

July 16, 2009

The Honorable Henry A. Waxman  
Chairman, Committee on Energy and Commerce  
U.S. House of Representatives  
2125 Rayburn House Office Building  
Washington, DC 50515

Dear Chairman Waxman:

The undersigned organizations strongly urge Congress to include meaningful medical liability reform as a critical component of any health system reform legislation. Meaningful medical liability reform is crucial to protecting patients' access to quality care and slowing the rising cost of health care. The inefficiencies of our current medical liability system, escalating and unpredictable awards, and the high cost of defending against lawsuits, even those without merit, contribute to the increase in medical liability insurance premiums, which are at or near all-time highs. As insurance becomes unaffordable or unavailable, physicians must make tough decisions including altering or limiting their services because of liability concerns, which impedes patient access to care. In addition, the cost of our liability system is borne by everyone as defensive medicine adds billions of dollars to the cost of health care each year, which means higher health insurance premiums for patients.

To address the liability problem, we strongly favor reforms based on California's Medical Injury Compensation Reform Act (MICRA) model, including a \$250,000 cap on non-economic damages, sliding scale for attorney fees, collateral source rule reform, periodic payment for future damage awards, as well as other reforms such as a requirement to file a certificate of merit in any medical liability lawsuit and expert witness requirements. In addition to MICRA-based reforms, various states have enacted alternative reforms that have demonstrated potential to help improve the medical liability system. For states that have not been able to pass comprehensive medical liability reform laws, we support federal grants to allow the exploration of state or local-based demonstration or pilot programs that have the potential to improve the current litigation climate through measures that could expedite equitable resolutions of disputes and contribute to the reduction of litigation costs and the practice of defensive medicine.

These alternatives include:

- **Health Courts.** Health courts would provide a forum, either a bench or jury trial, where medical liability actions could be heard by judges specially trained in medical liability matters and who hear only medical liability cases. The negligence standard would be the minimum threshold for compensation to award damages. The recovery of economic damages would not be limited, but non-economic damage awards would be based on a schedule. Medical experts and expert witnesses would have to meet certain qualifications.
- **Early Disclosure and Compensation Programs.** Under an early disclosure and compensation model, providers, including physicians, would be required to notify a patient of an adverse event within a limited period of time. Notification does not constitute an admission of liability. Providers offering to compensate for injuries in good faith would be

provided immunity from liability. Payments for non-economic damages would be based on a defined payment schedule developed by the state in consultation with relevant experts and with the Secretary of the Department of Health and Human Services (HHS).

- **Administrative Determination of Compensation Model.** A state's administrative entity would be charged with setting a compensation schedule for injuries, resolving claims for injuries, and establishing compensation based on the patient's net economic loss, subject to periodic payment and offset by collateral payments from sources such as insurance.

- **Expert Witness Qualifications.** Several states have amended the statutory qualifications for those who may serve as medical expert witnesses at trial. Some states (e.g., Georgia, Illinois, and Texas) have created additional standards that medical expert witnesses must meet in order to ensure the testimony juries receive is presented by an individual with particularized expertise in the matter in question.

- **Liability Protections for Use of Evidence-Based Medicine Guidelines.** A state would develop a pilot program relating to evidence-based medicine guidelines, including defining the scope of the program, types of liability protections and/or defenses, and measures for evaluating the effectiveness of the program. The pilot program would be developed and overseen by a multi-stakeholder group that must include significant physician participation. The evidence-based guidelines, including justifications for departure from the guidelines, would be developed, evaluated, reviewed, updated, and promulgated by national medical specialty societies or other public or private groups that provide physicians with substantial representation on oversight committees and with central decision-making roles in the development of the guidelines. Physicians who elect to participate in the program would utilize evidence-based guidelines and those participating physicians who follow evidence-based guidelines would receive liability protections for diagnosis and treatment in compliance with the guidelines. There would also be no presumption of negligence if a participating physician does not utilize the guidelines. Physicians would receive legal protections for using evidence-based medicine guidelines and/or their clinical judgment based on their patient's particular care and needs.

In addition, we recommend providing medical liability protections to those physicians who provide volunteer medical services during an emergency or disaster and who provide services mandated by the Emergency Medical Treatment and Labor Act.

We believe that it is time to find a bipartisan solution that will improve the health care system for America's patients, reduce the incentives for defensive medicine, and protect physicians from unaffordable liability premiums. As we move forward with health system reform legislation, it is imperative that policymakers preserve existing, effective state level medical

liability reforms and provide incentives to states to explore innovative solutions for addressing medical liability reform while continuing to protect patient access to care.

Sincerely,

American Academy of Dermatology Association  
American Academy of Facial Plastic and Reconstructive Surgery  
American Academy of Home Care Physicians

American Academy of Hospice and Palliative Medicine  
 American Academy of Neurology Professional Association  
 American Academy of Ophthalmology  
 American Academy of Otolaryngic Allergy  
 American Academy of Otolaryngology-Head and Neck Surgery  
 American Association of Neurological Surgeons  
 American Association of Orthopaedic Surgeons  
 American College of Cardiology  
 American College of Emergency Physicians  
 American College of Mohs Surgery  
 American College of Nuclear Physicians  
 American College of Obstetricians and Gynecologists  
 American College of Occupational and Environmental Medicine  
 American College of Osteopathic Internists  
 American College of Osteopathic Surgeons  
 American College of Radiation Oncology  
 American College of Radiology  
 American College of Rheumatology  
 American College of Surgeons  
 American Gastroenterological Association  
 American Medical Association  
 American Medical Directors Association  
 American Osteopathic Academy of Orthopedics  
 American Osteopathic Association  
 American Rhinologic Society  
 American Society for Gastrointestinal Endoscopy  
 American Society for Radiation Oncology  
 American Society for Reproductive Medicine  
 American Society of Anesthesiologists  
 American Society of Nuclear Cardiology  
 American Society of Plastic Surgeons  
 Association of American Medical Colleges  
 College of American Pathologists  
 Congress of Neurological Surgeons  
 Heart Rhythm Society  
 Infectious Diseases Society of America  
 Medical Group Management Association  
 North American Society for Pediatric Gastroenterology, Hepatology and Nutrition  
 North American Spine Society  
 Renal Physicians Association  
 Society for Cardiovascular Angiography and Interventions  
 Society for Maternal-Fetal Medicine  
 Society for Vascular Surgery  
 Society of Gynecologic Oncologists  
 Society of Hospital Medicine  
 Society of Interventional Radiology  
 Society of Nuclear Medicine  
 The Society of Thoracic Surgeons