The FAQs were developed by the ABA's Standing Committee on Governmental Affairs Subcommittee on Medical Malpractice and Health Care Reform and the ABA's Standing Committee on Medical Professional Liability.

FREQUENTLY ASKED QUESTIONS ABOUT MEDICAL MALPRACTICE
December 2009

1) How serious is the medical malpractice problem?

According to the Institute of Medicine, a 1999 study showed that at least 44,000 – and as many as 98,000 – patients die in hospitals each year as a result of preventable medical errors.[1] This is the equivalent of a jumbo jet crashing every day. And this study did not even attempt to study injuries. Even if the lower estimate is used, deaths as a result of medical errors are the eighth leading cause of death in America.

2) Is there a medical malpractice insurance "crisis" today?

According to news reports, medical malpractice insurance rates are now stabilizing across the country. However, in past years, insurance premiums in a number of areas rose significantly, even while the number of lawsuits filed each year has remained constant or declined. The question is why. According to a report commissioned by the Center for Justice & Democracy ("Falling Claims and rising Premiums in the Medical Malpractice Insurance Industry"), from 2000 – 2004, the amount that "the major medical malpractice insurers have collected in premiums has more doubled, while their claims payouts have remained essentially flat."[2]

The U.S. insurance market is intensely competitive, which has caused both dramatic increases and dramatic decreases in insurance rates over time. For example, competition caused insurance rates to be comparatively lower in the United States from 1979 through 1983 than in other countries. When increases occurred in the U.S. between 1984 and 1986, they appeared more dramatic because they occurred against the background of artificially low rates during the period of 1979 and 1983.[3] That same cycle seems to be operating today.[4]

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[1] Institute of Medicine, *To Err is Human: Building a Safer Health System* (November 1999)
[2] Angoff, Jay, Falling Claims and Rising Premiums in the Medical Malpractice Insurance Industry (commissioned by Center for Justice & Democracy), (July 2005), p. i.
[3] See Werner Pfennigsdorf & Donald G. Gifford, *A Comparative Study of Liability Law and Compensation Schemes in Ten Countries and the United States,* 159 (Donald G. Gifford & William M. Richman, eds., commissioned by the Insurance Research Council) (1991).
[4] See Edward Wasserman, "Blaming the Victim: Why are Liability Insurance Rates Soaring Again?", Miami Herald, December 30, 2002 and J. Robert Hunter, *Premium Deceit, 1999, 2002;* Zimmerman, Rachel and Oster, Christopher, *Insurers' Price Wars Contributed to Doctors Facing Soaring Costs; Wall Street Journal, June 24, 2002.*

3) Why do insurance cycles seem to affect doctors and hospitals more than some others?

Increases in medical malpractice insurance rates appear more dramatic because, unlike most businesses, doctors and other medical providers operate under fee schedules mandated by Medicare, health insurers and other third-party payers. With such inflexibility in this "ceiling" for revenues, large increases in malpractice insurance over short durations of time are now more difficult to accept and incorporate into one's medical practice than they were in earlier cycles. Moreover, a July 2003 GAO report found that, "Cycles in the medical malpractice market tend to be more extreme than in other insurance markets because of the longer period of time required to resolve medical malpractice claims."[5]

4) What has caused doctors' insurance premiums to increase?

Because the insurance industry is exempt from federal antitrust laws, it is difficult to get a clear understanding of how insurance premiums are set; but several studies show that the primary cost driver is insurance companies' diminished investment returns. Premiums are driven up by several additional factors, as well. These include: medical inflation, which has driven medical costs up 75 percent since 1991; the need for insurance companies to replenish diminished cash reserves; basic supply and demand issues caused by a significant decline in the number of companies providing medical malpractice insurance, particularly in certain geographic areas; and insurers' increased vulnerability to financial difficulties, which has pressured many medical malpractice insurers to increase rates despite new laws in many states capping payouts.[6] In other economic cycles, when the markets cool and interest rates fall, the profitability of insurance companies' investments plunge, prompting insurers to increase rates and abandon lines of insurance with unappealing claims histories.

5) Are lawsuits against doctors driving up their medical malpractice premiums?

There is no evidence that the tort liability system has been more than a minimal factor in causing the well-publicized large increases in medical malpractice insurance premiums, or that caps on damages would reverse any trend of increased premiums. Consumer groups interested in protecting consumers have made it clear that they do not believe that tort reform will reduce insurance premiums.[7] A 2003 General Accounting Office study of the causes of malpractice insurance increases found that, while malpractice awards have contributed to increased premiums, "a lack of comprehensive data at the national and state levels on insurers' medical malpractice claims and the associated losses prevented us from fully analyzing the composition and causes of those losses."[8] Insurers have not promised lawmakers that medical malpractice caps on damage awards and other limitations on recoveries will reduce premiums.

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[5] General Accounting Office, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates,* GAO-03-702 (June 2003)
[6] Weiss Ratings, Inc., *Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage,* June 2, 2003.
[7] See, for example, www.consumersunion.org, centerjd.org, and www.citizen.org.
[8] General Accounting Office, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates,* GAO-03-702 (June 2003)

6) Are high insurance rates driving obstetricians and gynecologists out of business or reducing access to health care?

The Congressional Budget Office noted in a January 2004 study: "On the one hand, [the U.S. General Accounting Office] confirmed instances of reduced access to emergency surgery and newborn delivery, albeit 'in scattered, often rural, areas where providers identified other long-standing factors that affect the availability of services.' On the other hand, it found that many reported reductions in supply by health care providers could not be substantiated or 'did not widely affect access to health care.'"[9] Moreover, a 2001 study by noted management specialist Professor Vasanthakumar Bhat found that although the "supply of physicians and specialties is extremely uneven, the medical malpractice system is not a significant factor in this supply."

The most recent statistics from the AMA show that, in 2006 (the latest year for which numbers are available), there were 42,333 physicians who designated their specialty as obstetrics/gynecology. In 2004, the figure was 42,059; 2000, the figured was 40,241; 1995, the figure was 33,697; in 1985, 30,867; in 1980, 26,305; and in 1975, the figure was 21,731.[10]

7) Are jurors biased against doctors, or overly generous in cases involving severely injured patients?

Not according to extensive studies of these questions. Despite what many people believe, jury damage awards in fact are not based on the depth of defendants' pockets, sympathy for plaintiffs, malice, or excessive generosity.[11] Physicians typically win cases in which their care met community standards,[12] and the severity of a patient's injury has little bearing on whether a physician wins or loses a case. There appears to be no evidence 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. In fact, studies of juries indicate a correlation between jury verdicts and doctors' ratings in negligence. Juries may even have a slight bias in favor of doctors.[13] And on those occasions in which juries do grant what appear to be awards that are excessive, there are numerous post-verdict legal mechanisms that tend to correct the anomalies.

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[9] Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice,* Economic and Budget Issue Brief (Jan. 8, 2004), p. 7

[10] See American Medical Association, *Physician Characteristics and Distribution in the US, 2008 Edition,* p. 30-31.

[11] See *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards*, by Neil Vidmar, at page 259, 1995. See also Daniels, Steve, and Martin, Joanne, *Civil Juries and the Politics of Reform*, (American Bar Association, 1995).

[12] See Taragin, et al., "The Influence of Standard Care and Severity of Injury on the Resolution of Medical Malpractice Claims," *Annals of Internal Medicine*, November 1992, Vol. 117, No. 9, p. 780.

[13] *Ibid* Vidmar at 182.

8) What are "non-economic" damages, and why are they appropriate?

So-called "non-economic" damages, such as pain and suffering and disability, compensate victims for losses sustained when they suffer a serious injury such as paralysis, disfigurement, blindness or deafness as a result of negligent behavior. In many cases, "economic damages" such as lost wages and medical expenses simply do not reflect the true cost of a defendant's negligence. Often the most devastating damages are the pain and suffering and disability that are endured daily for the rest of an injured person's life, and which can result in permanent harm to the quality of life for injured persons and their families. Since 1975, proponents of caps on non-economic damages have argued that these victims are entitled to no more than $250,000 – a number that continues to dominate caps proposals. Keeping pace with inflation, that $250,000 in 1975 would be worth $989,755.54 in 2008 – the latest date for which relevant data is available. Conversely, $250,000 in 2008 was worth $60,079.27 in 1975.[14]

9) Would capping non-economic awards reduce doctors' insurance premiums?

No. According to data provided by the American Medical Association in 2004, 22 states that already had caps in place were considered by proponents of a federal cap to be "in crisis" or "showing problem signs". This assessment follows a June 2003 report by Weiss Ratings, Inc., which found that "[c]aps on non-economic damages have failed to prevent sharp increases in medical malpractice insurance premiums, even though insurers enjoyed a slowdown in their payouts."[15] A similar 1999 study on the impact of tort reforms found that states with caps in place had experienced the same increases in liability insurance rates as the states that did not.[16] What these caps would do, however, is hurt the people who are most severely injured by medical malpractice.

10) Would tort reform reduce healthcare costs?

Medical malpractice litigation accounts for a very small portion of health care costs, and proposed changes to these laws would have a negligible impact on overall health care costs. Medical malpractice costs, as measured by medical malpractice premiums in 2006 – the most recent year for which all the necessary data to make these comparisons is available – accounted for only .58 percent of overall health care costs. The cost of the medical-legal system is borne for the most part by medical malpractice insurance premiums.[17] In other words, malpractice premiums fund settlements and verdicts to cover such things as the medical expenses, long term

[14] On-line Consumer Price Index inflation calculator based upon *Statistical Abstracts of the United States* and located at www.westegg.com/inflation

[15] Weiss Ratings, Inc., *Medical Malpractice Caps: The Impact of Non-Economic Damage Caps on Physician Premiums, Claims Payout Levels, and Availability of Coverage,* June 2, 2003.

[16] Hunter, p. 2.

[17] "National Health Expenditures Aggregate, Per Capita Amounts, Percent Distribution, and Average Annual Percent Growth, by Source of Funds: Selected Calendar Years 1960-2007." Center for Medicare & Medicaid Services, Office of the Actuary, National Health Statistics Group; U.S. Department of Commerce, Bureau of Economic Analysis; and U.S. Bureau of the Census; "Property/Casualty Insurance Industry Aggregates." Medical Malpractice Direct Premiums Written. National Association of Insurance Commissioners, 1992-2007.

care and lost wages of those injured by malpractice, the transactional costs of arbitration and litigation and the overhead and profits of malpractice insurers."

11) Would capping damages reduce national health care costs?

While caps on medical malpractice awards would have a dramatic and severe impact on injured people, it would have at best only a marginal impact on national health care costs.

12) Would caps reduce "defensive medicine"?

Defensive medicine" (ordering tests because of a fear of litigation) is not common. Doctors order tests to ensure that they have all the information they need to provide patients with the best possible care. In fact, a 1992 Congressional Budget Office report concluded that most of the care commonly referred to as "defensive medicine" would have been provided in any event, for reasons other than concerns about medical malpractice.[18] More recently, a 2004 CBO study noted that, "Some so-called defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients. On the basis of existing studies and its own research, CBO believes that savings from reducing defensive medicine would be very small."[19] On October 9, 2009, the Congressional Budget Office sent a letter to Senator Hatch on "the effects of proposals to limit costs related to medical malpractice ('tort reform')" that said that tort reform could affect costs for health care. The ABA's comments on that letter are found at:

http://www.abanet.org/poladv/letters/tortlaw/

13) Would caps on damages save taxpayers money?

There are reasons to believe that current proposals could actually cost the government more money. Under the current system, if Medicare or Medicaid pays someone's medical expenses and that person prevails in a medical malpractice matter, Medicare and Medicaid must be reimbursed from the award. If current proposals for caps on medical malpractice awards are enacted, the limits on damages could make it economically unfeasible for injured patients to pursue medical malpractice lawsuits. Medicare and Medicaid programs would then not be able to recover what they had paid out.

14) Should the collateral source rule be eliminated?

No. "Collateral sources" are usually health and disability insurers, including Medicare and Medicaid, that pay medical and disability costs up front when someone is injured. When an award is made against a negligent doctor, the collateral source rule allows those sources to

[18] See Congressional Budget Office, *The Economic Implications of Rising Health Care Costs*, October 1992, p. 27.
[19] Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice,* Economic and Budget Issue Brief (Jan. 8, 2004), p. 6

recover their money from the victim's award. Eliminating the collateral source rule would mean that collateral sources would not be able to get the money back because the award would have been reduced by exactly that amount, unfairly favoring medical professional liability insurers at the expense of injured patients, their health or disability insurers, or consumers of health or disability insurance (if those insurers pass the cost on to their customers in the form of increased premiums).

15) Should Congress write medical malpractice laws?

No. States have been writing medical malpractice and other tort liability laws for more than 200 years. This arrangement is a hallmark of our American justice system. Congress should not substitute its judgment for systems that have thoughtfully evolved in each state. Efforts to do so would likely be challenged on constitutional separation-of-powers grounds because health care has traditionally been an area left for states to regulate.[20]

16) What is the ABA's opinion on the use of "health courts" to resolve medical malpractice claims?

Under "health courts," medical liability cases would be removed on a mandatory basis from the state court system-- where cases are heard by judges and or juries-- to health care tribunals. The ABA firmly supports the integrity of the jury system, the independence of the judiciary and the right of consumers to receive full compensation for their injuries, without any arbitrary caps on damages or denial of rights to a jury trial. It is for these reasons that the ABA opposes the creation of any health court system that undermines these values by requiring injured patients to utilize "health courts," rather than allowing them to utilize regular state courts to be compensated for medical negligence.

For decades, the ABA has supported the use of and experimentation with voluntary alternative dispute resolution techniques in medical malpractice cases, but only after a dispute has arisen. Requiring injured patients to be a part of a Workers' Compensation model--such as the "health courts" proposal for medical malpractice cases--is inappropriate. Under Workers' Compensation systems, there is a trade-off of the loss of a right to bring an action in court that is counterbalanced by a "guaranteed" award that is not fault-based. With the proposed "health courts" proposal, an injured patient loses the right to bring an action in court but receives no guarantee of an award.

17) How can states improve their medical malpractice laws?

Tort laws – including medical malpractice laws – that work for everyone by protecting the rights of patients, doctors and insurers alike are essential. To this end, the ABA supports a number of improvements states -- but not the U.S. Congress -- should consider making in their tort laws if they have not already done so.

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[20] Recent Supreme Court decisions – including *Pegram et al v. Herdrich,* 120 S.Ct. 2143 (2000), and *Rush Prudential HMO, Inc. v. Moran***,** 122 S.Ct. 2151 (2002) – have continued to recognize that it is appropriate for the states to handle health accountability matters because health care is an area traditionally left to the states to regulate.

- State courts should be encouraged to make greater use of their powers to set aside verdicts involving non-economic damage awards that are disproportionate to community expectations.
- There should be rigorous enforcement of professional disciplinary codes that prevent the filing of lawsuits that lack merit. Sanctions should be imposed when those provisions are violated.
- Tort commissions should be created to annually review tort awards and publish suggested guidelines to encourage uniform awards.
- There should be a "clear and convincing" evidence standard for punitive damages, which should be awarded only when there is a conscious or deliberate disregard by the defendant of his or her obligations.
- Joint and several liability should be limited to economic losses when a defendant is less than 25 percent responsible for an injury.

18) How can we reduce the number of medical malpractice lawsuits?

If you want to reduce medical malpractice lawsuits, the place to start is with medical errors. As we said earlier, the Institute of Medicine reported in 1999 that at least 44,000 Americans die each year as a result of medical errors and "the number may be as high as 98,000." How do you reduce medical errors? One way to do that is to have increased reporting of medical errors and a system in place to exchange that information. The ABA supports the establishment of pilot programs that enable and encourage medical personnel to report "near misses" or hospital events that, if repeated, could threaten patient safety. Such pilot programs address both liability and patient safety. The Quality Improvement Act of 2005 was a great beginning. These initiatives need to be advanced.

19) Are there are other effective ways to reduce the number of lawsuits?

Some injured patients who bring a cause of action against their doctors say they would not have done so if only the doctor had apologized. Doctors say that if they make a mistake, they often do not apologize for fear that the apology will be used against them to prove liability. Apology legislation is a means of fostering better communication between doctors and patients. The ABA supports enactment of state and territorial legislation that provides that all statements, affirmations, gestures, or conduct expressing apology, sympathy, commiseration condolence, compassion, or a general sense of benevolence which relate only to the pain, suffering, or death of a person which are made by a medical provider or the staff of a medical provider to that person, that person's family, representative or friend, as the result of the unanticipated outcome of medical care, shall be inadmissible as evidence of an admission of liability or as evidence of an admission against interest for any purpose in a civil action for medical negligence.

In addition, in order to reduce the number of lawsuits, the ABA endorses the use of alternatives to litigation for resolution of medical malpractice disputes only when such alternatives are entered into on a voluntary basis after a dispute has arisen. It advocates the use of voluntary arbitrations, mediations and settlement conferences after a dispute has arisen, all of which are appropriate means of alternative dispute resolution.