

**5 POINT PLAN FOR REAL REFORM
OF THE MASSACHUSETTS HEALTH CARE SYSTEM**

**POINT 4
REFORMING THE MEDICAL
MALPRACTICE LIABILITY SYSTEM**

Summary

Physicians are increasingly concerned with the rapidly escalating costs of Professional Medical Liability or Malpractice Insurance System in Massachusetts, and across the country. While Massachusetts malpractice cases have not been unusually excessive and most cases are ultimately decided for the physician, the fear of being sued is increasing premiums and that is resulting in some physicians – especially those in high risk specialties such as obstetrics and neurosurgery – to leave their practices. This results in a reduction in access to care. At the same time, the fear of being sued leaves many doctors practicing defensive medicine ordering expensive tests to demonstrate their good faith effort to do everything to help the patient. This increases the cost of health care. Because doctors and hospitals are worried about lawsuits, even when they do everything well, they are reluctant to reveal information that could be extremely helpful in improving patient care and promoting best practices to reduce errors system errors. The current malpractice system, therefore, results in reducing access and creating health workforce shortages, increasing cost of care, and failing to improve safety, while not adequately addressing the needs of the majority of patients who are actually injured – albeit unintentionally for the most part – by the health care system. The proposed plan does not limit damages or compensatory judgments that could be awarded to patients who may be seriously injured, but is intended to help anyone injured by the health care system as well as to promote the improvement of a safer system for the benefit of all patients who may need care.

Section 1. Joint and Several Liability

The rule of joint and several liability allows an injured party to obtain all of the monetary award they may receive from a lawsuit from any one of the defendants regardless of their proportion of liability. For instance, if a patient suffers an injury during surgery and 3 people involved in the surgery are sued—the surgeon, the anesthesiologist and a surgical nurse—and the each of them is found to have contributed to the patient’s injury, proportionally at 10 percent at fault, 20 percent at fault and 70 percent at fault, the plaintiff can recover the full amount of the award from the party found to be only 10 percent at fault. Plaintiffs do this when one of the defendants has “deeper pockets” than the others.

This bill will eliminate the rule of joint and several liability for “health care practitioners.” Under this bill, individual defendants will only be required to pay the amount of damages for which they are proportionally liable. Therefore, if a defendant is determined by a jury to be 10 percent at fault, they can only be made to pay 10 percent of the damages award.

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Section 2. Collateral Source

The collateral source rule allows defendants to reduce the amount they must pay to an injured plaintiff by deducting from that amount the value of any other source of compensation the plaintiff has received or will receive. Massachusetts has a limited collateral source rule now but it applies to only payments the plaintiff has already received. This bill will allow the court to consider any future sources of payment or compensation. Allowing the full use of the collateral source rule will reduce large damage awards while not putting the injured plaintiff in any worse position.

Section 3. Expert Witness

This section and section 4 make changes to the rules governing the qualifications and testimony of expert witnesses. Section 3 applies to expert witnesses offering testimony at the Medical Malpractice Tribunal. This section enhances the qualifications for those experts testifying at the tribunal to require that they are (1) licensed by the medical board, (2) are board certified in the appropriate specialty and (3) actively practice in the same specialty. This section will ensure that experts testifying at the Tribunal are well-qualified to give an opinion and that they are not merely “roving medical experts” employed by plaintiff’s attorneys to get cases past the Tribunal stage.

Section 4. Expert Witness

This section adds the same requirements as section 3 for experts testifying at the trial stage of the proceeding.

Section 5. Accountability for Nurse Staffing

One major factor in medical errors and patient safety is the level of nursing staff available in hospitals. This section requires hospitals to develop a nurse staffing plan that takes into account the important variables in staffing determinations, submit it to the department of public health and incur fines if such plan is not filed correctly. This section will reduce health care costs by improving patient outcomes and thus the number of lawsuits.

Section 6. Evaluation of Nursing Care Quality

Hospitals shall submit an annual report to the Betsy Lehman Center for Patient Safety and Medical Error Reduction as to performance measures for nurse staffing and quality improvement.

Section 7. Limitation on High Risk Surgeries

Repeated studies have shown that certain surgeries and procedures are more prone to error and harmful outcomes when performed in hospitals that have less experience with them. By better monitoring where such surgeries are performed and requiring that such surgeries take place in settings where experience is sufficient to improve patient outcomes, we can reduce the number of errors and therefore the cost of these errors to the health care system. This

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section will set up a system for monitoring high risk surgeries (those that are prone to error from inexperience). By reducing the number of errors we will reduce the number of lawsuits and help keep medical malpractice rates down.

Section 8. Protection against Liability for Physician Apology to Patient

In cases where a mistake has been made, acknowledgement of the error and apology by the physician can prevent costly litigation and help speed resolution of the case. Physicians are wary of apologizing, however, because an apology can be deemed an admission of liability in administrative and judicial proceedings. This section will prevent a physician apology from being used against them in any such proceedings.

Section 9. Medical Malpractice Reinsurance Fund

This section will establish a Medical Malpractice Reinsurance Fund. This state backed fund will help reduce medical malpractice premiums by allowing insurers to obtain "reinsurance" for very large judgments against them. Reinsurance is a way to reduce the cost of malpractice premiums by reducing the risk insurers are exposed to of the very largest malpractice judgments.

Section 10. Patient Education

This section changes the definition of "postoperative complication" to include loss of function or aesthetics. This change, in conjunction with the following section, will help improve patient satisfaction with their medical care and help improve patient outcomes by requiring surgeons to better inform patients of potential postoperative complications and take steps to reduce their occurrence.

Section 11. Patient Education II

This section, in conjunction with the above section, requires health care facilities to put in place a procedure to reduce postoperative complications.

Section 12. Medical Professional Liability Insurance Rate Reduction

This section will authorize the division of insurance to approve rate adjustments by medical malpractice insurers. This is necessary to ensure that with the comprehensive slate of liability reforms contained in this bill, malpractice insurers return their decrease in costs to the health care professionals in the form of lower rates.

Section 13. Mediation

This section requires that the medical malpractice tribunal refer cases that may be appropriate for it, to mediation. Mediation is the least expensive and most amicable way to resolve civil matters and its use will save the system time and money.