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Via Electronic Mail

January 22, 2009

The Honorable Edward M. Kennedy, Chair  
Committee on Health, Education, Labor, and Pensions  
United States Senate  
Washington, DC 20510

The Honorable Michael Enzi, Minority Ranking Member  
Committee on Health, Education, Labor, and Pensions  
United States Senate  
Washington, DC 20510

Dear Chairman Kennedy and Senator Enzi:

I am writing to you on behalf of the American Bar Association and its over 400,000 members regarding health care access. As your committee works to develop health care access legislation, we would like to share with you ABA policies that may be helpful in your efforts. These policies are attached and cover a wide range of issues. They are among a host of policies related to health care access adopted by the ABA and are by no means exhaustive.

We also would like to let you know that the ABA has established a Working Group on Health Care Access Proposals which will review pending and future health care access proposals; develop issue papers to assist policymakers who are drafting health care access proposals; identify experts who might assist policymakers in their consideration of options; and identify policy areas, if any, for which additional ABA policy should be developed. Attached is a list of those ABA entities represented on the ABA Working Group on Health Care Access Proposals. If we can be of help on specific proposals please contact Lillian Gaskin, Senior Legislative Counsel in this office (phone 202-662-1768; email [gaskinl@staff.abanet.org](mailto:gaskinl@staff.abanet.org)).

I specifically want to call your attention to law-related ABA policies in the following areas: legal remedies when a patient has been injured by medical malpractice; legal remedies when a patient has been denied coverage ordered by his or her health care provider; and privacy of medical records. These are briefly described below.

## **I. Legal remedies when a patient has been injured by medical malpractice**

### **a. Proposals to federalize the medical malpractice laws of states and territories or to impose caps on damage recoveries**

While the ABA has developed proposals to improve the tort laws at the state level, it opposes federal preemption of the medical liability laws of the states and territories since

the courts and legislatures of the states and territories are the appropriate bodies to administer the tort laws.

The ABA believes that Congress should *not* enact legislation that would preempt the medical liability laws of the states and territories. For over 200 years, the authority to promulgate medical liability laws has rested with the states. This system, which allows each state and territory the autonomy to regulate the resolution of medical liability actions within its borders, is a hallmark of our American justice system. The states and territories also regulate the insurance industry. Because of the role they have played, the states and territories are the repositories of experience and expertise in these matters. Congress should not substitute its judgment for the systems that have thoughtfully evolved in each state and territory over time.

The ABA is especially concerned about caps on pain and suffering recoveries and believes they should not be capped at either the state or federal level. Those affected by caps on damages are the patients who have been most severely injured by the negligence of others. These patients should not be told that, due to an arbitrary limit, they will be deprived of the compensation determined by a fair and impartial jury. The courts already possess and exercise their powers of remittitur to set aside excessive verdicts, and that is the appropriate solution rather than an arbitrary and harmful cap. Currently pending before the Illinois Supreme Court is the case of *Lebron v. Gottlieb Memorial Hospital*, concerning the constitutionality of caps on damages. In that case, the ABA filed an amicus brief reiterating the ABA's longstanding policy opposing caps.

### **b. Proposed "Health Courts"**

As part of an ongoing effort relating to liability of health care providers, proposals have been made to create "health courts." Under a "health court" system, medical negligence litigation cases would be removed from the court system where cases are heard by judges and juries, and instead would be heard by health care tribunals. The proposals currently use a Workers' Compensation model and damages are subject to standardized schedules or formulas. The ABA opposes the creation of a system that requires injured patients to utilize "health courts" that deny injured patients the right to a trial by jury or full compensation for injuries caused by medical negligence. ABA policy has long endorsed the use of alternatives to litigation for resolution of medical malpractice disputes, but

only when those alternatives operate on a voluntary basis and only after a dispute has arisen.

## **II. Legal remedies when a patient has been denied coverage ordered by his or her health care provider.**

The ABA supports including provisions in health care access proposals to create a rigorous system of internal review and an independent system of external review of benefit payment requests, adverse coverage determinations and medical necessity

determinations, consistent with certain due process principles. In addition we support including provisions that would remove the ERISA shield to allow the states to hold employer-sponsored health care plans accountable in state court under state liability laws.

The ABA believes it is imperative that access to health care legislation provide adequate remedies for patients with health care plans. Without inclusion of such remedies in the legislation, patients often will have no effective means of redress if the plans improperly refuse to provide appropriate medical services.

### **a. Internal and External Review**

The ABA supports the right of all consumers to a fair and efficient process for resolving differences with managed health care plans, health care providers, and the institutions that serve such plans and providers, including: (1) timely written notification and explanation of a decision to deny, reduce or terminate services or deny payment for services; (2) a rigorous system of internal review; and (3) an independent system of external review. The ABA also supports enactment of legislation establishing alternative dispute resolution (ADR) procedures as one remedy for resolving disputes between patients and group health plans, as part of a process that includes a rigorous system of internal review and an independent system of external review of benefit payment requests, adverse coverage determinations, and medical necessity determinations.

We believe that any legislation approved by Congress that establishes a system of external review as a means of resolving disputes between patients and group health plans must include due process protections for patients that ensure that their constitutional and other legal rights and remedies are protected. Such legislation should include the following protections:

- A detailed set of procedural due process protections for patients, including: (1) the right to a hearing, with a fair opportunity to be heard and present evidence and witnesses; (2) the right to examine and cross examine witnesses and to argue their case orally and/or in writing; (3) access to relevant books and records; and (4) the right, at their own expense, to be represented by an attorney or other spokesperson of their own choosing;

- Confidentiality provisions that guarantee that the external review hearing shall remain confidential unless the parties agree otherwise;
- Provisions guaranteeing the independence and impartiality of the neutrals conducting the external review. To achieve this, the review program should not be administered by the health plan, and both the patients and the health plans should have an equal voice in selecting the neutrals (but if this is not feasible, then the neutral should be selected by the state);
- Competency standards for the neutrals conducting the external reviews requiring that all neutrals have knowledge and experience in health care matters and that neutrals reviewing HMO decisions to deny medical care based on “medical necessity” standards be qualified to render medical decisions in the specialty involved; and
- Provisions guaranteeing the voluntary nature of the external review process and providing that while external reviews should be available to all patients, they should be binding on the parties only if they so agree after the dispute arises.

By creating a system of internal and external review, Congress can help patients to receive the care to which they are entitled. It is essential, however, that these review programs be developed with proper due process safeguards in order to protect the legal rights of all participants.

#### **b. Removing the ERISA Shield**

The ABA also supports amending ERISA to allow causes of action to be brought in the state and territorial courts against employer-sponsored health care plans under state and territorial health care liability laws. The ABA supports and encourages utilization of ADR mechanisms prior to the filing of such causes of action. However, it is crucial for legislation to be enacted to address the inequities under current law by amending ERISA in this manner. Legislation providing for internal and external review of health care disputes, though useful, is not adequate if conducted in the absence of any ultimate consequence for denial or delay in providing necessary care. By removing the ERISA shield, there will be consequences for those plans that do not act appropriately.

Under ERISA, companies that contract with ERISA employers to provide health care coverage have largely been able to shield themselves from liability for health care treatment decisions that cause harm to enrollees. ERISA expressly preempts “any and all state laws” that “relate to any employee benefit plan.” ERISA was motivated by abuses in some private sector pension systems and was enacted primarily to protect working Americans from fraud and mismanagement in their pension benefit plans. However, some managed care plans have taken advantage of ERISA to avoid accountability under state health care liability laws.

Since ERISA was passed, traditional fee-for-service insurance, in which the doctor makes the decision about a patient’s care, has given way to managed care. Because managed

care plans, with their emphasis on cost containment, did not exist when Congress passed ERISA, the legislation was not written to address such plans. More importantly, we have only recently begun to see the consequences of ERISA's preemption of employer-sponsored health care plans. Generally, the courts have held that state law malpractice claims against doctors and managed care organizations that contract for their services are not preempted by ERISA. However, if a suit is brought for wrongful denial of, or delay in providing, benefits against an employer-sponsored health care plan, a state law claim will be preempted under ERISA. When ERISA preempts the state laws, a patient who is

injured because appropriate care was denied or delayed by an ERISA-regulated health care plan cannot bring an action in state court under the state tort laws. He or she can bring an action in federal court, but the only remedy he or she would have is recovery of the costs of health care services for which coverage was denied.

The remedies available under ERISA are clearly inadequate. Some HMOs have denied coverage for treatments or tests despite the recommendations of the patients' treating physicians. By the time an HMO is ordered to pay for a benefit that should have been provided initially, the patient may be irrevocably harmed or have died because of the delay. HMOs that consistently provide appropriate coverage are not rewarded under this system and may find themselves at a competitive disadvantage against those who do not provide necessary care in a timely manner.

HMOs and other kinds of employer-sponsored managed care companies should be held responsible if their decision to deny or delay medically necessary care that is covered under the insurance policy results in harm to a patient. These entities should be held to the same standards of accountability we expect of doctors, nurses, hospitals, and other health care providers. Enrollees in such plans should be able to bring a state cause of action under state liability laws in the state courts.

### **III. Privacy of Health Records**

For over two decades, the ABA has advocated for the protection of patient privacy and the security of health information. Toward that end, it has been a policy of the ABA to support legislation that acknowledges and strengthens individuals' right to privacy of their health information and seeks to protect the confidentiality of personally identifiable health information from any source, including medical records, electronic data, and genetic material.

Access to health care proposals should address in sufficient detail the manner in which the privacy and security of personal health information is to be protected. The absence of these provisions would raise a host of uncertainties and could weaken privacy protections and undermine the public's expectation of, and confidence in, the privacy of personally identifiable health information.

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Thank you for considering the views of the ABA on the subject of access to health care; we look forward to working with the Committee on Health, Education, Labor, and Pensions on these issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

cc: Members of the Committee