

## Chapter VIII

### A National Agenda for High Quality Health Care

Vice President Al Gore has said it simply: "The real malpractice crisis is malpractice." You don't have to be the Vice President of the United States to understand that the best way to limit the number of malpractice lawsuits is to give consumers better quality medical care. Too bad that such a simple truth has become a casualty of the political horse-trading over health care reform.

A long list of respected experts keeps testifying, year after year, that the malpractice problem is a medical problem, not a legal one. There are simply too many incompetent, negligent and careless physicians. It also must be emphasized that deaths and injuries are not the only forms of medical malpractice.

### **Financial malpractice.**

Amazingly, no one in Washington is discussing the impact of useless or even dangerous tests done to enrich physicians or hospitals. We have already discussed the disputed concept of "defensive medicine," one of the medical and insurance industries' favorite excuses for limiting victims' rights. It was noted that "defensive medicine" might reflect some combination of high quality care and outright fraud.

If the medical establishment is correct in their characterization of many tests, procedures and examinations as wholly unnecessary, or medically unjustified, then millions of Americans are being gratuitously subjected to risky, invasive and often painful procedures from blood tests to cesarean sections and hysterectomies. There may be little quantifiable injury, and little value in a lawsuit in these situations, but they are examples of malpractice all the same!

And, if it's true that many of these unnecessary medical treatments are ordered to enrich physicians and hospitals with an economic stake in diagnostic testing facilities, labs and other equipment, we have a combination of fraud and financial malpractice.

Financial malpractice is an area that has received insufficient attention. Billing errors in medical bills are a major form of financial malpractice. Errors have been estimated to affect 97.2 percent of audited hospital bills.<sup>214</sup> The federal government, the nation's largest consumer, is estimated to pay \$4 billion per year in overcharges or fraudulent Medicare charges billed by medical providers. This cost is passed on to the taxpayers.<sup>215</sup> The U.S. General Accounting Office estimated that overcharges and other forms of fraud and abuse cost the health care system \$70 billion in 1992.<sup>216</sup> No one knows how many consumers are the victims of this financial malpractice each year. Along with deaths and injuries, financial malpractice is a silent epidemic against which action must be taken.

## **How to solve the malpractice crisis.**

Many medical, consumer and patients' rights organizations have extensively researched the malpractice problem. Their solution is in stark contrast to that advocated by the insurance industry, the AMA, and the White House. Here is a summary of steps that could be taken to reduce malpractice and improve the quality of care in the United States. (A statement of principles for quality health care, including a Health Care Consumers Bill of Rights, can be found in Appendix C.)

### **Encourage Physicians to Improve the Doctor-Patient Relationship**

In 1990, the Texas Medical Association invited doctors who had practiced at least 20 years without a malpractice lawsuit to explain how they handle their relationships with their patients. Over 200 doctors responded, and almost all of them focused on improving communication with patients as the key to avoiding lawsuits.<sup>217</sup> The doctors made the following recommendations to avoid being sued:

- Develop close and friendly relationships with patients;
- Respect the patient's dignity;
- Respect the patient's privacy;
- Listen patiently;
- Be available and return phone calls promptly;
- Be polite;
- Be on time;
- Keep patients' expectations in line, prepare them for any eventuality;
- Have the patient join in decision-making;
- Be straightforward about accidents and bad results — never lie or cover-up;
- Document every stage of treatment;
- Be sensitive about billing practices;
- Avoid obvious high-risk situations, such as cases you are not fully trained or equipped to handle, patients whose personalities clash with yours, and patients who are unhappy with your treatment; and,
- Treat the patient as you would like to be treated.

Better communication with patients has a demonstrable effect on reducing malpractice claims. Here's more proof: the Northwest Physicians Mutual Insurance Company offered a 7.5 percent premium price cut to physician policyholders who participated in a half-day workshop on doctor-patient communication.<sup>218</sup>

### **Pay More Attention to “Loss Prevention” Techniques**

Medical science should do more to prevent malpractice through research that is disseminated to physicians and hospitals. So-called “outcomes research” enables health care practitioners to determine what works and what doesn't. There is presently no program in place to make sure all practitioners get this important information.

“Practice guidelines” could provide physicians with a check-list of standard, proven procedures. However, if physicians need only show they complied with such guidelines in order to escape malpractice liability, the effect will be to lead medical associations to issue minimal guide-

lines, a “lowest common denominator” approach that harms rather than protects patients.

Hospitals could improve their mechanisms for identifying and monitoring hospital-caused injuries. Aggressive risk management programs such as those instituted by the Harvard University-affiliated hospitals for anesthesia have proven very effective in reducing liability costs and insurance premiums. An integral part of the program was the development and implementation of clinical standards or protocols.<sup>219</sup> Prior to the use of such standards, the average anesthesia-related malpractice claim was approximately \$153,000; after such standards were effected, the average claim dropped to roughly \$34,000.<sup>220</sup>

## **Require Periodic Check-Ups for Doctors, Nurses and Hospitals**

Periodic refresher courses and continuing education is required of many professionals, including lawyers, accountants and, in some cases, doctors. However, as is true of many other professions, the requirements are weak and accountability is limited. Incompetence that might be merely costly when it involves other professionals becomes a matter of life and death when a medical practitioner makes a mistake.

Doctors should be required to obtain periodic recertification based upon written exams, clinical evaluations and audits of patients’ medical care records. The best way to prevent malpractice is to educate physicians before they make a mistake.

## **Toughen Government Monitoring and Discipline of Physicians**

Independent and rigorous oversight of the medical profession, including a crackdown on dangerous doctors, is essential to curb malpractice. Here are some of the proposals offered by consumer advocates:

***Don’t let the fox guard the chicken coop.*** Medical boards should be restructured so that local medical societies are not allowed to dominate, and eviscerate, the boards’ oversight and disciplinary functions. Boards should be controlled by non-physician majorities accountable only to the public. The medical lobby argues that lay people don’t

have the expertise necessary to evaluate the practices of physicians and hospitals, but this is a phony argument. Publicly-controlled medical boards can hire physicians and other technical experts as staff or consultants to review complaints and make recommendations to board members. But consumers, not physicians, should make the final decision.

***Boost the budget.*** State medical boards are typically underfunded, with too few investigators and administrative personnel to do the job. Lobbyists for the medical industry usually oppose legislative efforts to strengthen the boards with increased funding and staffing that would ensure timely and thorough investigations of complaints. Adequate resources should be provided to the boards. One hundred percent of physicians' license fees should go to funding the boards; presently, these funds are often diverted by lawmakers to pay for other state programs. In addition, Congress should create a small program of grants-in-aid to state medical boards. These federal grants should be tied to the boards' agreement to meet high standards of performance and independence.

***Strengthen discipline.*** Boards should be given more disciplinary authority, and the disciplinary process should be made more efficient. Presently, bureaucratic procedures slow the resolution of serious cases. Lawyers for physicians can fend off action for months or years, allowing dangerous physicians to remain "on the street." The boards should be given the authority to suspend a physician on an emergency basis pending formal hearings in cases where a doctor poses a potential danger to other patients. In addition, medical board disciplinary actions should not be stalled or delayed by litigation. In serious cases, they should take effect while a physician pursues lengthy appeals through the court system.

***Remove the shroud of secrecy.*** All formal disciplinary actions and all closed complaints, regardless of the outcome, should be considered public matters and the records of such cases should be made available promptly and easily (through a toll-free number, for example) to anyone who requests them. The medical lobby argues that it's not fair to make public complaints which have not been investigated and may be groundless. But as long as the board makes it clear to those who inquire that such

complaints have not been reviewed and may not be legitimate, how does disclosure harm the practitioner? It is better to err on the side of openness, and allow patients to determine for themselves if it is worth asking the doctor about pending or unresolved complaints. Besides, budgetary problems or deliberate delays often prevent legitimate complaints from being investigated promptly: why force a potential patient to take the risk by denying access to such information? In any case, a series of complaints against one physician or hospital, whether investigated or not, suggests trouble. Consumers deserve to know before they become victims.

Perhaps the most effective way to protect consumers is simply to require physicians and medical facilities to themselves disclose disciplinary actions and malpractice complaints to the consumer at the “point of purchase,” i.e., when the consumer checks in to the hospital or arrives at the physician’s office. This is when the consumer most needs the information and has the best opportunity to raise questions directly with the physician or hospital staff.

***Improve national coordination.*** The National Practitioner Data Bank (NPDB), taxpayer-funded and operated by the federal government, tracks doctor disciplinary actions, hospital revocation of physicians’ privileges and malpractice claims paid by insurers throughout the country and makes the data available to state medical boards and hospitals. Other state and federal agencies should be required to coordinate with the NPDB. For example, the Drug Enforcement Administration should alert pharmacists and the public about which doctors’ prescription licenses it has pulled or restricted. Moreover, criminal sanctions should be imposed for misuse of prescription drugs. Finally, consumers should have full access to the information contained in the NPDB.

***Protect patient and whistle-blower confidentiality.*** To encourage patients and witnesses to come forward with evidence of malpractice, complaints made in good faith to the medical board should be treated as confidential. Those who make such complaints should be given immunity from anti-free speech lawsuits brought by physicians to intimidate whistle-blowers and discourage such disclosures.

***Force insurance companies to cooperate.*** Insurance companies should be required to forward all claims and settlement information involving

malpractice claims against physicians, hospitals and other medical professionals to state licensing boards.

### **End Conflicts of Interest That Lead to Financial Malpractice**

Physicians should not have a financial interest in hospitals, laboratories, diagnostic facilities and other health care institutions. As noted in Chapter IV, research studies have demonstrated that such conflicts of interest lead to unnecessary medical care, raising health care costs and, worse, exposing patients to unnecessary medical risks.

Until the profit motive is removed from medical practice, physicians will continue to order unnecessary and expensive medical procedures.

### **End Abusive Billing Practices that Lead to Financial Malpractice**

Few consumers can understand hospital bills; thus, determining their accuracy is virtually impossible. The infamous “Explanation of Benefits” statement sent by insurance companies to the consumer is often equally indecipherable; consumers are, therefore, unable to determine whether the insurance company properly or improperly paid a medical charge. Presently, the only solution available for consumers who really want to track and verify medical charges is to keep lengthy written records, or use special personal computer software that organizes such information.<sup>221</sup>

To solve the billing nightmare, the federal government should mandate the use of standardized codes and forms by doctors, hospitals and insurance companies. Medical facilities which consistently and deliberately overbill should be subject to criminal penalties in addition to effective civil liability.

### **Regulate the Insurance Industry**

We know that the “litigation crisis” was nothing more than a gimmick by the insurance industry, a “con” that the medical profession readily embraced, largely for economic considerations.

The real cause of the cyclical insurance crisis, and the driving force behind the contrived malpractice lawsuit crisis, is the cash flow underwriting practices of the insurance industry. Unless the destabilizing premium surges and mismanagement caused by the “insurance cycle” are stopped, the result will be periodic “crises” in the insurance market, each an opportunity to scapegoat victims’ rights in order to cloak massive premium gouging, arbitrary cancellations and reduced coverage. The following are the key insurance reforms proposed by consumer advocates:

***Limit insurance rates, expenses and profits.*** One of the reasons that the insurance industry has been able to squeeze its customers in the malpractice insurance market and elsewhere is the lack of serious regulation and oversight of the industry.

The insurance industry is not subject to federal regulation and it is exempt from the federal antitrust laws, and even from Federal Trade Commission scrutiny without explicit Congressional approval. Congress should repeal these barriers to competition and oversight. Congress should also establish a federal office of insurance to monitor the industry and establish standards for state regulators to follow. A national industry-funded reinsurance program, created to compete with foreign reinsurers, would exert downward pressure on rates for reinsurance, which insurance companies purchase to back up the funds they hold in reserve to pay claims. Lower reinsurance costs would enable insurers to reduce their premiums. Congress should mandate that insurers establish such a fund.

The states, too, must initiate more effective steps to rein in the industry’s abuses. Most state regulation of insurers is weak to non-existent, reflecting the fact that officials responsible for oversight are typically beholden to the industry through previous or promised employment. Following the lead of California, there must be greater regulation of the industry’s prices and underwriting practices. To prevent wild fluctuations in insurance rates and instability that can lead to insolvency, state insurance departments should set upper and lower limits on permissible rates that insurance companies may charge. All rate increases should be subject to the prior approval of an insurance commissioner, accountable directly to the voters by election. Similarly, insurers should be prohibited from arbitrarily canceling or refusing to renew policies.



Finally, state insurance departments need more resources to effectively and independently monitor the industry.<sup>222</sup>

***Open their books.*** There must be more effective insurance disclosure laws, so that citizens, consumers and policymakers can review lawsuit and claims information to determine the extent of malpractice claims, whether the price of premiums is justified, and what further measures need to be taken to limit malpractice.

***Mandate fair rating practices to reward good doctors.*** Currently, insurance companies use narrowly defined subcategories to classify physicians who apply for malpractice liability insurance. Because there are so few physicians in some of the specialties, insurers cannot spread the risk effectively: the result is extremely high premiums for certain specialties, such as obstetricians. These rating systems force a majority of good doctors to subsidize the few bad ones. (It should be noted, however, that physicians collectively bear some responsibility for higher premiums to the extent that they do not discipline negligent physicians within their own ranks.)

Instead, insurance companies should be required by law to spread risk more equitably by placing physicians in a reduced number of underwriting categories. However, in order to differentiate poor doctors from the rest of the pool, insurance companies should charge rates based on a physician's own experience with malpractice claims. This practice, known as "experience rating," is much the same as the practice of rewarding good drivers with a discount on their auto insurance. It would ensure that doctors with histories of negligence or incompetence pay more, and doctors with clean records would be rewarded with lower rates.

The failure of government to take these and other ameliorative steps lies behind the current attacks on the legal rights of malpractice victims. The malpractice litigation crisis is symptomatic of a far deeper problem: the excessive market power and political power of the insurance industry. History has demonstrated that the insurance industry is a powerful force arrayed against consumers' legal rights. Its control over the pricing of malpractice insurance premiums, as well as data that would expose the truth about litigation and claims, has allowed it to manipulate the medical community into participation as shock troops in the war against its own patients.

This provides an explanation, though hardly an excuse, for one of the great mysteries of the malpractice debate: why the nation's physicians — whose reputations are collectively tarnished by those who malpractice — fight so hard to protect their negligent colleagues. The answer is, fundamentally, a matter of financial self-interest. Restrictions in malpractice victims' legal rights enable negligent or incompetent physicians or hospitals to avoid legal and financial liability for their actions. The lure of lower malpractice premiums is another economic incentive for the medical lobby to back such restrictions, though insurers rarely lower premiums for their policyholders. Compensation that ordinarily would go to victims stays in the pockets of physicians, hospitals and their insurers.

In the face of these realities, the idea of increasing the gauntlet of obstacles that sick and injured victims must face, in an already costly and forbidding legal process, is cruel and reprehensible.

### **Give Malpractice Victims More Access to the Legal System**

Malpractice lawsuits are almost always brought under a contingency fee arrangement, in which the compensation ultimately received by the victim must also be used to pay the attorney's fee and other costs of the suit. As a result, patients with relatively small, modest medical injuries — \$50,000 and under — are often denied justice simply because their legal damages are too small to attract a skilled attorney. Medical malpractice lawsuits are simply too costly to justify legal action for a relatively minor injury or limited medical bills.

One effective solution would be to create an alternative, streamlined system for minor malpractice cases. The current small claims court system might serve as a model. The "Small Malpractice Claims Court" would operate without the formal and complicated rules and procedures typical of most courts. Independent and impartial arbitrators would act as judges to decide the cases. Its goal would be to expedite the resolution of minor malpractice cases.

Use of an attorney in the Small Malpractice Claims Court would be voluntary, and, because the process would be informal, largely unnecessary. Malpractice victims could represent themselves, aided by a consumer advocate or ombudsman's office that would provide free guidance and instructions.

Of course, consumers would always be free to choose the traditional, more expensive and time-consuming litigation process, with the full panoply of legal rights it provides.

### **Prohibit “Secrecy Agreements”**

Many doctors and hospitals accused of malpractice often refuse to settle their cases unless the victim and his or her attorney agree to keep the facts of the case and the details of the settlement a secret. The medical profession insists on such “secrecy agreements” because doctors don’t want the public to know that they caused malpractice.

Unfortunately, these secrecy agreements shield incompetent physicians and dangerous hospitals from more than adverse publicity. They make it impossible for potential patients to avoid doctors and hospitals which have injured others in the past. While insurance companies are almost always informed of settlements involving malpractice claims against their policyholders, they are not always required to report settlements to state regulators. If regulators are informed, they usually refuse to divulge the details to others. Keeping previous instances of malpractice a secret leads to more unsafe medicine.

Moreover, secrecy agreements keep critical information from attorneys representing other victims of the same malpracticing doctor or hospital, forcing them to expend enormous time and resources to uncover facts that have already been uncovered but are subject to the confidentiality agreement. In this way, secrecy agreements promote wasteful and needless litigation.

Malpractice victims usually agree to sign “secrecy agreements” because they need compensation urgently and do not wish to risk a negative jury verdict. And while most trial attorneys recognize that secrecy agreements lead to more malpractice and unnecessary litigation they are duty-bound to accept the client’s decision to sign such an agreement.

Some observers say secrecy agreements help resolve lawsuits, because they encourage doctors and hospitals to settle cases quietly, before a highly-visible public trial begins. Many medical providers would have little to lose by going to trial if settlements become public knowledge, this argument goes.

Overall, the human cost of keeping malpractice a secret is far greater than the time and money saved by letting incompetent doctors and

hospitals hide from their actions. Secrecy agreements are anti-consumer. At a minimum, consumers should be able to “bust” a secrecy agreement by asking a court to make the information available to the public.

While state and federation legislation to ban “secrecy agreements” has been proposed, there is a simpler route. State supreme courts or other responsible state authorities should decree it a violation of ethics requirements for an attorney to request or sign a secrecy agreement.

## **Create a “Single-Payer” Health Care System**

Partisans on both sides of the health care reform debate have managed to separate the issue of quality of care from the question of how the new health care system will be structured and financed. The latter is the hot topic, while the issue of quality of care has been relatively ignored.

A lengthy discussion of the intricacies of health care reform is beyond the scope of this book, but you don’t need to be fluent in health care policy to understand that how health care is delivered is inextricably linked to the quality of care people will receive.

A “single-payer” national health program, in which a nonprofit public corporation would provide all consumers with universal and adequate health care, would eliminate the profits, waste and inefficiency from the current system. It is estimated that a “single-payer” approach would cover the costs of insuring all Americans — including the 37 million presently uninsured — for the same price we pay today for our failed system.<sup>223</sup>

A universal, single-payer health program would also reduce malpractice, because tough, pro-consumer standards would be imposed throughout the nation and the entire health care delivery system would be monitored by one federal agency working closely with state agencies under uniform standards.

Moreover, malpractice lawsuits would be greatly reduced by such a system. This is because victims injured by malpractice would not need to turn to the legal system to be compensated for the cost of medical treatment of the malpractice injuries. Those health care expenses would simply be covered by the national health system, which would then have the right to seek reimbursement from the negligent doctor or hospital.

## Guarantee Consumer Representation

Amid all the discussion of health care reform, one basic defect has emerged, only to be ignored by virtually everyone: how will the interests of consumers be represented once the health care reform becomes the law of the land?

How will a taxpayer control the use of his or her money by state and federal health agencies? Who will fight to make sure that new disciplinary standards for physicians are put into effect? If insurance companies are permitted to participate in the health care field, as the White House and many members of Congress insist, who will challenge unfair insurance practices or excessive premiums? Who will fight waste and inefficiency if a "single-payer" system is created? How will consumers learn to represent themselves in the "Small Malpractice Claims Court?"

In short, who will be in charge?

We must make sure that the new institutions and responsibilities created by national health care reform provide the basic democratic accountability contemplated by the Constitution. No reform can succeed if the public is not fully behind it. The consumers, taxpayers, voters, workers and shareholders who pay for the system must lead the process of building and controlling it; if they are excluded, and the special interests and their political allies are given that authority, health care reform will prove a disaster for consumers and will ultimately fail.

The solution is to create a structure through which people can participate in monitoring health care reform once it is passed by Congress.

Each state should charter a nonprofit consumer organization which is given the right to enclose notices in the envelopes sent out by federal and state agencies, physicians and hospitals. These notices will invite the public to join the consumer group for a modest membership fee — \$10 per year, perhaps.

The membership fees will provide the advocacy group with the resources it needs to represent the members' interests in all health care matters before governmental agencies, courts and the legislature.

The organization will be run by a board of directors, composed of members elected by its supporters. Through this democratic process, anyone who wants to can help guarantee that the public interest is protected as health care reform becomes reality.

Similar state watchdog groups monitoring utility rates have earned high praise for protecting consumers interests.<sup>224</sup>

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These reform measures, as important as they are, will never be enough to protect every patient from malpractice. Medical malpractice lawsuits — which most often involve negligence or substandard care — are a critical adjunct to even the most effective governmental programs.