involve conduct that is emotionally or physically bruising to the unfortunate victim, but of little consequence to society at large. Hence, punitive damages traditionally have served the important function of ensuring a measure of punishment for essentially private unlawful conduct that is commensurate with the antisocial nature of the act.

The present unrest about punitive damages in tort is wholly unrelated to the traditional cases of intentional harm in which the remedy was fashioned. In recent years, many jurisdictions have allowed punitive damages to be awarded in situations where the defendant’s conduct falls short of intentional wrongdoing. When it appears that the defendant has engaged in “willful and wanton” misbehavior, even though less than intended misconduct, a consensus would probably still exist in favor of allowing punitive damages—and there would be no chilling effect on patterns of everyday behavior. But concepts such as “willful misconduct” and the lesser standard of “gross negligence” have no easily identifiable referents in the real world of careless behavior. As a consequence, the judicial willingness to allow punitive damage awards in cases involving egregious conduct falling short of intentional wrongdoing has increasingly fostered a sense of concern that the limited function of such awards—to punish misconduct that is either clearly malicious or at least borders on intentional wrongdoing—might be exceeded in some cases.

The problem is well-illustrated by the case of Taylor v. Superior Court, 24 Cal.3d 890 (1979), in which the California Supreme Court engaged in a wide-ranging dialogue, involving separate concurring and dissenting opinions, on the issue whether punitive damages are appropriate in a case of injuries caused by an intoxicated driver. The majority answered in the affirmative, adopting a standard of whether the defendant’s behavior manifested “such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton.” But a consensus could not be reached.

The court divided both on whether this standard was an appropriately narrow expression of the limited scope of punitive damages in civil cases and on whether driving under the influence of alcohol typically involves conduct that in fact meets such a standard.

For many observers of the tort scene, the key question underlying any such debate would be who decides. Even if a “conscious disregard” standard is viewed as appropriately narrow language, it leaves considerable room for jury discretion in determining the propriety of punitive damages—unless additional controls are placed on the finder of fact. Critics of the present day operation of punitive damage awards would place special emphasis on the leeway given to juries and argue for judges to exercise greater control.

Critics also argue that the magnitude of punitive damage awards—both in number and size of awards—has reached intolerable proportions for businesses and professionals. This contention is usually an aspect of the more general charge that non-economic loss awards are out of control and wreaking havoc in the tort system. As in the case of pain and suffering damages, critics frequently propose a ceiling on punitive damages or controls on jury discretion.

A balanced assessment of whether punitive damages are a major problem clearly requires an evaluation of whatever empirical data are available. Preliminary studies by the American Bar Foundation and Rand provide some assistance.21 These studies suggest that punitive damage awards continue to be most common in traditional areas such as personal injury, fraud, false arrest and defamation. The ABF study found that punitive damages continue to be very infrequently awarded in accidental injury cases in any of the thirty jurisdictions studied.22

Critics of punitive damages argue that even if the incidence of awards remains relatively stable in unintentional injury cases, an occasional large award introduces an element of unpredictability that undermines the stability of the tort system, and distorts the settlement process. Moreover, they argue that the major strategic import of punitive damages is the introduction of evidence of the defendant’s wealth to influence the size of compensatory awards. This consequence, it is asserted, is masked by the focus on rates of growth in the number and size of recorded punitive damage judgments.

In response, defenders of punitive damage awards argue that ceilings would preclude the multimillion dollar “sting” that is the only effective safeguard against serious corporate misconduct. As to the concern about jury prejudice (through evidence of defendant’s wealth), some observers would respond by proposing bifurcation of the trial process.

2022At the same time, the study did find that punitive damages were awarded in a significant number of insurance bad faith cases—a category that might be regarded as distinct from the traditional areas of punitive damages. A forthcoming empirical study by Judge Richard Posner and Professor William Landes confirms the finding that punitive damage awards remain rare in all types of accidental injury cases. See Punitive Damages Said Very Rare in Products Suits, L.A. Daily Journ., Oct. 17, 1986, at p. 1.
The principal reason for the Commission's opposition to a ceiling on punitive damages is the deterrence concern. Although it cannot be conclusively demonstrated that the prospect of punitive damages serves as an effective deterrent in cases of catastrophic widespread harm, it does serve as a complementary strategy to criminal sanctions, which are typically minimal or non-existent in such cases, administrative remedies, which may be prospective only, and civil compensatory damages, which are sometimes disproportionately less than the magnitude of the defendant's wrongdoing.

But the Commission is not insensitive to the fairness concern about random cases of burdensome awards. Nor do we dismiss the possibility of abuses in the stringent limitation of punitive awards to cases of truly outrageous indifference to the safety of others. In our judgment, however, the most effective means of addressing these issues is through a rigorous set of procedures for determining punitive damages.

**Recommendation No. 5**

The scope of punitive damages in cases involving damage to person or property should be narrowed through the following measures:

a. The standard of conduct. Punitive damages should be allowed only in cases where the defendant's conduct indicates substantially greater indifference to the safety of others than ordinary negligence, such as intentional action or conduct in conscious disregard of the rights or safety of others.

b. The standard of proof. The standard of proof in awarding punitive damages should be higher than in awarding compensatory damages. The standard should be proof by “clear and convincing evidence.”

c. The process of decision.

1. Appropriate pre-trial procedures should be routinely utilized to weed out frivolous claims for punitive damages prior to trial, with a savings mechanism available for late discovery of misconduct meeting the standard of liability.

2. Evidence of net worth and any other evidence relevant only to the question of punitive damages ordinarily should be introduced only after the defendant's liability for compensatory damages and the amount of those damages have been determined.

d. Multiple judgment torts. While the total amount of any punitive damages awarded should be adequate to accomplish the purposes of punitive damages, appropriate safeguards should be in force to prevent any defendant from being subjected to punitive damages that are excessive in the aggregate for the same wrongful act.

e. To whom award should be paid. After deducting costs and expenses, the court should determine what is a reasonable portion of the punitive damages award to compensate the plaintiff and counsel for bringing the action and prosecuting the punitive damages claim, with the balance of that award allocated to public purposes.

**Comments**

(a) A principal concern in this area is that an occasional jury awards punitive damages against a defendant as a means of punishing serious negligence which does not amount to really egregious misconduct. Although the line separating negligence from conduct in conscious disregard of the rights or safety of others may be difficult to draw, we believe that there is a difference in kind that needs to be respected if punitive damages are to serve their proper function. The standard of conduct required by this recommendation is an attempt to meet this concern.

(b) The Recommendation establishes a higher degree of proof than is ordinarily required in a civil case in order to create a corresponding assurance that punitive damages will only be awarded where there is strong evidence that the standard of conduct has been violated.

(c) The segmentation provision in (c)(2) of the Recommendation is a specific instance of the Commission's more general belief, spelled out in Recommendation No. 16, that judicial economy and fairness will be promoted by wider use of this technique. At the same time, we recognize that in some cases, for example police brutality cases under 28 U.S.C. 1983, questions of liability and damages are often inextricably bound together and separate hearings would be unwise.

(d) Section d of this Recommendation, addressing multiple judgment torts, reflects a strong concern about punishing defendants repeatedly for the same wrongful course of conduct, such as may occur in certain toxics and drug cases. Nevertheless, there could be instances in which a single punitive damage action would be insufficient; for example, where information about the defendant's reckless or intentional misconduct emerges piecemeal over the course of many cases. More generally, the multiple judgment punitive damage issue needs further study as an aspect of a comprehensive approach to mass torts, as proposed in Recommendation No. 20.

(e) Although we believe that the jury should continue to be used for deciding questions of liability and size of award in punitive damages cases, we regard this area as one where the judge should be vigorous in exercising the power of remittitur and additur. More generally, we regard the concerns expressed in Recommendation No. 4 and the accompanying Comment, with respect to providing more guidance on the range of awards, as applicable here, as well.

**D. Joint-and-Severable Liability**

Under the doctrine of joint-and-several liability, every defendant who is found to be legally responsible for a tortious injury may be held responsible for the plaintiff's entire damages in the event that other defendants cannot be joined or are incapable of contributing their equitable share of the plaintiff's loss. Although this rule is not of recent origin, its earlier applications typically involved a relatively uncontroversial set of circumstances. An illustrative case would be the situation where a passenger in a car is injured in an accident caused by the negligent driving of his driver and the driver of another car. Even though the two were not acting jointly, each would be liable for the entire loss, and if one were insolvent the other might in fact bear the total cost of the harm done.

This classic application of joint-and-several liability was uncontroversial for two distinct reasons. To begin with, the common law of negligence, as it has evolved from the beginning of the Industrial Revolution, has been characterized by an all-or-nothing approach. The de-
The current dissatisfaction with joint and several liability appears to be an outgrowth of a series of related departures from the common law tradition. First, the all-or-nothing approach has been seriously compromised by the recent development of comparative negligence, and its corollary, comparative contribution among defendants. The tort system is now committed to thinking in terms of degrees of fault. Second, in a superficially distinct area, the longstanding tort immunity that shielded municipal entities from liability has been substantially reduced in recent years. This change, in turn, has created the prospect of suits against municipalities for creating dangerous conditions or failing to provide services which, in conjunction with the negligent acts of others, cause harm to innocent parties. As a consequence of the expansion of municipal liability, a joint-and-several liability scenario developed in which defendants engaged in distinct activities—e.g., a negligent driver and a careless roadway maintenance department—rather than like courses of conduct, harm the plaintiff.

The argument for changing the doctrine of joint-and-several liability proceeds from these premises.*

*Like the doctrine of joint-and-several liability, the collateral source rule has a long history at common law, and it has likewise been the subject of recent calls for tort law revision. In contrast to joint-and-several liability, however, the collateral source rule has not generated recent cases of a kind that suggest it might be operating more inequitably than it had in the past. Instead, the current criticism of the rule seems largely attributable to the present, ongoing reassessment of the tort system triggered by concern about rising costs of compensation. Because the Commission was unable to conclude that the collateral source rule (in conjunction with the exercise of subrogation rights) is either imposing significant costs on the system or creating serious inequities that need to be addressed, we have decided to make no recommendation on this subject. The collateral source rule is discussed in Appendix B.

To put an extreme case, consider a scenario in which a city is found to be 5% at fault for failure to trim a hedge that slightly impedes the view at an intersection where a reckless driver (95% at fault) runs a stop sign and seriously injures plaintiff pedestrian. If the driver is insolvent, the city ends up footing the entire bill for the plaintiff's injuries. There is a perceived sense of unfairness in cases where the blameworthiness of the defendant's conduct contributing to the plaintiff's harm is so dramatically out of line with the ultimate burden of damages borne by the defendant.

There are counter-arguments, however. The principal argument in favor of the doctrine of joint-and-several liability is that it promotes the fundamental goal of making innocent plaintiffs whole when they have been wrongfully injured. To the extent that we recognize the inequity of taxing a defendant beyond proportionate responsibility for the plaintiff's harm, we do so in some cases at the cost of full recovery for the plaintiff's injuries. Moreover, the sense of inequity engendered by the doctrine of joint-and-several liability arguably loses some of its force as the defendant's proportionate blame-worthiness increases.

Thus, some observers would undoubtedly feel far less concern about making the plaintiff whole through assigning full loss responsibility to a defendant who was 50% responsible for the plaintiff's injury (i.e., as responsible as the insured defendant) in contrast to a defendant who was only 5% responsible for the plaintiff's injury.

To complicate matters, there are no informative data sources on the extent to which "extreme" cases of joint-and-several liability arise. It is conceivable that municipalities and insurers have been reacting to a handful of horror stories in their recently expressed concern about the imposition of grossly disproportionate liability. Perhaps, instead, such cases arise infrequently, juries are largely unsympathetic to claims based on de minimis carelessness, and as a consequence, the number of these cases is not likely to rise dramatically in the future. On the other hand, it may be that the temptation to find the solvent "deep-pocket" defendant liable in cases of grievous loss, particularly in auto accident situations where hit-and-run and uninsured motorists abound, is sufficiently widespread to constitute a real and growing problem.

To round out the picture, it should be emphasized that the deep-pocket concern is generally triggered by the underinsurance or insolvency of the primarily responsible party. If adequate insurance or no-fault compensation arrangements existed to backstop the responsibility of the impecunious or absent defendant, by definition there would be no need for recourse to deep-pocket, joint-and-several liability.24

What, then, are the options? It would be possible to retain the status quo, re-affirming the long-standing rule of joint-and-several liability.

24In this connection, we underscore the salutary effects that would result from stronger efforts to promote more expansive uninsured and under-insured first-party motorists' coverage.
as a means of ensuring adequate compensation to injury victims. At the other extreme, it would be feasible to abolish joint-and-several liability altogether on the ground that a defendant should never be liable for more than a proportionate share of responsibility for an accident situation. Between these polar positions, there is an array of possibilities for “compromise” solutions (recognizing the equitable claims of both plaintiffs and defendants) based on partial limitations of joint-and-several recovery.

********

Recommendation No. 6

The doctrine of joint-and-several liability should be modified to recognize that defendants whose responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff are to be held liable for only their equitable share of the plaintiff's non-economic loss, while remaining liable for the plaintiff's full economic loss. A defendant's responsibility should be regarded as “substantially disproportionate” when it is significantly less than any of the other defendants; for example, when one of two defendants is determined to be less than 25% responsible for the plaintiff's injury.

Comments

(a) As the Recommendation indicates, no matter how slight the defendant's responsibility, the plaintiff should always be entitled to full recovery of economic loss resulting from defendant's tortious act (including estimated future medical expenses and wage loss). Thus, each defendant would still be jointly-and-severally liable, without limitation, for economic losses.

Moreover, a defendant whose responsibility is substantially disproportionate is absolved only of the excess over a proportionate share of non-economic loss.

(b) Since there is no inexorable logic in support of a 25% cutoff point, we offer it as illustrative only. However, any specified figure is arbitrary, and arbitrariness cannot be avoided by failing to quantify the concept of “substantially disproportionate” responsibility. Rather, a purely verbal standard introduces a different brand of arbitrariness—uncertainty and the prospect of failing to treat like cases in similar fashion.

(c) In comparative negligence states, only the co-defendants' respective shares of responsibility, and not the plaintiff's responsibility, should be taken into account in determining whether any single defendant's joint-and-several liability would be “substantially disproportionate.”

(d) When there are more than two responsible co-defendants, the determination whether joint-and-several liability of any single co-defendant would be “substantially disproportionate” becomes slightly more complicated, but the basic principle remains the same: whatever percentage figure is adopted as a threshold for the two-party situation continues to establish the necessary spread for a defendant's responsibility when compared to the co-defendant with the greatest responsibility in the three (or more)-party situation.

(e) Although recent unrest over the joint-and-several liability rule appears to arise most frequently in the municipal liability context, the doctrine has general application in the torts field. The Commission is not disposed to limit its recommendation for change to the field of municipal liability. If the joint-and-several liability doctrine at times fosters inequity, there is no apparent reason to limit relief to municipal defendants. At the same time, however, the liability of disposers, operators, and transporters in hazardous waste site cases raises such distinctive causation issues, and frequently involves such singularly large numbers of defendants, that it deserves further attention as anticipated in Recommendation No. 20 on mass torts.

E. Attorneys' Fees

The singular aspect of attorneys' fees in American tort cases is the established practice of compensating the lawyers of injury victims for their services on a contingency basis. The Commission reaffirms the value of the contingent fee system, principally because we believe that it has the salutary effect of providing access to the courts to economically disadvantaged injury victims who might not otherwise be able to pursue their legitimate claims for relief. In our view, it is unnecessary at present to argue the case for or against the contingent fee system at greater length, since the current criticism of the tort system is focused on the size of attorneys' fees rather than the mechanism for assessing the fees.

Beginning with the medical malpractice controversy of the mid-1970s, there have been recurrent complaints about the percentage of awards taken by plaintiffs' lawyers and a variety of proposals aimed either at capping their fees or creating a sliding scale dependent on the size of the award recovered. These proposals appear to reflect two concerns: (1) that injury victims, who are by definition a highly vulnerable class, should be protected from overreaching attorneys, and (2) that frivolous litigation, reflected in the rising overall costs in many areas of tort law, should be discouraged. Both arguments are buttressed by resort to empirical data. The claim that injury victims are receiving an inadequate portion of the pie relies on support for data indicating that a substantial proportion of the amount awarded in tort cases is never actually received by plaintiffs as recompense for their injuries. The contention that the overall costs of tort litigation are out of control relies on time-series data indicating a steady upward trend in the aggregate administrative and legal costs of the tort system.

It should be emphasized that the empirical data as well as observational experience show that the problem of high administrative costs cannot be attributed solely to legal representation on the plaintiff's side. Consider, for example, the often-voiced complaint that legal fees are inflated in some cases by over-lawyering through utilization of a team of attorneys for work that could be done by fewer counsel. It seems doubtful that anyone would contend this is exclusively a plaintiffs' representation issue.

More generally, the phenomenon of substantial lawyering costs in tort cases appears to be associated as much with defense costs and fees as with those on the plaintiff's side.

Some important qualifications to the generalized claim of excessive costs need to be entered. Rising costs of the tort system must be assessed in the context of population

24See 1986 ICI data, note 7, supra.
25On aggregate administrative and legal costs, see note 7, supra.
growth and rate of inflation. In addition, a higher rate of claims may mean—as is frequently contended in the medical malpractice area—only that a higher proportion of the legitimate cases are being pursued. Nevertheless, the Commission believes that both underlying concerns are warranted: injury victims need added protection against over-reaching and the tort system needs to be streamlined in order to cut the burgeoning administrative costs of shifting dollars in compensation to deserving persons.

But the Commission also believes that regulating attorneys' fees is an inappropriate strategy for accomplishing either of these objectives. Indeed, as an initial proposition, the Commission would point out a serious issue of equity: occasional instances of over-reaching and substantial outlays in administrative costs are concerns that affect every area of legal practice, rather than exclusive characteristics of personal injury cases.

More importantly, the legitimate concerns about administrative costs and over-reaching can be addressed through measures that are directly related to these problems. Instead of relying on fee limitations, which create disincentives to litigate potentially meritorious cases, excessive administrative costs of the tort system can be controlled by streamlining the litigation process—sanctioning spurious claims, clamping down on dilatory discovery practices, and so forth. In Section G, a number of proposals along these lines are offered. As far as the companion criticism about over-reaching is concerned, the most promising approach again rejects the blunt instrument of mandatory fee scheduling in favor of a strategy relying on mandatory disclosure and judicial authority to reduce plainly excessive fees. The strategy is embodied in the following recommendations.

*****

Recommendation No. 7

Fee arrangements with each party in tort cases should be set forth in a written agreement that clearly identifies the basis on which the fee is to be calculated. In addition, because many plaintiffs may not be familiar with the various ways that contingency fees may be calculated, there should be a requirement that the contingency fee information form be given to each plaintiff a reasonable time before a contingency fee agreement is signed. The content of the information form should be specified in each jurisdiction and should include at least the maximum fee percentage, if any, in the jurisdiction, the option of using different fee percentages depending on the amount of work the attorney has done in obtaining a recovery, and the option of using fee percentages that decrease as the size of a recovery increases. The form should be written in plain English, and, where appropriate, other languages.

Comments

(a) The purpose of this Recommendation is to ensure that there are no misunderstandings about fee arrangements. With respect to injury victims, the proposed disclosure form should contain language such as the following:

1. There is no established, required, or fixed percentage fee applicable to all contingent fee cases [but there is a maximum of ___% if the jurisdiction has any maximum]. A contingent fee, like all other fees, is a matter to be freely negotiated between the attorney and the client. The only requirement is that a contingent fee, like all other fees, must be reasonable under the circumstances.

2. A fee of one-third of the recovery is often used in contingent fee cases. That fee would generally be a reasonable fee in a contested lawsuit, where the liability of the defendant is in doubt or there is a substantial dispute about the amount of the damages. A fee of one-third may or may not be reasonable to both the attorney and the client in other cases.

3. One factor to consider in setting a reasonable fee is the amount of time expended by the attorney. If a settlement is reached in a case after an exchange of letters and some brief telephone conversations, a one-third fee would generally not be considered reasonable. If a case is settled after suit is filed, a lower fee is often appropriate when settlement occurs after a minimal amount of work by an attorney rather than where settlement occurs just before or during trial. On the other extreme, if a full trial and an appeal take place, a fee greater than one-third might be reasonable. For these reasons, a fee agreement with a sliding scale of contingent fees, depending on how far the litigation progresses, is permissible.

4. The risk that the lawyer may do considerable work and not recover any fee is also a factor that may properly be taken into account. Thus, a higher fee would be reasonable in cases where there is substantial difficulty in establishing that the defendant is liable, but in those cases in which liability is either clear or admitted, and the amount of the damages is minimally disputed, a lower contingent fee would be reasonable. Similarly, if the defendant, or the defendant's insurance company, has offered a settlement which has been rejected, some lawyers accept a fee only for the portion of the recovery beyond what has been offered.

5. In addition, some cases are extremely complicated or the amounts likely to be recovered appear to be quite modest. In those cases an attorney would be justified in charging a higher percentage as a fee.

6. It is often appropriate to use a contingency fee with percentages that decrease as the size of a recovery increases.

7. In the event that any dispute arises between a client and a lawyer about the representation or fees charged or paid [brief explanation of the dispute resolution mechanisms in the jurisdiction].

(b) Prior to the adoption of a mandatory disclosure form, there should be opportunity for input from the bar and the public.

Recommendation No. 8

Courts should prohibit the practice of taking a percentage fee out of the gross amount of any judgment or settlement. Contingent fees should be based only on the net amount recovered after litigation
disbursements such as filing fees, deposition costs, trial transcripts, travel, expert witness fees, and other expenses necessary to conduct the litigation.

Comment
The prohibition on applying contingent fees to gross judgments or settlements, proposed in the Recommendation, is needed because clients rarely think about the difference between net and gross recoveries when they enter contingent fee agreements (or even when a case is settled), and the difference can be quite substantial and seriously affect the ratio of the plaintiff's recovery to that of the attorney. Many lawyers follow the practice of applying the percentage to the net recovery, and the Commission believes that practice should be made uniform and mandatory.

Recommendation No. 9
Whenever judgment is entered in a tort case, fee arrangements with each party, and the fee amount billed should be submitted in camera to the court, which shall have the authority to disallow, after a hearing, any portion of a fee found to be "plainly excessive" in light of prevailing rates and practices.

Comments
(a) In the Commission's view, assurance of adequate representation and avoidance of excessively high fees require steps beyond mandatory disclosure and necessitate a limited measure of judicial monitoring of fee arrangements. The application for judicial review of fee arrangements, with each party and the fee amount billed should be submitted in camera to the court, which shall have the authority to disallow, after a hearing, any portion of a fee found to be "plainly excessive" in light of prevailing rates and practices. The "plainly excessive" standard is an attempt to create a safeguard against occasional instances of clear departure from customary fee standards of legal representation.
(b) This Recommendation is not limited to injury victims. The Commission's concern about potential overreaching and unreasonable costs of representation in personal injury cases extends beyond the contingent fee and the injury victim's representation; there is an equally vital concern that defendants are not overcharged in tort litigation and that hours are not billed for tasks that are needless or unnecessarily prolonged.
(c) As indicated, this Recommendation applies only to judgments and not settlements. Despite the Commission's concern that serious abuses of fee arrangements may sometimes occur in cases which are settled and in which the attorney has done very little work, we limit the Recommendation to judgments because of a competing concern that judicial monitoring of fee arrangements in settlements might excessively burden the Courts. In the Commission's view, states and bar associations should provide fee dispute arbitration mechanisms for cases that are settled in which a party contends that the fee was plainly excessive.
(d) This Recommendation provides that the bill and the basis for it be submitted in camera. The submissions and the court's determination should be made a part of the public record only if there is a finding of an excessive fee.

E. Secrecy and Coercive Agreements
Defense counsel in product liability cases often request that plaintiffs' attorneys enter into secrecy agreements in order to obtain documents, interrogatory answers, or even depositions. Because the courts are reluctant to referee discovery fights about every claim of privilege, and because the plaintiff's attorney in a particular case may be indifferent as to whether documents disclosed by defendants are available to the public, plaintiffs generally go along in order to move the case ahead. Judges generally assent to such agreements, in large part to move cases along and avoid controversy.
Secrecy agreements raise a number of issues in connection with ongoing litigation. The first is that in a typical products liability situation, there will be individuals suing all over the country, and the secrecy agreements preclude them from sharing information with each other, even where the other plaintiffs and their lawyers agree to be bound by the terms of the secrecy agreement. Some contend that the purposes of this practice are to run up the costs of litigation for plaintiffs and to prevent plaintiffs from sharing strategy as well as documents with one another. Others respond that the practice reflects genuine privacy concerns.
The second related issue is that the prohibitions also preclude the giving of information to regulatory and law enforcement agencies that may need the data to decide whether a particular product should be taken off the market, warning labels required, or other action taken to protect the public. Once again, supporters of secrecy agreements assert the privacy claim. In reply, critics of the practice point out that federal agencies are prohibited from disclosing trade secret materials, and most of them have procedures under which a person claiming that information is a trade secret, or otherwise confidential, are given reasonable notice before it is made public. Proponents of secrecy agreements question the efficiency of these governmental confidentiality provisions.
A third related issue arises when a promise is extracted from the plaintiff's attorney not to represent other victims in similar cases. Such an agreement is currently improper under the provisions of the Code of Professional Responsibility, which prevent restrictions on a lawyer's practice, but it is still done in some instances.26
A fourth aspect of the secrecy problem relates to post-settlement or post-verdict conditions that require the destruction or return of documents obtained from the defendant, including in some cases notes and files of the plaintiff's attorney. Assuming that the information-sharing prohibitions were removed, the principal effect of the destruction of documents would be to harm the victim who was either not yet in court, or was unaware of the settled case, before the documents were destroyed. If the documents were retained by the plaintiff's attorney, they would be subject to subpoena and, of course, to any protective orders which might be placed upon them. If destruction is regarded as unwarranted, one way to address this problem would be to allow the return of documents, subject to penalties attached to subsequent destruction by the defendant.

Some repetitive themes emerge in evaluating the secrecy issues. Protection of the privacy of litigants and third parties can be regarded as an important concern favoring secrecy. On the other side of the ledger, the cost-cutting considerations favoring

26See American Bar Association, Code of Professional Responsibility, DR 2-108. See also A.B.A. Model Rule 5.6.
information-sharing are complemented by substantial public health and safety concerns supporting early dissemination of information about dangerous products and practices. The following recommendations attempt to accommodate these competing interests.

**Recommendation No. 10**

Where information obtained under secrecy agreements (a) indicates risk of hazards to other persons, or (b) reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information.

**Recommendation No. 11**

No protective order should contain any provision that requires an attorney for a plaintiff in a tort action to destroy information or records furnished pursuant to such order, including the attorney's notes and other work product, unless the attorney for a plaintiff refuses to agree to be bound by the order after the case has been concluded. An attorney for plaintiff should only be required to return copies of documents obtained from the defendant on condition that defendant agrees not to destroy any such documents so that they will be available, under appropriate circumstances, to government agencies or to other litigants in future cases.

**Recommendation No. 12**

Any provision in a settlement or other agreement that prohibits an attorney from representing any other claimant in a similar action against the defendant should be void and of no effect. An attorney should not be permitted to sign such an agreement or request another attorney to do so.

**G. Streamlining the Litigation Process: Frivolous Claims and Unnecessary Delay**

The administrative costs of operating the tort system can be viewed as excessively high for two distinctly different kinds of reasons. Compensation under the American fault system is costly because it is implemented through a litigation process that reflects a variety of goals and commitments that are independent of concerns about administrative efficiency and economy. Foremost among those goals are adherence to the fault principle, which involves time-consuming, individualized determinations of reasonable conduct, and a commitment to the caseload.

As mentioned at the outset, the Commission has not engaged in a searching re-examination of these first principles, not because the fault system or the fault principle is sacrosanct, but because it is beyond the capacity of a group mandated to review the vast array of focused criticisms leveled at the system in action, to take on such an overwhelming assignment in the brief span of a one-year term. At the same time, the Commission has offered a number of recommendations that deal with less global aspects of tort doctrine and process—ranging from joint-and-several liability to intangible damage recovery—which, if implemented, should lead to reductions in the costs of the tort system.

Aside from foundational change, the total dollar cost of running the system can also be reduced by adopting two distinct types of judicial economy initiatives: (1) focusing on the litigation strategies utilized by attorneys engaged in handling personal injury cases, and (2) reassessing the efficiency of the litigation process itself. Here, we are concerned not with the substantive principles of liability law, but with the question whether measures can be taken to reduce dilatory tactics and needless delays that add considerably to the costs of the system and pose concrete risks of generating unjust outcomes in individual cases. Critics of the existing tort system argue that the litigation process is rife with opportunities for abuse by parties who have, on the defense side, the resources to outlast vulnerable injury victims, or who have, on the plaintiff's side, either unreasonable expectations or the capacity to hold out for the nuisance value of claims exceeding the actual costs of injury. These criticisms can be addressed by sanctioning the transgressors and by revising the rules of the game.

The problems of frivolous claims and unwarranted delay can arise in a variety of ways. A party may enter a claim or defense that is wholly without merit either at the outset or as matters develop during the course of litigation; or, a party may engage in entirely unwarranted dilatory tactics through employment of frivolous or harassing discovery requests or refusals to respond promptly to efforts to move the case along at a reasonable pace. In addition, the litigation process has intrinsic characteristics—such as the traditional requirement of unanimity in jury decisions—that can delay the timely resolution of tort claims. Just as the problems are varied, so too are the potential solutions.27

27For a comprehensive analysis, see Attacking Litigation Costs and Delay, Final Report of the Action Commission to Reduce Court Costs and Delay (ABA, 1984).

The common denominator is that the trial judge must play an active role in ensuring that pretrial preparation, settlement efforts, and the trial of the case move along with reasonable dispatch. The following recommendations are offered with these objectives in mind.

*****

**Recommendation No. 13**

A "fast track" system should be adopted for the trial of tort cases. In recommending such a system, we endorse a policy of active judicial management of the pre-trial phases of tort litigation. We anticipate a system that sets up a rigorous pretrial schedule with a series of deadlines intended to ensure that tort cases are ready to be placed on the trial calendar within a specified time after filing and trial promptly thereafter. The courts should enforce a firm policy against continuances.

**Comments**

(a) An example of such a system is the fast track employed in Maricopa County, Arizona, a description of which is attached as Appendix C.

(b) The judge should have the power, on good cause shown, to extend deadlines. The fast track system is meant to apply to "ordinary" tort litigation. It is not meant to be applicable in mass tort cases, or other tort cases that cannot reasonably be tried on a normal schedule.

(c) The fast track system should be implemented through the general practice of assigning a single judge to a case from beginning to end. Such a practice is essential in achieving greater judicial control over the caseload.

(d) Effective implementation of a fast track system rests on the premise that a sufficient number of
judges will be available for management of the civil caseload. In order to satisfy this requirement, it may be necessary to make pro tem judicial appointments under some circumstances.

(e) The fast track system also rests on the premise that the judge assigned to the case will make a conscientious effort to act expeditiously.

Recommendation No. 14
Steps should be taken by the courts of the various states to adopt procedures for the control and limitation of the scope and duration of discovery in tort cases. The courts should consider, among other initiatives:

1. At an early scheduling conference, limiting the number of interrogatories any party may serve, and establishing the number and time of depositions according to a firm schedule. Additional discovery could be allowed upon a showing of good cause.

2. When appropriate, sanctioning attorneys and other persons for abuse of discovery procedures.

Comments
(a) Similar limitations should be considered for all other forms of discovery.

(b) Depositions by tape recorder, including telephone depositions, and written witness statements can usually serve the purposes of discovering the testimony of most witnesses but without the extraordinary legal and other expenses for lengthy, redundant and largely irrelevant depositions.

(c) Telephone motions should be used whenever feasible, and motion briefs should be kept as concise as possible. Further proposals for dealing with abusive motion practice causing delay and harassment are included in Recommendation No. 15.

Recommendation No. 15
Standards should be adopted substantially similar to those set forth in Rule 11 of the Federal Rules of Civil Procedure as a means of discouraging dilatory motions practice and frivolous claims and defenses.

Comments
(a) Rule 11 provides, in pertinent part:
The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction.

(b) When sanctions are imposed, the court should determine the responsibility between the lawyer and client for the conduct resulting in the sanction and allocate the required payments accordingly.

(c) The Commission underscores the need for judges to be alert to the possibility of a Rule 11 standard being used as a harassment strategy against legitimate but novel claims. The benefits of Rule 11 will outweigh its risks only if trial judges remain highly sensitive to this potential for abuse.

Recommendation No. 16
Trial judges should carefully examine, on a case-by-case basis, whether liability and damage issues can or should be tried separately.

Comments
(a) The purpose of this Recommendation is to achieve greater economy in tort cases. Questions of damages need only be fully litigated if the parties fail to settle after a determination of liability. Correlatively, certain complex issues such as collateral source and punitive damage determinations can be more fairly and efficiently handled through this segmentation technique. However, the Commission recognizes that, in some cases, separation of the issues may be un-

the civil process through harassment and delay by litigants and their attorneys. It is also aimed at reimbursing the victim of such practices. With regard to the sanctioning of these practices, the Commission also directs attention to 28 U.S.C. 1927, providing judicial power to order payment of excessive costs where an attorney or other person "multiplies the proceedings" so as to "increase costs unreasonably and vexatiously."

(c) When sanctions are imposed, the court should determine the responsibility between the lawyer and client for the conduct resulting in the sanction and allocate the required payments accordingly.

(d) The Commission underscores the need for judges to be alert to the possibility of a Rule 11 standard being used as a harassment strategy against legitimate but novel claims. The benefits of Rule 11 will outweigh its risks only if trial judges remain highly sensitive to this potential for abuse.

Recommendation No. 17
Non-unanimous jury verdicts should be permitted in tort cases, such as verdicts by five of six or ten of twelve jurors.

Comments
(a) The Commission takes no position on the question of the appropriate size of the jury, such as six or twelve persons.

(b) Although recognizing the traditional values of unanimous jury verdicts, the Commission supports the principle of non-unanimous juries as an effective means of minimizing hung juries and the need for retrial.

Recommendation No. 18
Use of the various alternative dispute resolution mechanisms should be encouraged by federal and state legislatures, by federal and state courts and by all parties who are likely to, or do become involved in tort disputes with others.
Comment

As in other kinds of litigation, the question is increasingly asked whether there are viable alternatives to resolve at least some of the tort claims now commonly pursued in court-centered adjudication. The Commission believes that an affirmative answer is indicated. This is not to suggest that litigation substitutes should ordinarily be sought for tort claims. Rather, the suggestion is that legislatures, courts, and litigants should consciously consider the circumstances in which alternatives to the formal court procedures might better serve the needs of the various interests involved.

It is important to understand that we are not recommending abandonment of the judicial process for tort claims. Far from it. By “alternative dispute resolution” (ADR) we mean any process for the settlement of disputes other than adherence to the full and formal judicial process. Thus, courts may—and now often do—encourage alternative procedures on their own initiative. Common examples are court-annexed arbitration, court-assisted mediation, summary jury trials, and references to special masters. Each of these is a form of ADR that remains within the framework of the judicial process, but offers possible advantages of cost and time-saving. The most common forms of ADR are briefly described in Appendix D.

H. Injury Prevention/Reduction

One of the goals of tort law is the prevention of injury, and one area in which there is a substantial need for improvement is in disciplining licensed professionals such as lawyers, accountants, engineers, doctors, and other service providers whose negligence can lead to personal harm. Unfit professionals cause serious injuries to the public. Taking away their licenses would reduce the costs to the system and eliminate a substantial number of injuries.

Two major problems stand in the way of increased discipline that would rid the country of unqualified professionals. The first is lack of funding for the disciplinary authorities, which is generally due to the lack of interest by those in positions of responsibility for disciplining unqualified professionals. The second problem is information. Partially as a result of lack of funding, disciplinary authorities do not have sufficient information to proceed properly against incompetent professionals.28 Furthermore, settlement agreements often prohibit the reporting of such information to licensing authorities. Thus, unless an adequate monitoring system is established, licensing authorities do not learn of payments made because of professional malpractice which would trigger a further investigation.

Recommendation No. 19

Increased attention should be paid to the disciplining of licensed professionals through the following measures:

(a) A commitment to impose discipline, where warranted, and a substantial increase in the funding of full-time staff for disciplinary authorities. Discipline should be lodged in the hands of a state body, and not controlled by the profession itself, although professionals should have a substantial role in the process.

(b) In every case in which a claim of negligence is made against a licensed professional, and a judgment for the plaintiff is entered or a settlement paid to an injured person, the insurance carrier, or in the absence of a carrier, the plaintiff’s attorney, should report the fact and the amount of payment to the licensing authority. Any agreement to withhold such information and/or to close the files from the disciplinary authorities should be unenforceable as contrary to public policy.

Comments

(a) The Commission decided in favor of a reporting requirement despite a recognition that it may impede settlements, because of the serious nature of the professional malpractice problem.

(b) The Commission considered a de minimis cutoff to eliminate the reporting of payments that could be characterized as nuisance settlements. It decided to recommend against a cutoff because the disciplinary authorities will be able to ascertain those cases easily enough and evaluate them properly. Moreover, there may be cases where there is significant negligence but no real financial harm and hence a small settlement may conceal serious malpractice.

(c) Although not recommending any additional changes, the Commission considered a number of other matters which should be given further study. First, consideration should be given to mandatory malpractice insurance for professionals, both to protect the public and to assure that there is a disinterested third party who will report all data to the licensing authority. Second, there are substantial public policy reasons to require the release, both on an aggregate and on an individual basis, of data regarding claims paid and settled for licensed professionals. Third, consideration should be given to recertification of all professionals on a periodic basis. While there are obvious difficulties in any such system, the need to protect the public is so strong that further study should be made of this issue.

I. Mass Tort

The term “mass tort” has come to be associated with risk-related incidents or activities that result in large numbers of injury claims, neither “incidents” nor “activities” alone fully captures the meaning of the term, because some mass torts involve single events (incidents) such as the Bhopal tragedy and others involve courses of conduct (activities) like the production of asbestos or the marketing of DES. These examples have in common a massive injury toll from use or exposure to a hazardous substance or product. And it is the growing concern, during the past two decades, over environmental and toxic harms associated with hazardous substances that has given special meaning to the mass tort phenomenon.

Multiple injury cases are not limited to environmental and toxic risks. Airplane crashes claim hundreds of victims, and an occasional structural collapse, such as the Kansas City Skywalk case, can result in staggering numbers of deaths and serious injuries. Nonetheless, the newer type of mass tort case has some distinctive characteristics.
The modern mass tort case can involve nationwide claims if the harm is caused by a toxic product. Even if the claims are clustered in a single area, as in some of the environmental cases, they tend to arise over an extended time period. Either way, significant problems of joinder exacerbate the basic difficulty of efficiently litigating hundreds or thousands of cases arising out of a single risk-producing activity.

The singular difficulty in modern mass tort cases is the time-lag or latency problem. Frequently, toxic products or environmental risks cause widespread harm only long after the time at which the dangerous condition was created. By now, the leading controversies are well-known: asbestos, DES, Agent Orange, the Dalkon Shield, and dioxin (in hazardous wastes), among others, generated injury and dioxin (in hazardous wastes), generation after the course of conduct and dioxin. Frequently, the danger condition was created. The cases to date, in fact, have tended to take on a life of their own, and have been complicated by further litigation over subsidiary issues of liability insurance coverage. Successor corporations have sought absolution from responsibility. Bankruptcy has been utilized as a shield from catastrophic loss. The legal system, in short, has felt the shock-waves of mass tort cases in subsidiary fields traditionally far-removed from the territory of personal injury law.

The asbestos litigation serves as an illustration of some of these problems. The salient issues are not doctrinal refinements, but the administrative capacity of the tort system to function effectively, as evidenced by striking data on the enormous claims, costs and delay. As of mid-1983, Rand estimated that about 33,000 claims had been filed, distributed among a nationwide cluster of state and federal courts. The pace of claims far outstrips the rate of disposition—a process that has been substantially complicated by bankruptcy filings of some asbestos producers. In addition to substantial backlogs and delayed dispositions, litigation costs of the asbestos cases have been in the millions and growing steadily.

The current spate of mass tort cases raises three distinct problems of immediate interest to tort reformers. First, there is a pressing need for more effective judicial management of mass tort cases. This means, at the outset, devising better strategies for consolidating the voluminous number of claims, often dispersed in state and federal courts across the nation, in a single jurisdiction and treating those claims (to the extent appropriate) as a class action. The present procedural devices in the federal system for effecting such consolidation, application before the Judicial Panel on Multidistrict Litigation and utilization of Rule 23 of the Federal Rules of Civil Procedure, the common assent are not adequate to the task of efficient disposition of mass tort cases.

A second related criticism has arisen over the handling of multiple punitive damage awards. When a defendant is subjected to the sting of punitive damages for a reckless course of conduct in one case after another—each case proceeding as though it is the only one in which the course of conduct has been or will be punished—there is an obvious sense of injustice. Critics have argued that the proper solution is to consolidate the punitive damages action in a single proceeding. But if consolidation cannot be effected on other common issues, it is by no means obvious that courts will successfully resolve the discrete issue of punitive damages in a single proceeding. Up to now, such efforts have not met with success.

The long gestation period before harm occurs in these cases puts the legal system to a severe test. Frequently, it is extraordinarily difficult to determine the contribution of a toxic product to a plaintiff's serious illness (note that the mass tort cases often involve illness rather than accident claims), since the victim was exposed to a host of background risks of everyday life during the long period of gestation. Hence, mass tort cases typically involve difficult issues of determining causation based on probabilities. And the causation issues are complicated still further by the frequent problems of identifying the causal contribution of multiple defendants and allocating responsibility among the various sources.

Finally, there is the overriding question whether it makes sense to continue the effort to resolve hundreds or thousands of related claims of injuries from a single course of conduct within the tort system. This question tests our definition of substantive justice as well as the limitations of procedural innovation. It is by no means clear that fairness is achieved by serial, individualized determinations of causation and damages in situations where a huge number of victims suffered essentially similar injuries. When substantial doubts about the long-term solvency of responsible parties are added to the picture—so that some injury victims end up receiving far less than others simply because of the timing of their claims—the essential point is underscored: Certain types of mass injury cases may be more fairly handled by administered compensation schemes that assure like treatment for all similarly situated victims.

Whatever the appeal of such a solution, however, the implementation of a compensation scheme raises enormous problems. The crux of the matter is to establish satisfying parameters for what constitutes a compensable event (i.e. the type of injury that creates an entitlement to recovery), to devise a fair and efficient test of causation, and to decide who is to contribute to the fund. In the recent past, efforts have been made to frame definitions of compensable events as narrowly as a single type of toxic incident (such as asbestos or vaccine-related injuries) or as widely as hazardous wastes and toxic substances generally. Apart from narrowly-defined vaccine legislation, none of these proposals has gained widespread support. Funding schemes
similarly engender controversy, whatever their design.

This commission cannot undertake the necessarily detailed task of reassessing both the adequacy of specific procedural mechanisms such as Rule 23 and the related problems of allocating jurisdictional power between federal and state courts, while at the same time taking full account of the countervailing prospect of designing a fair and efficacious no-fault scheme that would replace tort liability in mass tort situations. Rather, we can only express our conviction that such an inquiry is a pressing instance of the need for further study that the ABA has asked us to identify.

Recommendation No. 20
The American Bar Association should establish a commission as soon as feasible, including members with expertise in tort law, insurance, environmental policy, civil procedure, and regulatory design, to undertake a comprehensive study of the mass tort problem with the goal of offering a set of concrete proposals for dealing in a fair and efficient manner with these cases.

Comments
(a) This Recommendation expresses the Commission's concern about whether the present tort system can adequately handle mass tort cases, and our view that the question deserves prompt and serious study.
(b) The mass tort commission should consider the following questions, among others:

1. **Definitional issues**—Should distinctions be recognized between traditional types of mass torts such as airline crashes and the current concerns about widespread toxic and environmental harm, so that a different set of substantive, procedural and institutional initiatives would be undertaken in the respective categories of cases?

2. **Responsibility for compensation**—In certain mass torts cases, would it be more appropriate for the injured parties to be compensated by a governmental fund rather than by the source of the injury? If so, under what circumstances should the fund be allowed to proceed against the source of the injury?

3. **National law**—Given the national aspects of most mass torts cases, should their resolution be guided by federal law rather than the laws of the separate states?

4. **Class action**—Should the rules governing class actions be revised to facilitate the handling of mass torts problems en masse?

5. **Punitive damages**—Should there be limits on the imposition of punitive damages in mass torts cases (e.g., limiting the number of times punitive damages can be imposed for the same course of conduct, limiting the size of awards, relating the size of awards to the financial resources of the defendant)? If so, what type of procedures can be devised to assure fairness to all and to allow for newly discovered evidence on the issue of malice?

6. **Causation**—Because so many mass torts involve claims of latent injury occurring over many years, how can the determination of causation be improved?

7. **Resort to bankruptcy courts**—Are the bankruptcy courts an appropriate forum for the resolution of problems arising from mass torts? If so, what rules should govern the disposition of these problems by those courts?

8. **Alternative mechanisms**—What alternatives (e.g., use of special masters) could be employed to deal with the administration of mass tort cases?

J. Concluding Recommendation

Recommendation No. 21
After publication of this report, the ABA Action Commission to Improve the Tort Liability System should be discharged of its assignment.

Comment:
The Commission met eight times between November 1985 and December 1986. In addition, there were a number of informal meetings among various members of the Commission as they worked together on a number of individual projects for the entire Commission. Throughout the entire effort, the Commission's reporter, Professor Robert L. Rabin, worked indefatigably to put into persuasive prose the judgments of the Commission. He has earned special commendations from all members of the Commission.

To recommend discharge of the Commission is not to say that the task is done. Much remains to be done by the House of Delegates, other bodies with special assignments, lawyers, judges, and legislatures. But that is work for others. We hope that this report opens the way to what will unquestionably be a long road ahead.

Respectfully submitted,

Robert B. McKay
Chairperson
Summary of Bell Committee Recommendations

The most important previous statement on behalf of the American Bar Association about the American tort liability system is contained in *Towards a Jurisprudence of Injury*, the report of the Special Committee chaired by former Attorney General Griffin B. Bell (Reporter, Professor Marshall S. Shapo). The thrust of the report is reflected in the following extracts from the concluding chapter, “Recommendations and Suggestions” (Page 13-1):

We have found the tort system to be vital and responsive as a working process, based in legal concepts, for dealing with injuries alleged to be wrongs. It derives strength from its incremental, case-centered approach, and from its status as a decentralized and constantly experimental feature of a federal system.

While identifying the strengths in the system, we are mindful of the need of any operating legal process for improvement...

We shall make a few specific recommendations concerning legal rules pertaining to tort law, but our principal emphasis is on ways to improve the administration of justice as it relates to the tort liability system...

The recommendations of the Committee Bell Report include the following:

**SYSTEMIC IMPROVEMENTS**

1. Creation of a data collection agency “for the comprehensive collection of data on injuries and injury-causing events...”
2. Experimentation by state and federal courts with various non-judicial dispute procedures.
3. Establishment by courts of better procedures for increased judicial efficacy.
4. Discouragement of frivolous litigation.
5. Development of increased incentives for settlement.
6. Support for uniform principles of tort law.
7. Development of special procedures for catastrophic concurrences.
8. Review of the jury system for possible improvements.
9. Consideration of ways to reduce costs and delays in the tort liability system.

**SPECIFIC RULES OF LAW AND POLICY**

Further attention by all interested parties was recommended for the following topics:

1. Statutes of limitation and repose.
2. Punitive damages.
3. Pain and suffering.
5. Joint and several liability.

Collateral Source Rule

Under the collateral source rule, a plaintiff is entitled to an award against the defendant which includes all of the costs of an accident, even if some of those costs, such as medical expenses or lost wages, were in fact reimbursed from a “collateral” source. A common example is the situation where a plaintiff’s judgment includes a substantial recovery for medical bills which were paid under a health insurance policy.

The main argument for changing the rule rests on an intuitive sense that it is unfair to treat as compensable damages a cost of the plaintiff’s injury that is not in fact borne by the plaintiff. As in the past, critics of the rule have argued that this double recovery is unwarranted. They would abolish the rule and allow net recovery of the out-of-pocket damages actually suffered by the plaintiff.

There are substantial counterarguments, however. In the first place, double recovery does not always occur. The right of subrogation is exercised by a variety of insurers including workers’ compensation carriers, homeowners’ underwriters, and some large hospitalization insurers. In cases where the insurer exercises a right of subrogation, the plaintiff recovers only those out-of-pocket losses actually incurred. Moreover, the argument proceeds, subrogation and the collateral source rule result in proper cost allocation since the defendant ends up bearing the full cost of the harm for which responsibility is established. In the absence of the collateral source rule and subrogation, those costs would be externalized to the “first party” insurer rather than assigned to the injury-generating activity. As a consequence, proponents of the rule point out, the cost of first-party insurance coverage such as hospitalization insurance might rise as a consequence of the abolition of the rule.

In reply, however, critics of the rule point to the administrative costs associated with shifting the first-party insurer’s reimbursement outlays to third-party sources through additional settlement and litigation efforts—administrative costs which have been, in a larger sense, a prime catalyst of the current dissatisfaction with the operation of the tort system. Unfortunately, there are no empirical studies that would resolve this debate by providing hard data about whether the administrative costs of subrogation exceed the incentive gains from better cost allocation. Thus, the Commission is not in a position to conclude that the rule, on balance, has an undesirable impact on costs.

A second argument in favor of retaining the collateral source rule attacks the notion of double recovery from another perspective. In many instances, it is pointed out, the plaintiff has in fact “earned” the tort insurance reimbursement through direct premium payments or implicit salary trade-offs in the form of fringe benefits. In such cases, supporters of the rule argue that the defendant would receive a windfall if the collateral source rule were abolished. In reply, critics point out that the rule is in no way calibrated to plaintiff’s explicit or implicit premium payments. There is double recovery as a matter of course, even if the plain-
tiff has made only the most minimal contribution towards insurance coverage.

Finally, defenders of the rule have sometimes relied on the pragmatic argument that the collateral source rule is simply an indirect means of assuring that the plaintiff actually receives some approximation of incurred damages, since roughly one-third of a tort judgment is typically taken by the plaintiff’s attorney as a contingent fee. Again, the critics of the rule have a response. They argue that the fairness of the contingent fee must be evaluated on its own merits, rather than elided through the indirect means of off-setting its impact by an arbitrary inflation of recoverable damages.

These arguments and counterarguments can be translated into a variety of proposals for change, describing a continuum between maintenance of the status quo and outright abolition of the collateral source rule. Some of the intermediate positions are directly responsive to the points just discussed. For example, the rule could be abolished except in situations where the plaintiff’s recovery was of premium payments. Or, in response to the concern about subrogation, the rule could be abolished aside from specified categories of cases in which it was deemed preferable policy to create a primary right of reimbursement in an insurance system, such as workers’ compensation. Still another approach would be to retain the rule only up to a ceiling and abolish it for “double recoveries” over that threshold. As suggested, in view of the uncertainty about the overall consequences of the rule, none of the options for change seemed especially compelling to the Commission.
party who may prematurely file a Motion to Set and Certificate of Readiness, any opposing party may file a certificate controverting the Motion to Set within ten days after it has been filed, and set out in precise detail the reasons for challenging the Motion to Set. Thereupon, the court is required to enter an order, without oral argument, placing the case on the active trial docket, either immediately, or, where good cause is shown, at a specified later date. It is at this point that an additional safeguard may well prove necessary, since it is now possible, as the rule stands, for a judge to set the case for a trial date well in advance of when it normally would be set if all the time allotted under the rule had been available.

At the expiration of 60 days following the filing of the Motion to Set, no further discovery may be undertaken by either party except by stipulation or by order of the court upon showing of good cause. Showing required for good cause is strictly interpreted and applied, so that exceptional circumstances must be present to support the application.

Cases on the active trial calendar are set for trial as soon as possible with preference given to short cases and to cases which by statute, rule, or court order are entitled to priority. In all cases, counsel is given at least 30 days notice of the trial date. Once the case has been set, no postponement of the trial is granted except for sufficient cause, supported by affidavit, or by consent of the parties, or by operation of law. In practice, any request for postponement is treated as an application, whether by consent or otherwise, and is treated as being subject to the discretion of the court. Again, all such requests are strictly interpreted and construed against the parties.

Common Forms of Alternative Dispute Resolution

- **Arbitration** is the best understood and the most widely practiced form of ADR. It is private adjudication in which the parties to a dispute agree, either by contract or at the time of disagreement, to accept the judgment of a third party (or panel of arbitrators) in resolution of their dispute. The proceedings may be quite informal or as formal as a court, with all the paraphernalia of discovery, witnesses, court reporters and written decisions. The most important characteristic is that the determination is binding and ordinarily enforceable in court. The striking exception to this principle is court-annexed arbitration, which is compulsory under court rules adopted in a number of state and federal jurisdictions. But the determination is not binding if either party is unwilling to accept the result and instead demands a trial by judge or jury. Despite that, the percentage of acceptances of the determination of the arbitrator ordinarily runs well in excess of 90 percent.

- **Mediation** is fast growing in popularity, both as a matter of private agreement to use the services of a third party to assist the parties in resolving their dispute, and as a matter of court suggestion or direction. Some states have even gone so far as to require that, before certain kinds of disputes may be tried in court (divorce cases, for example), the parties must submit the matter to mediation. Only if that is unsuccessful may they resort to the formal court procedures.

- **Negotiation** is like mediation in that the objective is for the disputants to reach agreement between themselves, but unlike mediation in that no third party is involved. That is—or at least should be—the first step in every dispute. Indeed, most disputes, within families, in businesses, even among nations, are settled by negotiation. If that were not so, the courts would surely be overwhelmed. The only new point is that negotiating skills are not necessarily intuitively understood. The art of negotiation is increasingly the subject of research, and techniques for its mastery can be taught.

- **Mini-trials** are a rapidly developing form of private adjudication in which the parties to a dispute agree upon a private “judge” before whom they present an abbreviated trial, after which the adjudicator offers a recommended “judgment” which the parties use as a basis for settlement negotiations. They are not bound by the decision, but the process has proved highly successful in complex intercorporate disputes and disputes with government agencies. A key element is that a representative of each client, bearing the authority to settle, is expected to be present for the “trial.”

- **Other court-related procedures** include the summary jury trial and reference to special masters for settlement discussions. The summary jury trial, now used in a number of federal district courts, is to all appearances a regular jury trial, but with abbreviated procedures and lacking the force of a binding judgment (although the jurors may not be advised of the fact that their judgment is not binding). This, too, has proved useful as a settlement device because the parties have an opportunity, at reduced cost and in a shortened time period, to assess the strengths and weaknesses of their own case and that of their opponents.
Abrahamson, Shirley S.

The Honorable Shirley S. Abrahamson has been a justice of the Wisconsin Supreme Court since 1976. Before her appointment, then election, to the court, she was a partner in the Madison law firm La Follette, Sinykin, Anderson & Abrahamson. She has taught at the law schools of the University of Wisconsin and Marquette University. Justice Abrahamson was graduated with honors from New York University and first in her class at Indiana University School of Law. She went on to receive a doctor of juridical science degree from the University of Wisconsin and has been awarded several honorary doctorates. An active member of the American Bar Association, Justice Abrahamson was a member of the Council on the Section of Legal Education and Admissions to the Bar and is a member of the Special Committee on Youth Education for Citizenship and the Executive Committee of the Judicial Administration Division. In addition, she is a Fellow of the American Bar Foundation and a member of the Council of the American Law Institute and the Executive Committee of the American Judicature Society. Justice Abrahamson is on the board of directors of the Foundation for Women Judges and on the board of visitors of several law schools.

Calabresi, Guido

Guido Calabresi is a 27-year veteran of Yale Law School, where he rose from assistant professor of law, to dean of the law school. At the time of his appointment as full professor in 1962 at the age of 30, Calabresi was the youngest professor at Yale, and one of the youngest in the university's history. An outstanding scholar, he was graduated first in his class from Yale twice, earning both his undergraduate and law degrees from the university. In addition, Calabresi was ranked first at Oxford University, which he attended as a Rhodes Scholar. Calabresi has received numerous awards for his academic and professional achievements, including the Laetare Medal from the University of Notre Dame, and a Fellow of the American Academy of Arts and Sciences. A Native of Italy, he emigrated to the United States with his parents in 1939, and became a naturalized citizen in 1948.

Carrigan, Jim R.

Carrigan is a United States District Judge for the District of Colorado. He previously has served as a Justice of the Colorado Supreme Court, Colorado State Court Administration, and Regent of the University of Colorado. Prior to becoming a judge he taught full time at four law schools and for many years practiced as a trial lawyer. Carrigan is Chairman of the Board of Trustees of the National Institute for Trial Advocacy and a member of the Boards of Directors of the Federal Judges Association, American Judicature Society, and the National Board of Trial Advocacy. He also serves on the Long Range Planning Committee of the ABA Tort and Insurance Practice Section. He is a member of the Judicial Administration Division and its Federal Procedure Committee.

He received his Ph.D. degree with highest honors and his J.D. degree with departmental honors from the University of North Dakota, and his LL.M. (Taxation) degree from New York University.

Chittenden, Thomas S.

Chittenden is Senior Vice President and General Counsel of Citicorp Insurance Group (New York City). Prior to his current position, he served as Senior Vice President and General Counsel of the American Insurance Association; President, Attorneys' Liability Assurance Society, Ltd.; Senior Vice President, Marsh & McLennan, Inc., and Executive Director and Chairman of the American Bar Association Commission on Medical Professional Liability. Chittenden is currently a member of the Council of the Tort and Insurance Practice Section, on the Executive Committee of the American Arbitration Association and a member of the Joint Task Force on Liability Insurance Coverage (New York State Bar Association—Association of the Bar of the City of New York).

A magna cum laude graduate of Yale, he received his LL.B. degree from Harvard Law School.

Decof, Leonard

Leonard Decof is a partner in the law firm, Decof & Grimm, and has twice been awarded an Award of Merit from the Rhode Island Bar Association, for outstanding contributions to the legal profession and the public. Decof is a fellow, board member and past president of the International Academy of Trial Lawyers. In addition, Decof is a fellow of the American College of Trial Lawyers, the International Academy of Barristers and Inner Circle of Advocates. He is a sustaining member, serves as a state delegate and member of the Board of Governors of the Association of Trial Lawyers of America, and is a member of the Rhode Island Board of Examiners. He is a diplomat in the American Board of Trial Advocates.

A graduate of Yale University and Harvard Law School, Decof is the author of numerous law review and bar journal articles, including articles on damages, medical malpractice and wrongful death. Decof is a regular faculty member of the National Institute for Trial Advocacy, and has taught trial advocacy at Harvard, Yale, Boston and Suffolk law schools.

Jackson, Don M.

Don Jackson is Counsel to the law firm of Harrison & Lerch in Phoenix, Arizona and Jackson & Bailey in Kansas City, Missouri. He has expertise in personal injury litigation, products liability litigation, medical malpractice, health law litigation and aviation law.
He is a member of the American Bar Association and has served as Chair of the Section of Tort and Insurance Practice, member of the Board of Governors, Chair of the House of Delegates Committee on Rules and Calendar, and member of the Consortium on Professional Competence. He is currently a delegate for the Senior Lawyers Division.

Jackson is also a Fellow of the International Academy of Trial Lawyers where he has served on the Board of Directors and as Dean of the Academy, a Fellow of the International Society of Barristers, American College of Trial Lawyers, American Bar Foundation and Arizona Bar Foundation. He has authored "Cross Examination of Plaintiff's Witnesses", and "Direct Examination of Defendant" and was a member of the drafting committee, "Manual for Multi-District and Complex Cases," U.S. District Courts.

Jackson was a city councilman in Kansas City, Missouri for eight years and Chairman of the City Planning Commission as well.

Jackson attended Harvard University and received his J.D. from the University of Missouri at Kansas City School of Law.

Jones, Elaine Ruth

Elaine Ruth Jones is an attorney in the Washington, D.C. office of the NAACP Legal Defense and Educational Fund, Inc., where she specializes in litigating civil rights cases, monitoring enforcement activities of executive branch agencies and legislative initiatives of the Congress, especially those that impact on the administration of justice in the Federal Courts.

Jones was an attorney of record in Furman v. Georgia (408 U.S. 238), the 1972 Supreme Court case which abolished the death penalty in 37 states.

A cum laude graduate of Howard University, Jones went on to become the first black female graduate of the University of Virginia School of Law in 1970.

Jones is the recipient of numerous awards and honors from the National Bar Association, where she was the first female recipient of its Founders' Award in 1980. In addition, Jones has lectured on civil rights issues at several universities including Oxford and the University of Tel Aviv. She completed a fellowship at Harvard University's Institute of Politics in the fall of 1982.

Lambert, Thomas

Thomas Lambert is Distinguished Professor at Suffolk University Law School in Boston, MA. He is also a contributing editor to the American Trial Lawyers Association and author of "Tom on Torts," ATLALaw Reporter. He was Editor in Chief of the Association of Trial Lawyers of America from 1955-80.

Lambert was a Professor of Law at Boston University School of Law, 1946-55. He was also Trial Counsel on the staff of Justice Robert H. Jackson, U.S. Chief of Counsel, Nuremberg War Crimes Trials. He wrote the United States Brief on Criminality of Nazi Party and presented to the International Military Tribunal the U.S. case against Martin Borman, Executor of Hitler's will. Lambert was also a Rhodes Scholar at Oxford University from UCLA.

McKay, Robert B. (Chair)

Robert B. McKay is a Professor of Law at New York University School of Law, where he served as dean from 1967 to 1975. A 1947 graduate of Yale Law School, McKay is a member of the ABA Board of Governors. In addition, he serves as chair of the New York State Attorney General's Advisory Committee on Ethical Standards, president of the Citizens Union Research Foundation, and chair of the Philadelphia Police Study Task Force. He was president of the Association of the Bar of the City of New York from 1984 to 1986.

McKay serves on the boards of the Legal Aid Society of New York City, the Helsinki Watch Committee, the Loews Corporation, the Revson Foundation, and the Vera Institute of Justice. He has chaired the ABA Section on Legal Education and Admission to the Bar, and the ABA Commission on Correctional Facilities and Services. He also chaired the New York State Special Commission on Attica, which published a report and produced a documentary film in 1972, based on its findings.

Middlebrook, Stephen B.

Stephen B. Middlebrook was appointed Vice President and General Counsel of Aetna Life and Casualty in 1981, after having served in various positions within the Aetna Life Department. In addition to managing a department of approximately 90 lawyers, he is responsible for the company's external communications and public affairs groups.

Middlebrook is active in the ABA's Tort and Insurance Practice Section and in its Section on Corporations and Business Organizations. He participated in the organization of the Spring, 1985 conference convened by TIPS to discuss The Bell Commission report, Towards a Jurisprudence of Injury. He is also a founder and director and member of the Executive Committee of the American Corporate Counsel Association, a member of the Board of Governors of the American Life Insurance Association, and a member of the Connecticut Bar Association.

Miller, Henry G.

Miller is a Senior Member of the Clark, Gagliardi & Miller law firm in White Plains, N.Y.

He is a member of numerous organizations, including the American Bar Association, the American Judicature Society, the American Board of Liability Attorneys, and the Association of the Bar of the City of New York. Currently, Miller is a delegate of the New York State Bar Association, of which he is also past president. He is also a past President of the Westchester County Bar Association. Miller is a fellow of the American College of Trial Lawyers and the International Academy of Trial Lawyers.

The author of numerous articles in legal publications, Miller has also made appearances on several television and radio shows concerning various facets of the law.

An Adjunct Professor of Law at St. John's Law School, Miller also lectures at Fordham Law School, New York State Trial Lawyers Association, New York Law Journal Seminars and New York State Bar Association. Miller received both a B.A. and J.D. degree from St. John's University.
Morrison, Alan B.

Alan B. Morrison has served as Director of the Public Citizen Litigation Group since 1972 where he has been an active public interest litigator. Prior to assuming directorship of the Public Litigation Group, Morrison was an Assistant United States Attorney in the Southern District of New York. He was also an associate at Cleary, Gottlieb, Steen & Hamilton (New York City).

He was a visiting professor at the Harvard Law School in 1978–79 and he has since then taught a litigation workshop in the January semester there.

Morrison has served on the Board of Directors and as Vice President of the National Resource Center for Consumers of Legal Services, on the Board of Governors of the District of Columbia Bar, and as a member of the President's Commission on a National Agenda in the Eighties.

He currently is a member of the Administrative Conference of the United States and the Advisory Committee on Procedures of the U.S. Court of Appeals for the District of Columbia Circuit.

Morrison is a graduate of Yale College, and a magna cum laude graduate of Harvard Law School where he was a member of the Law Review.

Newman, Jon O.

The Honorable Jon O. Newman is a United States Circuit Judge, serving as a member of the United States Court of Appeals for the Second Circuit (Conn., N.Y. and Vt.) since June 1979. He served as a United States District Judge for the District of Connecticut from January 1972 until his appointment to the Court of Appeals.

Judge Newman is a graduate of Princeton University and Yale Law School. His governmental positions include serving as United States Attorney for the District of Connecticut from 1964–1969.

In the Hartford community, Judge Newman is chairman of the Hartford Institute of Criminal and Social Justice and is a member of the boards of the University of Hartford and Mount Sinai Hospital.

Judge Newman teaches at the University of Connecticut Law School. He has written numerous articles and is co-author of a high school text-book, "Politics: The American Way," which has been translated into several foreign languages by the United States Information Agency.

Subak, John T.

Subak, a native of Czechoslovakia, is Group Vice President and General Counsel for the Rohm and Haas Company in Philadelphia.

Prior to joining Rohm and Haas he was an associate and subsequently a partner with Dechert, Price & Rhoads.

He is a member of the American Bar Association where he has served as chairman of the Section of Corporation, Banking and Business Law and Editor of the Business Lawyer.

Subak is also Director and Vice President of the Defender Association of Philadelphia, and Director of the American Cancer Society and the Milton Roy Company.

A summa cum laude graduate of Yale University, he received an LL.B. degree at Yale Law School where he was Editor of the Yale Law Journal.

Rabin, Robert L. (Reporter)

Robert L. Rabin is A. Calder Mackay Professor of Law at Stanford Law School in California, where he has taught since 1980. An academic scholar, he has authored three books and numerous articles and review essays on tort law and the regulatory process.

An active member of the legal community, Rabin is a member of the Board of Editorial Advisors of the American Bar Foundation Research Journal, the Editorial Board of the Foundation Press, the Editorial Advisory Board of Law and Policy, and the Advisory Committee of the Journal of Legal Education. He is the former chairman of the Section on Administrative law of the Association of American Law Schools.

Rabin is a graduate of Northwestern University, earning his J.D. and a Ph.D. in political science from the university.
Dissent by Judge Jim R. Carrigan:

I respectfully dissent. This Action Commission was created to recommend practical remedies for perceived problems in the tort system. In my view the tort system and the insurance system are inextricably interrelated. Both require action to improve the overall tort compensation system.

The well-orchestrated chorus of those who—in the press and legislative halls—have sought to place blame for the so-called “tort crisis” or “insurance crisis” on lawyers, juries and courts seems to have succeeded with this Commission as well. Thus the report sets out nineteen action recommendations directed to reform of the tort side of the equation, but not one action recommendation directed to reforming the insurance side.

Moreover, many of the Commission’s action recommendations would reduce or eliminate rights presently held by innocent tort victims—the “consumers” of tort law. No action recommendations would diminish rights of defendants or their insurers. Thus the clear implication of the overall report is that plaintiffs and their lawyers, along with juries and judges, have somehow created a “tort crisis” that can be cured or alleviated by these recommended actions.

If there is a tort crisis outside the recent public relations and lobbying campaigns, it is at least as attributable to problems in the insurance system as to problems in the legal and judicial systems. All could benefit from action for improvement, and some of the Commission’s recommendations would deserve support if they were part of a balanced package suggesting actions to improve both tort and insurance systems.

Absent any action recommendation addressed to the insurance half of the problem, the recommendations merely reprise last season’s insurance industry theme song. In spite of my respect and affection for the Chairman, Commission Members and Reporter, I must decline to sing along.

CONCURRING WITH JUDGE CARRIGAN’S DISSENT ARE:
Leonard Decof
Elaine Jones
Thomas Lambert

Dissent by Thomas F. Lambert, Jr.

With regret and deep respect, I am obliged to dissent from specific provisions of the Commission’s Report and Summary of Recommendations. Because of obvious time constraints, I can only list the particular recommendations evoking and comprising the specificities of my disagreement with both the Report and Recommendations. Division does not in my view connote weakness. One is comforted in recalling the observation of Chief Justice Hughes—when in the higher reaches of other disciplines—philosophy, theology, science—the experts disagree, why should we expect the law to emerge into an icy stratosphere of certainty. As my boss, Justice Robert H. Jackson, used to say, “It is better for a court to be divided than wrong.” As it seems to me, the evolution of ABA policy on the subjects of our Commission’s concerns over the past quarter of a century has been, in fact, a moving consensus. Progression from an older to a newer consensus touches lively, crucial issues that are bound to bring a measure of disagreement (if everybody is doing his homework). Movement does generate uncertainty, and often dissent may enable majoritarian positions to avoid the reproach of fiat or the vindication of presuppositions.

Then there was the wisest philosopher in the world. When asked if he could only take one word to a desert island, which would it be, he answered, “But.” A very precious word in the vocabulary of lawyers as well as philosophers.

Subject to and in the spirit of the above, I dissent from specific provisions in the Commission’s Summary of Recommendations and corresponding provisions of the Report, as follows:

B, 2,3,4 (“Pain and Suffering Damages”)
C, 5,a,b,d,e (“Punitive Damages”)
D (“Joint and Several Liability”)
E, 7,8,9 (“Attorneys’ Fees”)

The above indicated disagreements will be fleshed out and documented in a subsequent expression of views as may be found viable.

CONCURRING WITH THOMAS LAMBERT’S DISSENT IS:
Leonard Decof
The profound respect I have for the members of this Commission only compounds my concern regarding the substantive recommendations contained in the Report.

The evident willingness of my colleagues, however unwittingly, to join forces with those who seek to limit the legal and economic rights of innocent victims is distressing. Any such coalition ought to be forged solely on the basis of a comprehensive compilation and analysis of verifiable data. Yet far too many of these recommendations cry out for sounder factual predicates. For the American Bar Association to haphazardly join the chorus of those who for selfish political and economic reasons attack the legal profession would be a bizarre result of this Commission's mandate. Yet that is precisely the result, I fear, that may be achieved by adoption of this Report.

It is not that none of these recommendations have merit. Many of them do and are supportable. Others contain ideas that with a little re-working at least might form the basis of sound policy. As a package, however, and as presently drafted, they send a very wrong message. At best, they are only a partial solution for what we have not demonstrated is a real problem.

I. GENERAL OBJECTIONS

A) Insurance

The Commission is surely correct when it writes that a “truly comprehensive analysis of the tort system must, of course, range...beyond liability rules and the litigation process” and focus as well on the “dramatic growth in the influence of insurance on the tort system”. The Report thus correctly agrees that both “the insurance component and the tort component must be addressed if significant improvement in the present system is to be achieved.”

Yet no such inquiry has been undertaken by the Commission. In fact, as Judge Carrigan has pointed out, “the report sets out nineteen action recommendations directed to reform of the tort side of the equation, but not one action recommendation directed to reforming the insurance side.”

The one recommendation which is made regarding the insurance side states:

The American Bar Association should establish a commission to study and recommend ways to improve the liability insurance system as it affects the tort system.

I agree. And I submit it would be folly to support that recommendation and the underlying “Comments” regarding the insurance industry which are contained in the Report and at the same time, without benefit of the insurance study, to advance nineteen comprehensive action recommendations for improving the tort system. The tort system and the insurance system are inextricably interrelated.

The property/casualty insurance industry cries out for careful scrutiny. The industry is the shaper and keeper of its own data—data it will not share except by loosely defined categories of information. The Com-

mission, to its credit, seems to recognize that fact. In suggesting eight areas of sorely needed analysis regarding the insurance industry, it hints at an understanding of just how inadequate our current knowledge of genuine claims data really is and it demonstrates an awareness of how loosely regulated the industry has become, particularly in light of its antitrust exemption under the McCarran-Ferguson Act. The Commission notes studies by the General Accounting Office and others that argue that the industry, even when troubled, was largely responsible for its own financial condition, a condition, by the way, that is presently enormously profitable.

All of this insurance focus is centrally important to the issues addressed by the Report. There can be no mistaking why we have come to a point where the tort system has been committed to a commission for scrutiny. Why is there a perceived “tort liability crisis”? Undoubtedly, the reason relates to action on the insurance side: large, often staggering increases in premium costs with a simultaneous reduction of the level of coverage afforded, or worse yet, total unavailability of coverage.

This Commission simply cannot accept without question the premises of the insurance industry regarding the state of our tort system or the state of the industry’s own financial condition. Yet it joins the industry’s call to change liability rules and other issues affecting major areas of tort law, and does so without regard for insurance issues. The tort system, if it is to be fine tuned at all, should be considered within the context of a balanced approach, and should be tempered with very grudgingly. The Commission should not ignore its own citation of a summary prepared by the National Conference of State Legislatures. Many states have adopted legislation drastically limiting the rights of injured victims, with no apparent effect, or even promised effect, on insurance premiums or availability.

Happily, implicitly, the Commission seems uncomfortable with the insurance industry’s view of the world. Hence its “Recommendation No. 1” calling for a study of the industry and an attendant outline of eight areas that merit scrutiny. But disappointingly, the Report then parades forth nineteen action recommendations on the tort side. Taken as a package, they appear to provide an endorsement of the insurance industry’s notion that the system needs fixing and that the fault lies with the injured victims and their lawyers. We don’t know that, though, without further analysis. And to pretend that we do by supporting these recommendations, in this form and at this time, in effect makes the American Bar Association, uncharacteristically, the unwitting handmaiden of the insurance industry.

Let me emphasize again that some of the recommendations have merit. Even some of the objectionable recommendations contain proposals that if reworked might be supported. But at the core are a handful of bad recommendations that send the wrong signal, are unwarranted by the facts and worse, would reduce rights of victims. Reform, remember, should be designed to eliminate wrongs, not rights.

B) Cause/Effect

The Action Commission has failed to substantiate, indeed it hasn’t even addressed, the proposition that the tort system has been either the
cause of, or had an effect on, the insurance affordability/availability crisis.

It is apparent that recent calls for so-called tort "reforms" have emanated from the insurance industry. These calls for reform have been styled as a means to solve the liability insurance crisis faced by insureds in 1986. The crisis saw some insureds unable to purchase certain lines of liability insurance at any price, and where it could be purchased it was at an enormous increase in cost.

What the Action Commission did not address is the fact that there is no causal connection between the tort system and the present insurance crisis. One after another, independent commentators have concluded that the primary blame for the liability insurance crisis rests squarely on the shoulders of the insurance industry, which underpriced its product in the late 1970s and early 1980s in a mistaken belief that high interest rates would continue to earn record investment income. This cash-flow underwriting led to unanticipated losses when in the mid-1980s interest rates declined and investment income failed to cover losses attributed to policies previously underpriced.

Further, recent filings and comments by the insurance industry and other commentators indicate that the enactment of so-called tort "reforms" has no perceptible impact on insurance premiums or rates.

C) The Report is Anti-Consumer

The report makes many anti-consumer presumptions, e.g., that awards for pain and suffering are too high. Almost all "reforms" it recommends have the effect of narrowing or taking away the victims' rights, while at the same time providing no relief or promise of relief of insurance costs. The consumer is required by this Report to give many "quids" but receives no "quos".

Further, certain provisions aimed at lawyers, which at first blush seem protective of consumers, actually work against them. (e.g., "cooling off period" of Section E7, discussed infra).

The most insidious harm to consumers comes from those proposals which inferentially undermine the attorney-client relationship and create further mistrust of lawyers.

D) The Report is Anti-Lawyer

The findings and the recommendations of the Action Commission are apologetic at best, accusatory at worst, toward the ethical conduct of the bar. Both the tone and content of the recommendations evidence a clear disrespect for the integrity of the attorney-client relationship and for lawyers in general, while failing to identify and condemn those small groups of lawyers whose actions disgrace the vast ethical majority.

The Commission unwittingly falls into line with the media, and, sadly, much of the public, who tar all lawyers with the same brush.

The report in certain recommendations assumes that attorneys are not capable of properly negotiating or adequately disclosing fee arrangements to clients and unnecessarily recommends intrusions on the attorney-client relationship.

However, while denigrating lawyers in general, it pays no attention to those specific segments of the bar whose actions cry out for regulation.

In my opinion, there are two categories of lawyers who do the greatest harm to the system, the profession, and the public they are supposed to serve. They are the mass-disaster chasers and the misleading advertisers. Although certainly not representative of the profession, these two small groups attract enormous attention to themselves, and create a bad image for all lawyers and consequent mistrust by the public. The mass-disaster chaser is commonly regarded by the media as nothing more than a scavenger. The misleading advertiser is a huckster, who misrepresents his qualifications to entice clients to come to him with cases he is unqualified to handle, and usually botches or sells short. This group has been and will be, more and more often, the cause of lawyer malpractice suits, creating still further damage.

I feel the Commission should have made specific recommendations regarding these two categories of lawyers, who bring disrepute to the entire bar.

II. SPECIFIC OBJECTIONS

In addition to generally objecting to the Action Commission Report and its recommendations, I respectfully dissent to the following enumerated recommendations, for the reasons hereinafter cited.

Recommendations of the Action Commission were:

B) Pain and Suffering Damages

"2. There should be no ceilings on pain and suffering damages, but instead trial and appellate courts should make greater use of the power of remittitur or additur with reference to verdicts which are either so excessive or inadequate as to be clearly disproportionate to community expectations by setting aside such verdicts unless the affected parties agree to the modification.

3. One or more tort award commissions should be established, which would be empowered to review tort awards during the preceding year, publish information on trends, and suggest guidelines for future trial court reference.

4. Options should be explored to provide more guidelines to the jury on the appropriate range of damages to be awarded for pain and suffering in a particular case."

These recommendations chip away at the Seventh Amendment to the Constitution of the United States and the state-guaranteed right to jury trial. They represent a clear shift from the right of a jury to determine the question of damages to a judge determining damages. I shall consider them seriatim.

2. Greater Use of Remittitur and Additur

The clear implication here is that the juries all too frequently come to the wrong decision. It is also clearly implied that the courts do not act
often enough to "correct" these decisions. A careful analysis of the limited empirical data that is presently available does not support these suppositions nor does even a close reading of the Commission's own report and footnotes.

Recommendation No. 2 interjects the notion and concept that "community expectations" ought to be factored by a judge in considering whether to reduce or increase a jury's verdict. This new, undefined concept sets up an artificial guideline to determine the correctness of a verdict. Additionally, the provision is over-broad in its invitation to the bench to exercise greater use of powers not shown to either be abused or underutilized.

Currently, an award must "shock the conscience of the court" to invite judicial intervention. To set up a new, untested standard will surely foster much litigation over the meaning and application of such standard. Are we to erase the great body of law that has built up on motion for new trial, the role of judge and jury, etc., and start anew?

Juries now correctly base their awards on specific evidence applied to specific facts. This new provision introduces the nebulous concept of the community's expectations and invades the province of the jury which heard the evidence and testimony relative to damages. To the extent this provision changes judicial discretion, it is objected to.

3. The Creation of Tort Award Commissions.

This recommendation again diminishes the power and functions of the jury. Juries are unique. Six or twelve objective observers provide a fresh perspective to each case. They reflect the manners and mores of the community. Judges reviewing a tort award commission's statistical evidence will, of necessity, subject damage assessment to a rigid formula-type determination robbing both plaintiff and defendant of the right to have their case tried by a jury, on its facts and its evidence. Judges will bring past cases and awards to each new case, something the law has heretofore shunned. A key feature of this proposal is to consider evidence dehors the record, the first thing every jury, and every judge is supposed not to do.

4. Ranges of Damages/Guidance

This unsettling provision again will have the direct effect of eroding the 7th Amendment right to trial by jury and its state constitutional progeny. Juries have always held the power to set damages based on the evidence introduced at trial. The new recommendation could empower a judge to unfairly influence a jury's assessment of damages by allowing the court to instruct on appropriate ranges.

The Action Commission has failed to distinguish why it is more appropriate to provide guidance to juries with respect to pain and suffering as opposed to other damages, either economic or non-economic.

A more practical observation concerning this recommendation is also noteworthy. A published range of verdicts or awards may have the opposite effect its drafters intended. Arguably, its drafters believe this section will bring a limiting effect to the unusual situation of a particularly high award for pain and suffering. In reality, a range of awards may well raise the average compensation paid. If a jury is told that the typical range of award for the injury suffered is $50,000 to $100,000, it will automatically increase its award to those levels even if it had considered only a $25,000 judgment. All awards will ratchet up to the lower part of a range. Additionally, a zero award or defendant verdict will become rare if a jury is told these type cases typically result in $50,000-$100,000 recovery.

SECTION C—PUNITIVE DAMAGES

The Commission’s recommendations regarding punitive damages are perhaps the most bewildering. As in the case of non-economic damages, the Commission recognizes the clear social utility of these awards, opposes ceilings but yet feels compelled to respond to concerns regarding "random cases burdensome awards." Although apparently unsubstantiated by the available data, these concerns prompt the Commission to recommend a "vigorous set of procedures" for the determination and regulation of punitive awards.

The best and most widely respected work on punitive damages has been done by Dr. Stephen Daniels of the ABA's own American Bar Foundation. Dr. Daniels' work demonstrates clearly that punitive damages are awarded very infrequently. Even when awarded, the damages are not as excessive as the rhetoric would suggest. Of the thirty jurisdictions studied by Dr. Daniels, only New York and Los Angeles had median punitive damages in excess of $50,000 (and please note, for example, that in New York only 1.6% of the cases that reached the award stage involved punitive damages). Much of this work is cited by the Commission in the Report (see, for example, footnotes 5, 21 and 22). In addition to the Bar Foundation study, the Report cites a "forthcoming empirical study by Judge Richard Posner and Professor William Landes" which it says "confirms the finding that punitive damage awards remain rare in all types of accidental injury cases."

Attorneys in general and this Association in particular can be very proud of the work done by lawyers in the fight to achieve a safer, more responsible commercial society. The deterrent effect of punitive damages is beyond question. For the ABA to adopt a "reform" recommendation motivated by an unsubstantiated concern with "burdensome" awards would be a strange result.

SECTION D—Joint and Several Liability

This will be, I predict, one of the most controversial provisions of the entire Action Commission Report. The problems are manifold.

i. "De Minimis" percentage

By allowing a defendant less than 25% at fault to be relieved of joint liability, the drafters forevermore allow further legislative or judicial "tinkering" on the issue of what is a "de minimis" percentage. Some future legislature may believe 50% or 75% fault should be the threshold. The plaintiff will have lost forever the right to full compensation.
ii. Hypocrisy of Distinguishing between Economic and Non-Economic Damages

The majority has concluded that economic damages will remain eligible for joint contributions. By design, however, non-economic damages will not be fully compensable in certain situations. What is the basis of the distinction? Other than experience, what is the political compromise that permits non-economic damages to go unrecovered? The majority offers no rationale for this distinction.

Are plaintiffs with no actual damages less worthy of recovery? If a plaintiff is poor, unemployed, or a housewife with little economic loss, why should the law say their pain and suffering injury is less worthy of full compensation?

The policy adopted by the majority of discrimination against non-economic loss is simply indefensible and lacks any rational explanation.

iii. “But for Test”

From the earliest beginnings of the common law, it has been a goal of the tort system to fully compensate a plaintiff for his injuries. Today, even with a system of fault allocation, the law in the vast majority of states recognizes joint contribution of tortfeasors.

Allocation is a convenient and logical means of dividing responsibility. It was not designed to allow a plaintiff to go uncompensated in cases involving a non-solvent defendant.

In most cases, we should recall that but for the action of a 10% at fault defendant, the plaintiff would not have even been injured. Each defendant is in reality 100% responsible for the plaintiff’s harm in that but for the negligence of each defendant, including a 10% defendant, the harm would not otherwise have occurred. In other words, each defendant is a proximate cause of the plaintiff’s harm.

In a typical auto case, e.g., there may have been no accident or harm at all but for the 10% at fault defendant who crossed traffic.

Some argue it is unfair for a 10% defendant to be forced to pay the entire award where a 90% co-defendant is insolvent. How fair is it, however, for the plaintiff to receive 10% recovery for all his harm? To balance any apparent unfairness, the majority has recommended a gross unfairness. We are now deviating from the tort law’s historic goal of providing full compensation to an innocent victim.

iv. Insurance Impact

To consider joint and several liability devoid of any insurance discussion is to ignore the reality of the tort system as both a compensation and deterrence mechanism. A distinct minority of states have eliminated or modified joint and several liability. What effect has this had on insurance rates? None.

In Iowa, Kansas, and New Mexico, its prior elimination has yielded no savings to policyholders, nor has insurance been more available in 1986.

Aetna and St. Paul have admitted in filings before state insurance departments that elimination of joint and several liability will have negligible, if any, impact on insurance premiums.

If there were not low policy limits on many of the typical automobile insurance policies or if there were adequate compulsory insurance levels, perhaps the change suggested in recommendation #6 would not be so harmful. But the facts of coverage being what they are, the new recommendation greatly increases the prospect that the plaintiff will go uncompensated in the dual defendant auto case.

SECTION E—Attorneys Fees

7. Written Agreements

I commend written fee agreements.

However, this provision further suggests that a client should not sign any contingent fee agreement until after the passage of some arbitrary “cooling off” period. In practice, what does this mean to a client?

It can mean that a client has no representation at a time when most needed. While the claims adjuster or defense attorney gathers evidence or offers a settlement to a plaintiff, the plaintiff is unable to secure representation due to this provision which purports to confer valuable rights to the plaintiff. As written, the provision is poorly conceived and drafted.

The provision can have other unanticipated effects on the bench and bar. At a time when the bar is wrestling with the problems of attorneys rushing to the scenes of disasters, this provision has the obviously unintended effect of aiding and abetting the parachutist who descends on the site.

In mass disaster and other cases, the discount lawyer is encouraged to underbid or cheapen the practice by bartering his services during the cooling-off period a more scrupulous lawyer is abiding by. Quality and experienced lawyers are disadvantaged by more eager, bargain-basement lawyers promising lower fees without regard to any ability to deliver competent legal services. This will do the public a great disservice.

8. Percentage of Gross Recovery

My only quarrel here is with the manner of overseeing attorneys fees.

Historically, the bar or other disciplinary mechanism has had the power to regulate excessive fees. In this recommendation, trial courts are asked to oversee fee arrangements. I believe there is no evidence whatever that the present system does not work, and that regulation of fees should be left to the bar and highest courts of the States.

9. Submit fees to trial judge in camera.

(i) This is an anti-lawyer provision because it infers all tort lawyers, plaintiff and defendant, cannot be trusted to negotiate a fee contract with their client, one on one. It is detrimental to the attorney-client relationship, creating mistrust from the outset.

(ii) This provision will create an additional and significant burden upon the trial courts, possibly necessitating evidentiary fee hearings in all cases that go to judgment.

(iii) This provision omits settlements, so fees from such cases are unwittingly exempt. Arguably, fees in settlements may need even more reg-
ulation. Such a provision also creates pressure on plaintiff and defense attorneys to settle and thus avoid disclosure of fee arrangements.

(iv) State Rights

In many states, the power to review the competence of attorneys is placed with a Bar Disciplinary Committee. The Action Commission took no evidence on the frequency, or lack thereof, of Bar actions and discipline. I feel that supervision of attorneys' fees is properly left to the disciplinary committees or highest courts of the states.

19(b) Licensed Professionals

This section is amorphous and poorly drafted. The provision applies to professionals of all types, engineers, hairdressers, etc., etc. It seems that a literal reading would require a multitude of boards set up to discipline a great variety of professionals.

The worst feature of this section is that it can be construed to take the task of disciplining lawyers away from disciplinary boards and high courts of states.

February, 1987

The Commission, new unit within the Division, is charged with collecting, maintaining, disseminating information involving the support of law related activities; 2) recommendations for assistance on the creation and IOLTA programs; 3) liaison with state IOLT programs; and, 4) overseeing Clearinghouse which assistance on IOLTA sign and operation.

Working within the jurisdiction, the Commission has important projects throughout the national assessment survey involving all state IOLT programs. The results reveal areas facing IOLT program insurance and marketing.

With this awareness, the Commission can now take steps to present these needs. Additi
RESOLVED, That the American Bar Association reaffirms its opposition to legislation that places a dollar limit on recoverable damages that operates to deny full compensation to a plaintiff in a medical malpractice action.

RESOLVED, That the American Bar Association recognizes that the nature and extent of damages in a medical malpractice case are triable issues of fact (that may be decided by a jury) and should not be subject to formulas or standardized schedules.

FURTHER RESOLVED, That the ABA opposes the creation of health care tribunals that would deny patients injured by medical negligence the right to request a trial by jury or the right to receive full compensation for their injuries.
REPORT

As part of an ongoing effort to “reform” that portion of the civil system of justice that deals with the liability of health care providers, proposals are being discussed that would, through the implementation of so-called “Health Courts,” remove medical negligence litigation from the court system where cases are heard by judges and/or juries in favor of an administrative procedure where malpractice cases would be heard by health care tribunals who have expertise in health care. The concept of having a specialized court hear medical malpractice cases along the lines of what is being proposed by groups such as the Progressive Policy Institute and Common Good is highly problematic.

The effort to create a separate administrative Health Court system runs counter to a number of established principles of the American Bar Association (ABA). These policies will be discussed below. As a result, the Standing Committee on Medical Professional Liability urges the ABA House of Delegates to adopt a resolution that would urge Congress to oppose enactment of any legislation that would lead to the creation of such Health Courts.

The central feature of any Health Court procedure is the requirement that any medical negligence case be tried before a tribunal that is separate from the civil system of justice. Most often, these proposals suggest that such cases be tried before one or more persons who have specialized knowledge in medicine. For example, Common Good has a widely-disseminated proposal that would create a system that has features that are found both in “No Fault” or Workers’ Compensation systems. As of the writing of this report, the Common Good proposal is apparently still evolving and must be viewed as a work in progress. The most recent evolution is the suggestion that patients could “opt in” to the systems and waive their right to a jury trial. This development would be particularly troubling should the “opt in” actually prove to be a mandatory part of health care agreements that HMO’s, insurers, hospitals and health care providers might require their patients to sign before allowing treatment. It has long been ABA policy to endorse the use of alternatives to litigation, such as arbitration, for resolution of medical malpractice disputes under circumstances whereby the agreement to arbitrate is entered into only after a dispute has arisen and is entered into on a voluntary basis. Thus, any “opt in” provision would necessarily have to be transparently voluntary in order to pass muster by this organization.

In addition the Progressive Policy Institute (PPI), in a February 2005 Policy Report, which was co-authored by Nancy Udell, the Director of Policy and General Counsel of Common Good, proposed that “[m]alpractice cases should no longer be heard in civil courts. Instead they could be handled in administrative processes overseen by the states. The system would be similar to the one that handles workers’ compensation claims.” However, unlike under workers’ compensation systems, an injured patient under the Health Courts being proposed would need to prove negligence on the part of the health care provider.

Using the Workers’ Compensation model for medical malpractice cases is inappropriate. In these programs, there is a trade-off of loss of a right to bring an action in court that is counterbalanced by a “guaranteed” award. With Health Courts, the plaintiff gives up the right to bring an action in court for no guarantee of an award.
The PPI/Common Good approach would also dictate that the “specialized judge” retain an expert in order to determine the standard of care, a procedure that is currently left to the parties in malpractice litigation, with the testimony of opposing experts to be weighed by a jury. It also would mandate a schedule of limits on non-economic damages, to be set by an “independent” commission created by Congress. This is directly contrary to existing ABA policies against any limit on pain and suffering damages in tort actions, including medical negligence actions. A schedule would not be appropriate in medical malpractice cases. Would it be fair to award a pre-fixed award for negligence which resulted in a paralyzed hand for a surgeon, or lost or impaired vision for an artist, or lost or impaired hearing for a musician?

Significantly, no proposal for the establishment of Health Courts would require that a plaintiff be permitted a jury trial on his/her claim of medical negligence. This is contrary to the Seventh Amendment of the Constitution of the United States, which preserves the right to trial by jury. It is also against the ABA policy related to juries which was adopted by the ABA House of Delegates in February 2005, which states that “parties in civil matters have the right to a fair, accurate and timely jury trial in accordance with the law.” There is also substantial doubt as to whether such a procedure would violate the due process clause of the United States Constitution.

Empirical studies have demonstrated that juries are competent in handling medical malpractice cases. Duke University School of Law Professor Neil Vidmar’s 1995 extensive study of juries found that:

- [o]n balance, there is no empirical support for the propositions that juries are biased against doctors or that they are prone to ignore legal and medical standards in order to decide in favor of plaintiffs with severe injuries. This evidence in fact indicates that there is reasonable concordance between jury verdicts and doctors’ ratings of negligence. On balance, juries may have a slight bias in favor of doctors.

In addition, he concludes at page 259 of his 1995 publication that research “does not support the widely made claims that jury damage awards are based on the depth of the defendants’ pockets, sympathies for plaintiffs, caprice, or excessive generosity.” A survey of studies in the area by University of Missouri-Columbia Law Professor Philip Peters, Jr. published in March 2002 likewise found that:

- [t]here is simply no evidence that juries are prejudiced against physician defendants or that their verdicts are distorted by their sympathy for injured plaintiffs. Instead, the existing evidence strongly indicates that jurors begin their task harboring sympathy for the defendant physician and skepticism about the plaintiff.

A July 2005 Illinois study conducted by Professor Vidmar also concluded that there was no basis for the argument that runaway verdicts were responsible for increases in malpractice premiums.

Janice Mulligan
Chair, Standing Committee on Medical Professional Liability

February 2006
3 See, e.g., ABA Resolution opposing “ceilings on awards” in malpractice actions, ABA House of Delegates, February 1978; and the ABA Resolution opposing any “ceilings on pain and suffering” damages, ABA House of Delegates, February 1987.
4 The Seventh Amendment reads: “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.” U.S. CONST. amend. VII.
5 ABA Policy, Principle 1, “The right to jury trial shall be preserved,” adopted by the House of Delegates, February 2005.
RESOLVED, That the American Bar Association urges Congress to address foreseeable preemption issues clearly and explicitly when it enacts a statute that has the potential to displace, supplement, or otherwise affect state tort law by:

(1) clearly and explicitly stating when it intends to preempt state tort law; and,

(2) clearly and explicitly setting forth the extent of the preemption of state tort law it intends, and the extent to which, through a savings clause or other means, it intends not to preempt state tort law or related common law duties.

FURTHER RESOLVED, That the American Bar Association urges Congress, when making any decision on whether to preempt state tort law, to take into account the historic responsibility States have exercised over the health and safety of their populace and to balance the competing concerns relating to preemption.

FURTHER RESOLVED, That the American Bar Association supports the principles and requirements of Executive Order 13132 on Federalism regarding federal agency actions that may have preemptive effect on state tort law.

FURTHER RESOLVED, That the American Bar Association urges the President to further require that each Federal agency subject to Executive Order 13132:

(1) State in any proposed rulemaking whether it intends or believes the rulemaking to have the effect of preempting state tort law;

(2) Explain the scope of the anticipated preemptive effect on state tort law and why such preemptive effect is appropriate or legally required; and

(3) Provide

(a) factual support in the record for any assertions that state tort law has in the past interfered or is currently interfering with the operation of federal laws or regulations, or
(b) reasoning to support any predictions or concerns that state tort law would in the future interfere with the operation of federal laws or regulations.

FURTHER RESOLVED, That the American Bar Association urges the President to improve agency compliance with Executive Order 13132 by requiring inclusion of an entity independent of the agency regulatory office with sufficient autonomy, authority, and resources to conduct an effective review in the rule-making process before a preemptive rule is adopted.

FURTHER RESOLVED, That the American Bar Association urges independent regulatory agencies, which are not covered by Executive Order 13132, to comply voluntarily with that order regarding federal actions that may have preemptive effect on state tort law and follow the procedures set out in the fourth and fifth RESOLVED clauses above.
Introduction

The American Bar Association (ABA) has a longstanding commitment to certain core principles such as working for just laws and a fair legal process, assuring meaningful access to justice for all persons, and preserving the independence of the legal profession and the judiciary. A task force is occasionally created to address a particular issue as a short-term assignment. In this instance, the Task Force on Federal Agency Preemption of State Tort Law was commissioned to review the ABA’s policies concerning federal preemption in the field of tort law, including products liability law, and to make such recommendations to the House of Delegates regarding preemption that it deems appropriate.1

ABA Policies Relating to Preemption

House of Delegates policies have consistently recognized the states’ traditional role in regulating tort law. In 1981, the House of Delegates opposed legislation such as a pending bill that would impose a Model Products Liability proposal as federal law. A 1983 resolution restated the ABA’s opposition to broad federal codification of product-liability laws. However, that resolution supported federal legislation that: 1) addresses tort claims related to occupational diseases (e.g., from asbestos) with long latency periods that threaten the solvency of a significant number of manufacturers and impose excessive burdens on the judicial system, and 2) allocates product liability risks between the federal government and its contractors and provides indemnity against those risks. A 1988 resolution recommended that Congress address foreseeable preemption issues clearly and explicitly when it enacts statutes affecting regulated conduct. It also recommended that each federal agency (1) establish procedures to timely consider the need to preempt state law or regulations that harm federally protected interests, and clearly and explicitly address preemption issues in regulatory decision-making, (2) engage, when practicable, in informal dialogue with state authorities in an effort to avoid any foreseeable conflict with state laws or regulations, and (3) provide affected states and interests with notice and an opportunity for appropriate participation in the proceedings when proposing to act through adjudication or rulemaking to preempt a state law or regulation. A 1995 resolution reaffirmed the continued right of the states and territories to regulate product liability law and opposed federal legislation abolishing strict seller liability.

1 The Task Force had its genesis in a letter to Congress supporting the Medical Device Safety Act (S. 3398 and H.R. 6381), sent by then-ABA President H. Thomas Wells Jr. Because some ABA members suggested that a review of ABA Preemption policies was in order, President Wells appointed the Task Force, and President Carolyn Lamm renewed the Task Force’s mandate. After reviewing those policies, the Task Force determined that no change in the policies was required and decided to focus on procedural approaches to preemption that might lessen confusion and uncertainty about when federal law preempts state law.
Our Federalism

"Preemption" is the displacing effect of a federal law or regulation on state law. The concept and its proper operation are fundamental in our system of federalism.

The law primarily governing our communities is state law, including state constitutions, common law, statutory law and administrative law. The primacy of state law flows from the historical fact that the original states, as sovereign entities, pre-existed the federal union. Upon adoption of the Constitution, the federal government, within the spheres of its delegated authority, was given superiority over state law. At the same time, respect for state authority, as a matter of comity, is part of the federal equation, giving due recognition to the Framers' solution to creating a union of previously sovereign states in which they "split the atom of sovereignty" between the federal and state governments. \textit{U.S. Term Limits, Inc. v. Thornton}, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

This relationship is expressed in two Constitutional provisions--the Supremacy Clause (Art. VI, Cl. 2) and the Tenth Amendment. Under the Supremacy Clause, the "Constitution and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land ... any Thing ... to the Contrary notwithstanding." Under the Tenth Amendment, "The powers not delegated to the United States ... are reserved to the States respectively, or to the people."

A perennial problem in our federal system is that of defining the boundaries between federal law on various subjects and state law dealing with the same general subjects. The boundaries should be maintained as clearly as reasonably possible so that legal rights and responsibilities are as clear as reasonably possible from the viewpoint of our citizens and their activities, including business activities. They are entitled to know, as definitely as practicable, what is "the law" as a whole, including when what constitutes the relevant law is a shared federal-state responsibility.

Forms of Preemption

In general concept, the boundary is clear: Within the federal government's lawful sphere, federal law may "preempt" state law—that is, it may displace the state law that would otherwise govern—depending on the content and purpose of the federal provision. The preemption can be "express" under the terms of a provision in the Constitution. For example, Art. I, Sec. 10 provides that "No State shall...coin money." The displacement can be express in a federal statute, for example the preemption provision in ERISA or in the Medical Device Amendments of 1976. The displacement may also be partial or limited, by express terms of the statute, as in the Hazardous Materials Transportation Safety and Security Reauthorization Act of 2005 (119 Stat. 1895), which authorizes states to supplement the federal regulatory scheme as long as certain conditions are followed.

The preemption can be "implied," i.e., the federal law must be interpreted to displace some rule of state law. An historical example is the immunity of federal instrumentalities from state taxation, as in \textit{McCulloch v. Maryland}, 17 U.S. 316 (1819). Federal displacement can cover
a "field" that is within federal regulatory competence. An example of field preemption is the "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels ... that may be necessary for increased protection against hazards to life and property, for navigation and vessel safety, and for enhanced protection of the marine environment," which is regulated by the Ports and Waterways Safety Act of 1972. See United States v. Locke, 529 U.S. 89 (2000). More common than field preemption is "implied conflict preemption," which can be of two types—"direct conflict" preemption and "purposes and objectives" preemption. The former occurs when a regulated person or entity cannot comply with both federal and state law at the same time. The latter occurs when a state law interferes with the full accomplishment of the purposes and objectives of Congress. For instance, in Gibbons v. Ogden, 22 U.S. 1 (1824), a New York law limiting which steam boats could travel within the state conflicted with a federal statute licensing steam boats for the coastal trade. Similarly, a state law that bars its agencies from purchasing goods and services from companies that do business with a particular foreign country (Myanmar) may frustrate Congress' enactment of its own regime of sanctions placed on the country, by prohibiting contracts permitted by the federal act. See Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).2

The various subjects of the Supreme Court decisions and statutes mentioned above suggest the range and pervasiveness of preemption particularly as the federal government has increased its regulatory role over the past century, including the growth of federal instrumentalities, assertion of authority over commerce in all shapes and forms, and enhancement of legally recognized personal rights and relationships. In fact, preemption considerations arise nearly every time Congress adopts a statute, or ratifies a treaty, or empowers a regulatory agency to issue regulations, or when the Executive exercises its regulatory authority under Article II or statutes enacted by Congress.

However, federal authorities, in exercising their powers, often have given inadequate attention to questions of preemption. At times they have given no attention to these questions; at other times they have addressed them in ambiguous or confusing ways, without input from the public or the regulated industries. Agencies, even with unique technical or institutional expertise to recognize how federal objectives implemented through their regulations could be compromised by state law, have sometimes asserted preemption without express authority or public participation through notice and comment when promulgating rules. Moreover, neither Congress nor the federal agencies regularly follow up to examine effects on state law subsequent to a regulatory effort. Even more confusing, federal authority has shifted back and forth over whether preemption applies to the same set of issues.

The proper substantive scope of federal preemption is a broad policy issue. Generally speaking, state law is primarily operative and should be assumed to continue in effect along with federal law in the same field. In some areas, federal and state regulation may complement each other and may further the public interest, while, in other areas, national uniformity may provide a public benefit and needed clarity to those who are regulated. When there is federal preemption, the federal law clearly is the supreme law of the land. The preemption it mandates can be plenary

3 Foreign agency preemption is beyond the scope of this Task Force's engagement.
or it can be partial. When the interaction of federal law and state tort law claims is at issue, a fact-specific inquiry may be necessary to determine whether federal regulation and the specific action or inaction that forms the basis of the tort claim can properly coexist. It is not possible to make a definite description of what subjects and "fields" and federal laws and regulations should be preemptive -- or to what extent preemption should take place when appropriate. Some observers believe that adoption and administration of federal laws and regulations should be systematically accompanied by regular and careful attention to the resulting relationships between the federal provisions and state law. Others question whether such explicitness is always possible or should be expected, given practical constraints and political realities, as well as limits on the ability to foresee potential conflicts. The Task Force agrees, however, that it is desirable to be explicit about the preemptive effect of federal law when such a course is possible.

Congressional Preemption

The Task Force's study of the issues concerning preemption of state tort law recognizes the critical and usually determinative role played by the Congress. An examination of the case law shows the premium courts put on the clarity and consideration that Congress gives the preemption question. Where such clarity is lacking, courts have come to seemingly inconsistent conclusions about whether state law and state tort lawsuits are preempted. For that reason, the Task Force urges Congress to establish procedures that will appropriately illuminate whether it intends to preempt state law. The Task Force further urges Congress to be mindful and accommodating, in any preemption decision it makes, of the historic responsibility that States have exercised over the health and safety of its populations. These values should be kept in mind when considering the potential benefits that a uniform national approach can sometimes provide, as well as the certainty and clarity preemption can offer to regulated industries regarding their legal obligations, while recognizing the desirability of providing consumers with a “double protection” through state and federal mechanisms.


Just as Congress has explicitly expressed its intention to preempt state law in legislation, it is equally capable of clearly expressing its intention not to preempt state law, including tort
claims. Federal legislation frequently includes “savings clauses” that convey Congress’s intent to preserve the authority of state and local governments to enact parallel requirements that may have additional remedies (e.g., consumer protection laws), to adopt additional or more stringent regulations to fit local conditions (e.g., railroad regulation), or to regulate a specific matter upon the approval of a federal agency (e.g., workplace safety).

Preemption may also be implied and not just a function of congressional expression. Discerning when implied preemption applies has been a judicial task fraught with uncertainty. As discussed briefly above, determinations of implied preemption consider: 1) whether Congress “evidences an intent to occupy a given field,” Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984), 2) whether compliance with both federal and state requirements constitutes “a physical impossibility,” Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or 3) whether state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Hines v. Davidowitz, 312 U.S. 52, 67 (1941). The first type of preemption, “field preemption,” rarely affects state common-law claims; the other two forms of implied preemption may have an impact on the continued viability of common-law claims that would impose obligations upon a party that is also required to follow federal regulations or other mandates on the same issue.

Even when legislation expressly addresses preemption and includes a savings clause, the Supreme Court has found that ordinary principles of conflict preemption continue to apply. See Geier v. American Honda Motor Co., 529 U.S. 861, 869-74 (2000). As Justice Breyer recognized, “one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict” between state and federal law. Id. at 884.

In addition, the Supreme Court has recently described “the presumption against preemption” as a second cornerstone of preemption doctrine. Levine, 129 S.Ct. at 1194-95. This presumption is based on the “assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Id., quoting Lohr, 518 U.S. at 485 (additional quotation omitted). In approaching the interpretational task of determining preemptive effect, the Supreme Court has often applied a “basic presumption against pre-emption,” particularly in fields which the states have traditionally occupied. See, e.g., Bates, 544 U.S. at 449. The presumption, along with the tools used to imply preemption, further highlights the importance courts place on a clear expression of congressional intent. A clear indication of intent is also critical to preemption by agency determinations, as the Court has allowed agencies to initiate preemptive effect as long as it is “acting within the scope of its congressionally delegated authority.” City of New York v. FCC.

---

1 Some courts have held that this presumption against preemption may be weakened or “disappear” in cases that are outside the realm of public health and safety, see, e.g., Wachovia Bank, N.A. v. Watters, 431 F.3d 556 (6th Cir. 2005), aff’d, 550 U.S. 1 (2007), that fall in fields of regulation that have been substantially occupied by federal authority for an extended period of time, such as financial services, see, e.g., Silvas v. E-Trade Mortgage Corp., 514 F.3d 1001, 1004 (9th Cir. 2008), or that involve interpretation of a statute that includes an express preemption clause where the words of the statute itself may provide the best evidence of legislative intent of the scope of preemption, see, e.g., Altria Group, Inc. v. Good, 129 S. Ct. 538, 556-57 (2008) (Thomas, J., dissenting, joined by Roberts, CJ, and Alito and Scalia, JJ.) (citing cases in which the court has not raised a presumption against preemption).
Moreover, as the Court has recognized, agency positions on the preemptive effect of federal law are "entitled to respect" and are generally accorded "substantial deference." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 67-68 (2002).

What is clear from preemption jurisprudence is that Congress has the authority to define the existence, scope, and import of preemption, but has often left those questions unanswered. The courts have plainly struggled to divine congressional intent in those circumstances. To the extent practicable, Congress should consider exercising its authority to guide the courts with the clearest possible expression of its purposes and of the interplay of its enactments and federal regulations promulgated pursuant to congressional authority with those of the states, their regulatory authorities, and state tort systems.

**Federal Agency Preemption**

In 1999, President Clinton promulgated Executive Order 13132 on federalism to provide guidance to agencies with respect to their actions that have effects on states.\(^4\) It announced a general policy that agencies should not take actions limiting the policymaking discretion of states unless the national activity was appropriate in light of the presence of a problem of national significance. In addition, it imposed special requirements on agencies with respect to preemption of state laws. It called upon agencies not to construe statutes or authorizations in statutes to preempt state law in the absence of an express preemption provision, "some other clear evidence that the Congress intended preemption of State law," or "where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute."\(^5\) If preemption was desirable, it was to be restricted to the minimum level necessary to achieve the purposes of the statute. Finally, the Order prohibited agencies from issuing regulations that have the effect of preempting state law unless, to the extent practicable, the agency consults with state and local officials early in the process and in the preamble describes the consultation that took place, the concerns raised by the state and local officials, and the agency’s response.\(^6\) President Bush continued the Order without change.

Despite the Order, some have asserted that executive agencies are not consistently following its directions. For example, when the National Highway Traffic Safety Administration (NHTSA) proposed a rule regarding roof crush-resistance standards, the agency announced its tentative determination that its rule would preempt all conflicting state common-law requirements, yet it stated that the proposed rule did not have sufficient federalism impact to warrant consultation with state and local officials.\(^7\) After this issue was extensively addressed through public comment, NHTSA changed its view with respect to preemption of tort law claims in the final rule.\(^8\) The Food and Drug Administration (FDA), when it adopted a final prescription drug labeling rule with a statement that the rule preempted certain state tort law claims, noted that its proposed rule had not proposed preemption (and consultation with state and local officials required by E.O. 13132 had not taken place).

---

\(^5\) See id., at § 4, 64 Fed. Reg. at 43257.
\(^6\) See id., at § 6(c), 64 Fed. Reg. at 43258.
\(^7\) See 70 Fed. Reg. at 49245.
\(^8\) 74 Fed. Reg. 22348, 22380-83 (2009)
Others note that there may be instances in which an agency proposes a rule without expressing a preemptive effect, but later learns through comments received that the continued application of state law in the area at issue would conflict with the rule. In such instances, the Task Force recognizes an agency must retain the flexibility to state a preemptive effect in the final rule.

E.O. 13132, like all modern executive orders directed to agencies, contains a provision declaring that its mandates are not subject to judicial review. Consequently, the only enforcement derives from the President himself or the Office of Management and Budget, which has certain oversight authority under the Order.

Shortly after taking office, on May 20, 2009, President Obama issued a memorandum to the Heads of Executive Departments and Agencies on preemption. In it, he affirmed his commitment to E.O. 13132 and reminded agency heads of the need for a sufficient legal basis to support regulations intended to preempt state law. President Obama then provided three specific instructions. First, he required that agencies should not include in regulatory preambles statements that the department or agency intends to preempt State law through the regulation except where preemption provisions are also included in the codified regulation. Second, agencies should not include preemption provisions in codified regulations except where such provisions would be justified under legal principles governing preemption, including the principles outlined in E.O. 13132. Finally, President Obama required agencies to review regulations issued within the past 10 years that contain statements in regulatory preambles or codified provisions intended to preempt State law, in order to decide whether such statements or provisions are justified under applicable legal principles governing preemption. If the agency determines that a regulatory statement of preemption or codified regulatory provision cannot be so justified, the agency should initiate appropriate action.

The American Bar Association has taken positions regarding how agencies should address preemption. In 1988, the ABA recommended that:

Each Federal agency establish procedures to ensure timely consideration of the need to preempt state law or regulations that harm Federally protected interests in the areas of regulatory responsibility delegated to that agency by Congress, and each agency clearly and explicitly address preemption issues in the course of regulatory decision-making; and...

When a Federal agency foresees the possibility of a conflict between a state law or regulation and Federally protected interests within the Federal agency's area of regulatory responsibility, that agency, when practicable, engage in informal dialogue with state authorities in an effort to avoid such conflict; and

When a Federal agency proposes to act through agency adjudication or

---

9 See id., at §11, 64 Fed. Reg. at 43259.
11 Id.
rulemaking to preempt a state law or regulation, that agency attempt to provide all affected states, as well as other affected interests, notice and an opportunity for appropriate participation in the proceedings.

E.O. 13132 is consistent with the ABA resolution. President Obama’s memorandum is likewise consistent with the ABA resolution to the extent it advocates that federal agencies give due respect to federalism principles when engaging in rulemaking activities. Given the age of the current ABA resolution and the recent controversies regarding preemption of state tort law, the Task Force believes it is appropriate to restate the ABA’s position regarding the procedural requirements that agencies should use before attempting to preempt state law — notably, when practicable, adequate prior consideration and affording prior notice-and-comment on any proposal intended to preempt state law. In certain respects, President Obama’s order and memorandum go beyond the ABA resolution, which attempted to be neutral regarding the appropriateness of preemption. The new proposed resolution would retain that position of neutrality.

The Task Force proposes that the President require three particular procedures that we believe are critical before an agency regulation should be able to preempt state law. An executive agency should first state in any proposed rulemaking whether it intends or believes it to have a preemptive effect, second explain the scope of the anticipated preemptive effect and why it is necessary, and third provide factual support in the record for any assertion that state law has interfered or is interfering with the operation of federal law and reasoning to support predictions or concerns that state tort law would interfere with the operation of federal laws or regulations.

The Task Force believes that in order to ensure compliance with E.O. 13132, it is desirable that an entity independent of the agency regulatory office that has sufficient autonomy, authority, and resources conduct a review of the rule-making process before preemption is adopted. The Office of Information and Regulatory Affairs (OIRA) in OMB already reviews all proposed and final executive agency regulations under E.O. 12866, and the Department of Justice’s Office of Legal Counsel can issue legal interpretations that are binding on other executive agencies. Such an independent entity might be OIRA, an office in the Department of Justice, or simply an office in the agency proposing the rule if that office has sufficient autonomy, authority, and resources for effective review. The Recommendation urges the President to consider requiring such review.

Because Executive Order 13132 does not apply to independent regulatory agencies and the President has traditionally not directed those agencies to take particular actions, the resolutions aimed at reinforcing the provisions of the order and recommending that the President direct certain actions would not apply to independent regulatory agencies. Those agencies, however, also adopt rules that may have preemptive effect, and the measures recommended for executive branch agencies when they engage in rulemaking intended to have preemptive effect would be equally beneficial if utilized by independent regulatory agencies. Accordingly, the Task Force recommends that independent regulatory agencies voluntarily follow the procedures of Executive Order 13132 as well as the procedures recommended in paragraphs 1(a)-(c) in the preceding resolution — explaining in the preamble of a proposed rule why preemptive effect is necessary; providing factual support in the record for any assertions that state tort law has
interfered or is interfering with the operation of federal law; and providing the reasoning to support any predictions or concerns that state tort law would in the future interfere with the operation of federal laws or regulations.

The procedures set out in the recommendation are limited to preemption of state tort law. The Executive Orders of Presidents Reagan (E.O. 12512) and Clinton (E.O. 13132), and the August, 1988 ABA policy on preemption, were not so limited, but the task force's mission was only to consider preemption of state tort law. The limitation of this recommendation to tort law is not intended as a statement that the procedures are necessarily so limited, but the propriety of application to other areas of the law was not explored by the task force.

In order to develop its recommendation and report, the Task Force on Federal Agency Preemption of State Tort Laws held numerous meetings and conference calls. It reviewed a large number of resources, many of which are found on its website at the following link: http://www.abanet.org/dch/committee.cfm?com=BG108100

On May 29th, 2009, the Task Force hosted a meeting attended by two distinguished presenters, Professor David Vladeck and Attorney Bert Rein, who addressed the policy reasons for or against preemption of state tort law by administrative agencies, including when and under what circumstances preemption is desirable.

On October 1, 2009, the Task Force hosted a public forum in Washington, DC with representatives from eight organizations in order to obtain the views of the organizations on federal agency preemption of state laws. The entities represented at the forum were: the Alliance for Justice, the American Association for Justice, the Chamber of Commerce's Institute for Legal Reform, the Defense Research Institute, PhRMA, the Product Liability Advisory Council, Public Citizen and the Public Justice Foundation. A video of the program is found on the website of the Task Force.

The roster of the Task Force members is attached to this report as Appendix "A." The Task Force also benefitted from the active participation of Judge Gregory Mize, currently a Fellow at the National Center for State Courts."

Respectfully submitted,
Edward F. Sherman
Chair, Task Force on Federal Agency Preemption of State Tort Laws
August 2010
Appendix A
Task Force on Federal Agency Preemption of State Tort Laws

Chair:
Professor Edward Sherman, Chair
Tulane University School of Law
New Orleans, LA

Members:
Peter Bennett, Esquire
Bennett Law Firm PA
Portland, ME

Elizabeth Cabraser, Esquire
Lieff Cabraser Heimann et al LLP
San Francisco, CA

The Honorable Raoul G. Cantero III
Supreme Court of Florida
Miami, FL

Hon. C. William Frick
Maryland House of Delegates
Annapolis, MD

Professor William Funk
Lewis & Clark Law School
Portland, OR

Clifford E. Haines, Esquire
Haines & Associates
Philadelphia, PA

Professor Geoffrey C. Hazard, Jr.
UC Hastings Law School
San Francisco, CA

Mary Campbell McQueen, Esquire
National Center for State Courts
Williamsburg, VA

Robert S. Peck, Esquire
Center for Constitutional Litigation
Washington, DC

R. Harrison Pledger, Jr., Esquire
Pledger & Associates PLC
Chantilly, VA

Stephanie M. Rippee, Esquire
Baker Donelson et al
Jackson, MS

Timothy S. Tomasik, Esquire
Clifford Law Offices
Chicago, IL

Richard Turbin, Esquire
Turbin Richard
Honolulu, HI

Howard T. Wall, III, Esquire
Capella Healthcare, Inc
Franklin, TN

Lisbeth Ann Warren, Esquire
Johnson & Johnson
New Brunswick, NJ
RESOLVED, That the American Bar Association supports the development and use of evidence-based, clinical, or medical practice guidelines or standards regarding patient care and safety that are created by independent organizations comprised of experts, recognizing the need to incorporate updates on a continuous basis and further recognizing that such guidelines are not necessarily synonymous with the applicable standard of care in any particular jurisdiction;

FURTHER RESOLVED, That the ABA opposes federal or state legislation that provides that a healthcare provider is not negligent, or is presumptively not negligent and is therefore not responsible for an adverse outcome on the sole basis that the healthcare provider followed or practiced in conformity with, evidence-based, clinical or medical practice guidelines or standards.

FURTHER RESOLVED, That the ABA opposes federal or state legislation that provides that a healthcare provider is negligent, or is presumptively negligent and is therefore responsible for an adverse outcome on the sole basis that the healthcare provider failed to follow or failed to practice in conformity with, evidence-based, clinical or medical practice guidelines or standards.
Contingent Fees

Keith A. Hebeisen, Esq.
Clifford Law Offices, P.C.
Chicago, Illinois
kah@cliffordlaw.com

Steven B. Lesser Esq.
Becker & Poliakoff, P.A.
Ft. Lauderdale, Florida
slesser@becker-poliakoff.com

NO money, mounting bills, can't work.
Every Month

bill by the hour
for attorney’s work

+ 

costs

What is a Contingent Fee Agreement?

• A contingent fee is calculated as a percentage of the amount recovered for the client.
• Attorney paid nothing unless she succeeds in recovering money for a client.
• Lawyer also pays for and assumes responsibility for all costs associated with investigating and prosecuting the case.
• Client usually not obligated to reimburse the attorney for advanced costs.
• Very few plaintiffs have financial resources to pay attorneys’ fees and costs.
• Being paid for legal services and recouping substantial advanced costs hinges entirely upon a lawyer’s success.
• No guarantee of recovery in any case.
• Financial risk associated with contingent-fee arrangements is real. Banks won’t touch.
Purpose and Benefits of Contingent Fees

• Access to the Legal System for the Injured
  - “Contingent fees provide access to the courts; and no justification exists for imposing special restrictions on contingent fees in medical malpractice actions.”
    (Resolution of the ABA House of Delegates, February 1986).
  - Even un-injured middle class Americans cannot bear the substantial up-front costs of a suit.
  - Once injured, even those few previously able to finance attorney fees and costs of a claim no longer can do so.
  - Hospitals and large-scale health corporations have seemingly limitless medical and financial resources.
  - Contingent fees “even the playing field” for injured patients.

• Contingency Fees Align the Interests of Attorney and Client
  - Lawyers who are willing to bear these up-front costs and risk have a vested interest in a successful outcome.
  - The contingent-fee attorney is a true advocate for a client’s cause.

• Improves Safety and the Quality of Medical Care
  - Without access to the courts, a patient’s ability to effectively address medical errors and shed light on unsafe practices is diminished.
  - If patients can not obtain legal representation, there will be a reduction in legal liability in meritorious cases, which stalls the progressive development of quality medical care.
Section 5 of H.R.5

- In no event shall the total of all contingent fees for representing all claimants in a health care lawsuit exceed the following limits:
  - Forty percent of the first $50,000 recovered by the claimant(s)
  - Thirty-three and one-third percent of the next $50,000 recovered by the claimant(s).
  - Twenty-five percent of the next $500,000 recovered by the claimant(s).
  - Fifteen percent of any amount by which the recovery by the claimant(s) is in excess of $600,000.

Section 5 of H.R.5

- Limitations in this section shall apply whether the recovery is by judgment, settlement, mediation, arbitration, or any other form of alternative dispute resolution.
- Court is permitted to “authorize or approve a fee that is less than the maximum permitted under this section”.
Task Force On The Contingent Fee

American Bar Association
Tort Trial & Insurance Practice Section

Objective:
*Whether excessive medical malpractice litigation exists as well as excessive contingent fees*

Report Issued on September 20, 2004

Task Force Members

- Steven B. Lesser (Chair), Shareholder, Becker & Poliakoff, P.A., Ft. Lauderdale, Fla
- Edward R. Blumberg, President, Deutsch & Blumberg, P.A., Miami, Fla
- Janice P. Brown, Principal, Brown Law Group, San Diego, Ca
- Thomas A. Demetrio, Shareholder, Corboy & Demetrio, P.C., Chicago, Il
- Lewis H. Goldfarb, Goldfarb Associates, LLC, New York, NY
- Kim D. Hogrefe, Attorney Managing Director, Chubb & Son, Warren, NJ
- Perry K. Huntington, Attorney and Senior Vice President, AIG Technical Services, Inc., New York, NY
- Robert Johnson, Senior Counsel, McDonald's Corporation, Chicago, Illinois
- Daniel M. Klein, LLP, Atlanta, Ga
- Marc S. Moller, Partner, Kreindler & Kreindler, LLP, New York, NY
- Professor Charles M. Silver, University of Texas Law School, Austin, Tx
- Professor Patrick E. Longan, Mercer Law School, Macon, Ga (Reporter)
- Professor D. Christopher Wells, Mercer Law School, Macon, Ga (Reporter)
Presentations

• Academics
• Legislators
• General Counsel of Medical Associations
• Medical Malpractice Plaintiff and Defense Lawyers

Stirring Up Mischief

• Sandra Mortham, Executive VP and CEO of the Florida Medical Association quoted as saying:
  “The contingent fees limited by a proposed Florida Constitutional Amendment should be enough for the greedy Trial Lawyers”
• Before a Legislative Panel: “I do not feel that I have the information to say whether or not there are frivolous lawsuits in the state of Florida”
Conclusion of the Task Force

• Limitations on Contingent Fees Is a Bad Idea

Urban Legend Debunked!

• No Data To Support that Pursuing Non-Meritorious Cases = Big Pay-Off To Lawyers
• Financial Investment Alone Is A Deterrent
• Medical Malpractice Case Worth $250K “Untakeable”
Limiting Contingent Fees Has No Impact On Health Care of Patients

- Premium Increases Not Due to Lawsuits
- Improved Medical Technology
- Higher Patient Expectations
- Longer Human Lifespan
- Congressional Budget Office Study Shows Caps Do Little to Reduce Defensive Medicine
- More Tests=Increased Risk To Patients

The Real Story

- Effort by medical profession to limit liability
- Facts show that there has never been a malpractice explosion
- Study shows 2% of people injured by medical error ever file a claim
- Why the hype????
Contingent Fees Do Not Increase Litigation And Do Not Encourage “Frivolous” Suits

- Prosecuting medical malpractice lawsuits is risky and extremely costly.
- Attorney must prospectively meticulously evaluate the potential merit of the case, anticipated costs, and the realistic recovery if successful.
- Contingent fees deter the filing of non-meritorious, or so-called “frivolous” cases.
- With payment for their services and recoupment of the costs hinging entirely upon successful recovery, lawyers know not to file non-meritorious cases which can lead to huge financial losses.

What About the Rights of Patients?

- Right to Counsel of Choice
- Caps Squeeze Lawyers Out of Malpractice Litigation
- Leaves Victims Without Representation
- Florida Supreme Court Justice Pariente: “the ceiling on contingency fee percentages would discourage the participation of knowledgeable and experienced counsel”
The One Way Street - Unfair

- No Limit on Defense Lawyer Fees
- No Limit on Number of Lawyers to Defend
- “Not allowed to use a lawyer whose market valuation is equivalent to those who might represent the defense.”

Contingent Fee Caps Hurt Patients

- Fee Caps Limit Access
  - Reduces the number of lawyers available
  - Attorneys will turn down meritorious cases.
  - Caps not only fail to help patients - they hurt patients.
HR5 “Look Back” Is Risky Business

- Power to adjust fee based upon “justice and equity” is too broad.
- Risk Undertaken at the Outset of the Case May Change (Some better or worse)
- Changes in the Law
- Further Disincentive for Counsel To Take a Malpractice Case-Money at Risk!

Conclusion/Reality Check

- No Data to Justify Caps
- Ethical Requirements Deter Legal System Abuse
- Financial Risks Serve To Deter Non-Meritorious Cases
- Constitutional Right to Counsel and Access to the Courts Must Prevail Over Other Concerns
Contingent Fee Caps Are Contrary to Public Policy

• Fee Caps are Arbitrary
• Fee Caps are Contrary to Existing ABA Policy
  – ‘No justification exists for imposing special restrictions on contingent fees in medical malpractice actions.’
  – A sliding scale for contingency fees in medical malpractice litigation may very well reduce total awards for patient-victims by depriving them of representation by a trial lawyer sufficiently skilled at obtaining the highest appropriate award. Mandatory sliding scale systems could also inhibit claimants’ access to the court system by limiting the availability of counsel. And imposing sliding scales only in medical malpractice cases would, in effect, create a different level of skills among available counsel for plaintiffs in medical malpractice cases from those available to claimants in other tort cases.

Contingent Fee Caps Improperly Preempt State Law And Are Contrary to ABA Policy

• “For over 200 years, the authority to determine medical liability law has rested with the states. This system, which allows each state the autonomy to regulate the resolution of medical liability actions within its borders, is a hallmark of our American justice system.”
• “Congress should not substitute its judgment, as it does in H.R. 5, for the systems that have thoughtfully evolved in each state over time.”
Real Life Impact of H.R. 5 Arbitrary Limits on Contingent Fees

- Denies Access to Lawyers
- Meritorious Cases Do Not Get Filed
- No Impact on Filing of Non-Meritorious Cases
- One-sided- No Cap For Defense Lawyer Fees
- Tilts Playing Field In Favor Of Defendants and Insurance Companies
- Hinders Patient Safety
- Improperly Intrudes Into Role of the States
Joint and Several Liability

Keith A. Hebeisen, Esq.
Clifford Law Offices, P.C.
Chicago, Illinois
kah@cliffordlaw.com

Definition

• If an injured person proves that a defendant acted negligently to cause his injury, the defendant must pay all compensatory damages for the injury.
• When two or more persons negligently cause the same injury, each of those persons are both together (jointly) and separately (severally) liable for the entire injury.
• Injured person may recover compensation for the full amount of the injury from any one of those persons.
Underlying Public Policy

• Persons who caused the harm are in the best position to apportion respective responsibility amongst themselves once liability for the injury is decided.
• There is a strong public policy that it is preferable for one negligent party to shoulder the entire burden instead of the innocent victim being under-compensated.
• Joint and several liability prevents under-compensation of an injured party if one of the negligent parties cannot pay his proportionate share of liability.

Contribution

• Contribution involves an apportion of liability between defendants based upon their respective responsibilities.
• Interaction of joint and several liability with contribution serves to ensure both that plaintiffs are compensated fully for their injuries and that defendants can apportion responsibility for those injuries amongst each other.
• Defendant A is found responsible for plaintiff’s injuries and plaintiff can collect for 100% of his injuries from Defendant A.
• If Defendant A claims Defendant B is also responsible, Defendant A can then file a contribution action against Defendant B.
• If A is successful on his contribution claim, B has to pay his share to A, thereby preventing A from having “overpaid.”

Joint and Several Based Upon Multiple Causes of an Indivisible Injury

“Here again is the typical case that two vehicles which collide and injure a third person. The duties which are owed to the plaintiff by the defendants are separate, and may not be identical in character or scope, but the entire liability rests upon the fact that each has contributed to the single result, and that no reasonable division can be made.”
Dean Prosser, Joint Torts & Several Liability.”
(25 Cal. L. Rev. 413)
Joint and Several Liability is a Well-Established and Longstanding Doctrine

- 1771 English case holding that even defendants acting independently were subject to joint, rather than several, liability.
- The United States Supreme Court long ago declared that “[t]he rule is settled by innumerable authorities that if injury be caused by concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone. It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury.” (Miller v. Union Pac. R. Co., 290 U.S. 227 (1933)).

Provisions of H.R. 5 Section 4(d)

“(d) FAIR SHARE RULE.—In any health care lawsuit each party shall be liable for that party’s several share of any damages only and not for the share of any other person. Each party shall be liable only for the amount of damages allocated to such party in direct proportion to such party’s percentage of responsibility. Whenever a judgment of liability is rendered as to any party, a separate judgment shall be rendered against each such part for the amount allocated to such party. For purposes of this section, the trier of fact shall determine the proportion of responsibility for each party for the claimant.” (emphasis added).
Provisions of H.R. 5 Section 4(d)

- H.R.5, Section 4(d) impermissibly limits the liability of each defendant (1) in all healthcare lawsuits(2) to the share of economic and non-economic damages attributable to his or her share of responsibility (3) compared to the responsibility of any other person, including non-parties (4) without allowable reallocation of uncollectable shares.
- Under H.R. 5, if collection can not be made from one or more persons responsible for the injury, the deficiency is shouldered by the injured party.
**Most States Have Joint and Several Liability Laws Different from H.R.5**

- Only 9 states have adopted a rule similar to H.R. 5, i.e., proportionate several liability in the recovery of all damages, with assignment of a percentage of responsibility to non-parties.
- 15 states have retained pure joint and several liability with certain limitations.
- 2 states have retained joint and several liability with reallocation of uncollectible shares.
- 2 states have pure joint and several liability for economic damages and for non-economic damages only if defendant’s fault is at least 25% (ABA “Substantially Disproportionate” Policy).

**The Issue of Joint and Several Liability Should Be Left to the States**

“The reasons for leaving this matter to the law of the applicable jurisdictions include: 1) there is no majority rule on this matter extant today; 2) in addition to the lack of a majority rule, there is a farrago of arrangements in existence, most of which employ some amalgam of joint and several liability and several liability in the case of independent tortfeasors; 3) much of the law in this area is statutory; 4) different foundational perspectives on tort law justify differing resolutions of the appropriate use of joint and several or several liability; and 5) in some cases, other aspects of a local jurisdiction’s law play an important role in the resolution of this question.”
H.R.5, Section 4(d) Improperly Preempts State Law And Is Contrary to ABA Policy

“For over 200 years, the authority to determine medical liability law has rested with the states. This system, which allows each state the autonomy to regulate the resolution of medical liability actions within its borders, is a hallmark of our American justice system . . . the ABA believes that Congress should not substitute its judgment, as it does in H.R. 5, for the systems that have thoughtfully evolved in each state over time.”

- ABA Letter to House Judiciary, February 8, 2011

H.R.5, Section 4(d) Improperly Preempts State Law And Is Contrary to ABA Policy

- The ABA believes that, at the state level, the laws providing for joint and several liability “should be modified to recognize that defendants whose responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff are to be held liable for only their equitable share of the plaintiff’s non-economic loss.”

- While the ABA supports these and other improvements to the tort laws at the state level, it opposes federal preemption of the medical liability laws of the states and territories. Therefore, the ABA opposes Section 4(d) to the extent that it would preempt existing state laws and to the extent that it would apply a proportionate liability rule to all damages, not just the plaintiff’s non-economic damages.”

- ABA Letter to House Judiciary, February 8, 2011
Real Life Impact of H.R.5, Section 4(d)

- Fails to Ensure Injured Persons Are Fully Compensated And Unjustly Shifts the Burden of Uncollectible Shares to Shoulders of Innocent Injured Person
- Improperly Preempts A Wide Variety of State Laws
- Contrary To ABA Policy