

*ACTION PENDING – No resolution presented herein represents the policy of the Association until the House of Delegates shall have approved it.*

**Report and Recommendation of the  
Health Care Task Force**

The Task Force was directed to create a list of positive recommendations for changes in the health care delivery system and the process by which injured persons are fairly and promptly compensated when that system fails. Recommendations for change were not to be in any way limited and were to include legislative and judicial initiatives.

As evidenced by our appendix, highly competent and diverse groups have investigated and studied these same issues. With those resources interested committees and sections of our association presented detailed recommendations in each area of inquiry. From its study and investigation and after three lengthy convocations of its members the Task Force, acknowledging with appreciation the actions of the Chief Justice and the Governor, make the recommendations that are attached.

With these recommendations, the Task Force sincerely anticipates that the citizens of the Commonwealth, health care providers and attorneys can establish a harmony in the delivery of health care safely and economically reasonable with fair compensation to claimants when appropriate.

We thank the Task Force members, the chairs of the committees and sections and the PBA staff for their extraordinary active participation. We particularly acknowledge the insight, enthusiastic leadership and tireless efforts of President Golden in this effort.

Submitted by,

Honorable Mason Avrigian, Co-Chair  
John J. Bagnato, Esquire, Co-Chair  
Nora Barry Fischer, Esquire, Co-Chair

April 15, 2004

## **Recommendations**

### Judicial

1. The Supreme Court should consider statewide standardization of jury pool qualifications and service because there is common agreement that more educated and more diverse jury panels result in more just determinations.
2. The Supreme Court should implement a rule change requiring early and mandatory status conferences at which, when indicated, the attendance of a qualified MCARE representative be required.
3. The Supreme Court through its judicial educational program should improve the instruction to the trial bench concerning the issues involved in the trial of medical malpractice cases and study the feasibility of dedicated tribunals.
4. The Supreme Court should examine the desirability of expanding the present rule regarding settlement conferences to include the right of any party to request the same and require the presence of a qualified MCARE representative with authority.
5. The Supreme Court should encourage the trial bench to consider the use of all tools at their disposal including: implementation of the rules to adhere to Pennsylvania fact pleading practice; early intervention in weak cases; and the expanded use of motion for summary judgment practice and bifurcation to streamline the process.
6. The Supreme Court should encourage the trial bench to consider where appropriate granting motions for remittur and change the standard for its use from "...is so excessive and unconscionable as to shock the conscious of the court". to "... the award deviates materially from what would be considered reasonable compensation".

The Task Force acknowledges the Supreme Court's initiatives in the adoption of rule changes addressing venue, certifications and alternative dispute resolution. Reports indicate that the court's initiatives have already positively impacted the reduction in filings.

Legislative

1. Consider the desirability and economic impact of the continuation of mandatory and appropriate levels of insurance for all health care providers and the inclusion of authority for private practitioners to participate in self-insured groups.
2. Adopt appropriate legislation for the mandatory adherence by health care providers to advanced health care directives and to provide them appropriate immunity.
3. Review and amend the present statutory and regulatory requirements that adversely impact the reporting, recording and prohibitions on settlements and ADR results.
4. Review and amend legislation that negatively impacts on the reporting and recording of errors by health care providers and peer review processes to correct and eliminate those errors.
5. Review and determine the appropriate expansion and increase authority of the Insurance Commissioner in medical malpractice insurance rate regulation and to develop programs for the increased participation of and competition among malpractice carriers in the Commonwealth.
6. Study the alleged inequities in provider reimbursement and implement adjustments where indicated.
7. Review present licensing suspension and revocation process for repeat offenders and provide the necessary and adequate funding to the Licensing Boards to implement its statutory mandates.
8. Encourage legislative and regulatory reforms to coordinate current quality review and monitoring systems to enhance quality activities and eliminate the present duplicated efforts.
9. Encourage and promote through appropriate funding the development, implementation and teaching of standards for the provision of health care and thereby eliminate the costly practice of defensive medicine.

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General

1. Develop a cooperative educational program with health care providers describing health care delivery as an art and not a science and diminishing the expectations of absolute perfection.
2. Create an ongoing liaison with representatives of various professional and other health care agencies to continue to study and make recommendations to improve the delivery and cost of health care.
3. Create a permanent liaison with representatives from the Pennsylvania Medical Society and similar professional organizations to foster mutual understanding, education and respect.
4. That the President consider the continuation of the Task Force with comparable but long-term goals.

**Bibliography**

"Understanding the First Malpractice Crisis of the 21st Century", by William M. Sage, M.D., J.D. It is a chapter reprinted with permission from the Health Law Handbook, 2003 Edition, Alice Gosfield, Editor, published by West, posted by the Project on Medical Liability in PA (which is funded by The Pew Charitable Trusts).

United States General Accounting Office, *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates*, GAO-03-702, June 2003

Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice (Economic and Budget Issue Brief)*, January 8, 2004.

Erie County Medical Malpractice Workgroup, *Medical Malpractice Report*, Mercyhurst College Civic Institute, Erie, PA, February 9, 2004.

Press Release, *Statement by Tommy G. Thompson, Secretary of Health and Human Services Regarding S. 2061, the "Healthy Mothers and Healthy Babies Access to Care Act"*, February 24, 2004

Mindlin, Nevin J., *Pennsylvania Bar Association White Paper (expanded) for Health Care Task Force*, March 1, 2004.

*Report of the Governor's Medical Malpractice Liability Insurance Crisis Task Force*, March 2004

Press Release, *"Governor Rendell announces medical malpractice liability proposals."* March 24, 2004

Press Release, *"Rules Changes Promote Mediation, Streamline Case Processing"* Harrisburg, March 29, 2004

**Pennsylvania Bar Association  
Health Care Task Force**

Hon. Mason Avrigian – **Co-Chair**  
Wisler Pearlstine Talone Craig Garrity  
& Potash LLP  
Blue Bell, PA 19422-2326

John J. Bagnato – **Co-Chair**  
Spence Custer Saylor Wolfe & Rose  
Johnstown, PA 15907

Nora Barry Fischer – **Co-Chair**  
Pietragallo Bosick & Gordon  
Pittsburgh, PA 15219

**Members:**

Halmon L. Banks, III  
Workers Compensation Law Section  
Martin Banks Pond Lehocky & Wilson  
Philadelphia, PA 19103

Alexis Leslie Barbieri  
Co-chair, Government Lawyers  
Committee  
Office of Attorney General  
Harrisburg, PA 17120

Harry M. Byrne, Jr.  
Family Law Section  
Law Offices Harry M Byrne Jr  
Bala Cynwyd, PA 19004

Kathleen L. Daerr-Bannon  
Co-chair, Alternative Dispute Resolution  
Philadelphia, PA 19102-1706

Michael A. Cassidy, Esquire  
Tucker Arensberg PC  
Pittsburgh PA 15222-5401

David Jackson DeVries  
Co-chair Government Lawyers  
Committee  
Harrisburg, PA 17101

Hon. Pamela Pryor Dembe, Co-chair  
Chair Judicial Administration  
Committee  
Philadelphia Court of Common Pleas  
Philadelphia, PA 19107

Elizabeth Camilla Detwiler  
Business Law Section  
Lockwood Financial  
Malvern, PA 19355

Lee W. Doty  
Co-chair Health Care Law Committee  
Montgomery McCracken Walker &  
Rhoads  
Philadelphia, PA 19109-1029  
LDoty@mmwr.com

John I. Gordon, Co-chair  
Insurance Staff Attorney Committee  
Lafayette Hills, PA 19444

Kimberly Shawn Gray  
Co-chair, Health Care Law Committee  
Highmark Inc  
Camp Hill, PA 17089

Marielle F. Hazen  
Elder Law Section  
Law Office of Marielle Hazen  
Harrisburg, PA 17110

Emmanuel O. Iheukwumere  
Minority Bar Committee  
Eaton & McClellan  
Philadelphia, PA 19102

Richard Louis Jacobs, Co- Chair  
Insurance Staff Attorney Committee  
Gibsonia, PA 15044

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Hon. Thomas King Kistler  
Civil Litigation Section  
Centre County Court of Common Pleas  
Bellefonte, PA 16823

John P. Knox  
Co-chair, Senior Lawyers Committee  
Timoney Knox LLP  
Fort Washington, PA 19034-7544

Penina K. Lieber, Esquire  
Obermayer Rebmann Maxwell & Hippel  
LLP  
Pittsburgh, PA 15219

Donald J. Martin  
Solo and Small Firm Practice Section  
Norristown, PA 19401-4769

Brenda Katherine McBride, Co-chair  
Women in the Profession Committee  
McBride & McBride PC  
Grove City, PA 16127

Hon. Todd B. Seelig  
Young Lawyers Division  
Bureau of Workers Compensation  
Philadelphia, PA 19130

Joseph G. Skelly  
Professionalism Committee  
Harrisburg, PA 17112-1915

Leonard Tintner  
Co-chair, Senior Lawyers Committee  
Boswell Tintner Piccola & Alford  
Harrisburg, PA 17108-0741

Stephen Mitchell Walker  
In-House Counsel Committee  
Highmark Inc  
Pittsburgh, PA 15222-3099

Mark A. Welge, Co-chair  
Alternative Dispute Resolution  
Committee  
Welge Dispute Solutions LLC  
Newtown Square, PA 19073

Kathleen Wilkinson  
Women in the Profession  
220 Ivy Lane  
Haverford PA 19041-1745  
Harriet F. Withstandley  
PA Department of Aging  
Harrisburg PA 17101-1919

Joseph F. Wusinich, III  
Medical & Health Related  
Interdisciplinary Committee  
Wusinich Brogan & Stanzone  
Downingtown, PA 19335

Diann Stinney – **PBA Staff Liaison**  
Pennsylvania Bar Association

Nevin Mindlin, PBA Legislative  
Manager  
Pennsylvania Bar Association

Peter Pokorny, Legislative Council  
Pennsylvania Bar Association

**Health Care Task Force  
January 12, 2004  
Minutes**

The following members of the Task Force were present on the call, Tri-chairs, Mason Avrigian, John Bagnato and Nora Barry Fischer. Members; Kathleen Daerr-Bannon, Mark Welge, Thomas Kistler, Marielle Hazen, Harry Byrne, Jr., Lee Doty, Kimberly Gray, Stephen Walker, John Gordon, Richard Jacobs, Pamela Dembe, Joseph Wasunich, Joseph Skelly, John Knox, Leonard Tintner, Donald Martin, and Brenda McBride. PBA President Tom Golden and PBA staff, Fran O'Rourke, Peter Pokorny and Diann Stinney were also present.

Tom Golden began the meeting with a sincere thank you to all who have agreed to be a part of this very important Task Force. He went on to share some of the things that have been happening which prompted him to put the Task Force together. The medical malpractice crisis, the negative bill board campaign launched by the PA Medical Society and constant lawyer bashing were among the issues that he would like to see addressed. Tom noted that no matter where we stand or how we look at things, it is evident that there will be a health care crisis in Pennsylvania and he doesn't want the legal profession to hold all the blame. Tom went on to say that the PBA already has the best and brightest people right now in the committees and sections of the Bar and that is why he has come to them to make up this Task Force. Tom is confident that with all of the talent within the PBA, a wealth of meaningful and positive suggestions will surely be put forth. He also emphasized that the PBA is not looking to address just one issue but to try to look at the health care delivery system as a whole. He would like the PBA to be prepared to offer diverse and helpful suggestions for solutions to the legislature and courts. Tom advised that Task Force that there will be hearings on the Medical Malpractice Caps issue next week in the Senate and probably a vote in the Senate Judiciary committee in February. He hopes that the PBA Task Force will be prepared to offer some assistance on all of these important issues sometime in March.

Co-chair Mason Avrigian also thanked members of the Task Force and explained that the roles the chairs plan to play is as a catalyst to bring all of the committees/sections together. The first order of business is to schedule a face-to-face meeting for Wednesday, February 18, 10:30 a.m. – 2 p.m. at PBI. Between now and then, he asks that each committee and section start talking about issues to discuss. Each Task Force chair will call the members of the Task Force to offer any help or direction.

Co-chair John Bagnato added that it is important that we try to preserve reasonable medical care and redress where appropriate. He noted several areas of discussion that could and should be undertaken during this process. They include: end of life care, unnecessary testing, cost of experts, impact of venue change, alternative dispute resolution, standards for medical schools and the impact of trial court administration.



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Co-chair Nora Barry Fischer observed that as the Task Force keeps in mind the preservation of quality health care, each committee and section has a role to play in the discussion. She also noted several issues that could and should be discussed, including; what role insurance plays, what about consent clauses (good or bad), MCARE, what role do trial judges play, mandatory mediation as an option as well as working with other disciplines to seek solutions.

Questions from the members such as a request for an outline to get started and any helpful statistics or reports on lawsuits were raised and discussed. Judge Dembe reported that there has been a report done which looks at the number of filings since the venue change. She will try to get a copy of the report and it will be distributed to members of the Task Force. Questions also were raised about consent clauses and explanations for how doctors' policies are rated. Are policies rated according to performance or track record? These and other issues were discussed further and underscored the necessity to have input from all of the assembled committees and sections. There was some concern over duplication of effort but it was agreed that it would not be a negative thing to have different points of view on the same subject matter.

Exorbitant verdicts and what is behind them is a question for discussion as well as how to highlight the doctors' part in the crisis, reimbursements by insurance companies and the struggles hospitals and others are facing. The members all agreed to look at the system of health care delivery as a whole and strive to come up with some positive, non-partisan suggestions and solutions to take to state legislators.

As further discussion centered on statistics and reports, it was determined that any and all material that would be helpful to the Task Force will be forwarded as it is received. As a way to more effectively communicate with each other, a listserv will be established for the Task Force. Information will be sent to you as soon as it is up and running. A request was made for a copy of the negative billboard ad. A copy will be sent to members.

The co-chairs are available to all if you have any questions or concerns. The meeting concluded with the understanding that each committee and section would have something prepared to discuss at the February 18 meeting.

The meeting was adjourned with thanks to all for their participation.

**Pennsylvania Bar Association Health Care Task Force  
February 18, 2004  
Report**

Hon. Mason Avrigian, John J. Bagnato, Nora Barry Fischer, Halmon L. Banks, III, Harry Byrne, Michael A. Cassidy, David Jackson DeVries, Tom Golden via phone, John I. Gordon, Kimberly Shawn Gray, Richard Louis Jacobs, Hon. Thomas King Kistler, Donald J. Martin, C. Dale McClain, Nevin Mindlin, Fran O'Rourke, Peter Pokorny, Diann Stinney, Andy Susko, Leonard Tintner, Stephen Mitchell Walker, Mark A. Welge, Linda Williams, and Joseph F. Wusinich, III, were in attendance.

Tom Golden stated his hope that the work of the Task Force would produce a laundry list of improvements to all areas of the health care issue without a prejudicial or weighted view in any direction but rather an intellectual approach to a subject that is multidimensional and hard to get your arms around. He anticipates suggestions on all levels of the question which could be formulated into a position paper which could be used with our members, our legislative efforts and with the general public to show that we can come up with good solutions to hard problems. Concerned that lawyers have been terribly misrepresented. Thanks all for their efforts in this endeavor.

Elder Law Section

Dale McLain, who was sitting in for the chair, reported that the section has been working on a new law on Health Care Directives. They are concerned that a void in that legislation will cause even more legal action. They are going to continue to work to resolve this issue with the legislature.

Solo & Small Firm Section

Chair reported that conversations with members of the section have produced a variety of comments which include:

There is a concern that the health care bureaucracy has multiple levels of care, which includes decent care for the well insured and nothing for the working poor.

Concern that nothing will happen until the system collapses.

Problem with providers being overworked and unable to control what they get paid.

The Section would like the PBA to stand for something that could make a real change to the whole health care system.

Alternative Dispute Resolution Committee

The chair reported on the work done by the Supreme Court Task Force. The Task Force has studied models of mediation including the Rush Model. They have not expressed a preference for a particular model at this time. There are presently changes under consideration to move cases quickly and less costly through the system. These changes could come about through rule changes or directly by language from the Supreme Court. It is agreed that early intervention before litigation is started is preferable.

It was noted that the impact of venue change and certificate of merit has produced decreases in the number of cases in Philadelphia but it is too early to see what the overall impact of these changes are.

During the discussion it was noted that there are courts in the Commonwealth with experience in moving cases through the system and health systems are interested in early intervention.

There is evidence of resistance from patients on arbitraiton. There is a report available on the internet, July 98 Commisson on Health Care Dispute Resolution. It is an ABA publicaiton.

The question of whether Abington Hospital has a mediation program was raised.

#### Senior Lawyers

There was limited response from the senior lawyers.

#### Insurance Staff Attorney (written report)

The Committee would like to see the formulation of some type of objective information that could be given to the public that is in plain english for them to understand.

Obeservaitons include:

Difficulty finding doctors to perform IMEs, young residents and medical students saddled with student loans can't afford to practice here, doctors have not addressed the need to reduce the incidence of medical malpractice, the standard of care seems to be perfection.

Suggestions:

1. More reporting requirememts within the State Medical Board to discipline, perhaps more license suspensions.
2. Med Mal review case boards.
3. Structure pain and suffering awards as an annuity which end upon the claimant's death.
4. Reduce awards to the present value.
5. Allow doctors to go bare and reduce the amount of insurance required.
6. Remittur

#### Interdisciplinary Committee

The Committee has no position on caps. They would like to explore whether liability insurance should remain mandatory. They would be interested in working with the ADR committee in formulating some type of mediation program.

#### L. Williams, Head of Public Health Care Protections

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Pointed out some concerns; difficulty understanding what other government agencies are doing regarding the same issues, doctors and hospitals may not be doing all they can to reduce costs, patients sometimes getting tepid medical care because doctors are afraid, realizing that some mistakes cannot be avoided, and can we get some reasonability back into the system. There is a concern that nothing is happening to bad doctors. The main concern should be how to insure that PA citizens have access to health care when they need it and to attorneys when something has gone wrong.

Nevin Mindlin has made a formal request for information to indicate the number of actions against doctors in Pennsylvania since 1999. He has asked for a detailed listing by year. He will share the information with the Task Force when he receives it.

### Government Lawyers

Chair wanted to ensure that work being done by the Task Force would result in some changes somewhere in the system. Noted difficulty getting any consensus from the Committee because of the diversity of the group.

### In-House Counsel

Chair noted that the two issues of concern for his Committee are; concern about the affordability of health care and the image of lawyers.

The impact of the federal systems on the state health care system should be noted.

There are some truly bad actors and the medical community must realize that they have to play a bigger role in policing those bad actors. The federal government does maintain a database that tracks them. It needs to be determined what would be a good basis for a Community base line standard of care.

The bottom line is to protect citizens.

### Health Care Law Committee (written reports)

The committee offered a list of long and short-term solutions:

1. More effective tort procedures.
2. Mandatory mediation/arbitration and subject matter expert arbiters.
3. Immunity law strengthening and external peer review.
4. Supreme Court Rule Revisions (4003.5 and 4003.6)
5. Legislatively imposed caps.
6. MCARE – safety measures and prosecution.
7. Allow “going bare” or lower required limits.
8. Quality review streamlining.

Long Term Solutions:

1. Creation of parties of goodwill in both the medical and legal communities to assure role of public leadership for the long-term resolution of public health crisis.
2. PBA take leadership role in creating cooperative study of medical and legal issues involved in the provision of accessible, affordable, high quality health care.

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3. PBA would investigate public regulation of medical care by private torts to evaluate impact that litigation has.
4. Better quality control and removal of physicians whose skills or practice standards are substandard.
5. Change medical education protocol.

### Workers Compensation Section

Members are concerned with increasing costs for depositions, fees and reports from doctors. The members are not sure what the answers are. Accessibility to health care for all citizens is a concern. Having difficulty find doctors to do IMEs.

### Public Relations Task Force

Andy Susko informed the group of the activities of the Public Relations Task Force.

1. Respond with an effective media campaign to address the negative ads of the PA Medical Society.
2. Lawyers are under attack and inappropriately so and have to fight back.
3. Want to get out a series of promotional messages about the value of lawyers and the jury trial system.

The public does not very well understand the importance of the jury trial system as a part of our overall justice system. Need to communicate as effectively as possible on a limited budget. There are two pilot programs being considered: people's law school on cable television with basic legal information and a call in legal help line for television and radio.

### Civil Litigation Section (written report)

Suggestions include:

1. Improve the jury pool.
2. Mandatory "status conferences"
3. Dedicated judges.
4. CAT Fund Representation.
5. Motions for summary judgment.
6. Tighter pleadings.
7. Focus on the weak cases.
8. ADR.

There was a discussion regarding juries and what changes need to be made. One-day/one jury rules statewide were considered to be a good suggestion as well as some way to improve instructions to juries regarding economic damages. Bifurcation split the instructions, not the trial.

Expanding the ability of the judge regarding the remittur was also mentioned. The problem of coming up with a standard was noted.

It was also questioned what the prohibition about written jury instructions is?

Recap

There were certain reoccurring themes during this discussion. Five of the most common are:

1. Legislation
2. Mediation/Arbitration
3. Procedures
4. Discipline
5. Costs

Committees should go back to each committee/section and report what happened here and see if there is anything else they want to add. The more hard cold facts and statistics we can get, the better.

There will be a report prepared of this meeting. That report along with the written reports submitted today will be put on the list serve for your use.

The Task Force will meet on Thursday, March 25 at 10:30 a.m. at PBI Mechanicsburg. Please email Diann with your attendance plans.

**Pennsylvania Bar Association Health Care Task Force  
March 25, 2004**

Hon. Mason Avrigian, John J. Bagnato, Nora Barry Fischer (via phone), Halmon L. Banks, III, Alexis Barbieri, Harry Byrne, Michael A. Cassidy, Kathleen Daer Bannon (via phone), Hon. Pamela Pryor Dembe, John I. Gordon, Kimberly Shawn Gray, Donald J. Martin, Nevin Mindlin, Peter Pokorny, Diann Stinney, Andy Susko, Leonard Tintner, Mark Tunnell, Harriet Withstandley (via phone) and Joseph F. Wusinich, III, were in attendance.

Harriet Withstandley, from the Department of Aging, reviewed some facts on the state of the health care crisis in general and particularly in relation to the elderly. The number of uninsured continues to rise and the future and solvency of Medicare is in question. The cost of health insurance is an enormous burden to employers and individual. Long-term care is another area in which increase in demand is anticipated. Concerns remain about the ability to deliver quality health care cost effectively. Liability claims against long term care facilities are increasing. The public standing of doctors and lawyers has been damaged by the medical malpractice crisis. Older citizens are often victims of the tort system. Economic damages may be limited for them. Non-economic damages may be adversely affected by age. Caps on non-economic damages will negatively affect this group of people. There were no recommendations from the Department at this time. It was noted that there needs to be fixes in both areas the health care delivery system as well as the tort area. The main recommendation is to focus on the overall health care system.

Chair Bagnato told the members that even though we have an aggressive time frame, it is hopeful that we could put together a list of recommendations that could be brought forward to the Board of Governors and House of Delegates in May. Today, any supplemental information offered would be appreciated and any committee/section may make a formal presentation. The end result of this meeting is that the chairs will put together a list of items that have been gleaned from the meetings and reports submitted. The chairs will then circulate that document to the Task Force for approval by the committee/sections.

Donald Martin reported that the Solo and Small Firm Section is endorsing the Civil Litigation Section's report and recommendations. They appear to be a fair and balanced set of recommendations.

Mason Avrigian reported that the Elder Law Section Chair reported that Senate Bill 495, which the Section was advocating, has now been stalled in the General Assembly. They will continue to monitor the bill as it deals with very important end of life issues.

There was discussion on how to handle the presentation to the House and make sure that each committee/section has an opportunity to have their reports submitted and to have any opposition attached also. Each committee/section is asked to make sure that any feedback from your group be reported to the chairs. It is also important that the representatives to the Task Force note whether the comments are the personal comments of the chair or a consensus of the group they represent.

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Nora Barry Fischer noted that even if there are fixes for the medical malpractice crisis there are continuing problems for the entire health care system in this state.

Joe Wasunich reported on the efforts he has made to divide his committee members into relevant subcommittees to look at these and other health care issues.

Andy Susko reported that the Public Relations Task Force would have their draft report ready next week. The principal recommendation is that the Bar Association adopt the Virginia advertising campaign. The Bar can license the model for a small fee. They will also suggest a "People's Law School" modeled after other state projects. They will also develop talking points for lawyers and a grassroots campaign to get out to the public, the value that attorneys bring to society. Andy also suggested that this Task Force might want to get its report before the Board of Governors before the May meeting.

John provided an explanation of what would be included in the House of Delegates material. There was discussion about whether or not it would be too voluminous and how to best get the best documents in front of the House to support the recommendations. John offered that whoever wants a report attached should let the chairs know. The representatives to the committees/sections should determine how to handle the reports they submitted. The Task Force will attach reports unless told differently by the committee/section. Everyone will have an opportunity to resubmit a report if they so choose.

The co-chairs will investigate whether or not they can present a preliminary report to the Board on April 28.

Nevin Mindlin gave an update on the status of the medical malpractice legislation. The Senate bill which contains the caps legislation is now in the House. There does not seem to be any interest in moving that bill right now. Nevin will be meeting with members of the General Assembly next week. More information is available on the PBA website under the legislative department section.

The group began deliberating which of the suggestions submitted so far would receive the approval of the Task Force.

1. Clear Standards for Venue person Selection and Elimination was approved. This was originally titled "Improve the Jury Pool." After much discussion, it was determined that there are instances of the jury pool not being entirely representative because of the way many are allowed to be excused from jury duty. It was agreed that the Supreme Court should determine a narrow list of circumstances under which one could be excused from jury duty.
2. Mandatory Status Conferences was approved.
3. Dedicated Judges was not approved. After intense discussion about whether or not this was not only economically but also geographically feasible, it was a recommendation that was not fully supported. It was agreed that judges could be more regularly trained on issues involving medical liability cases.

Kathleen Daer Bannon offered some insights into how ADR could be used to alleviate some of the concerns that are being addressed. What means could encourage people to voluntarily and freely enter into arbitration? When there is a workable system in place, you avoid some of these problems of runaway juries, finding enough capable jurors, there



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is much less formality and more congeniality. There are easier scheduling issues. Arbitrators provide expertise in the area. Kathleen would like to see the Task Force look at arbitration as one way to address some of the issues being discussed. Judge Avrigian assured her that ADR is a topic of discussion further down the agenda.

4. CAT Fund Representation was approved. There is great concern that the CAT Fund ignores judicial orders and regularly fails to look at cases before it's too late to prevent them from going to verdict.
5. Motions for Summary Judgment was approved. Recommendation should be addressed to the Supreme Court. There was discussion of judges granting these motions but then being overturned by the Superior Court.
6. Tighter Pleadings was approved. Again recognizing that there is not necessarily a problem with the rules but with the enforcement of the rules.
7. Focus on the Weak Cases was approved but moved as a subsection of number 2.
8. ADR was approved. Kathleen Daer Bannon is anxious to see the two programs as listed in the newspapers that are proposed to be tested in Pennsylvania. Programs can be successful when they are appropriately designed and implemented. Nevin suggested that the Task Force approve ADR in concept but not get so narrow as to preclude any opportunity for negotiations with the legislature. Reporting requirements for doctors may prove to be a major hurdle to encouraging arbitration in medical malpractice cases.

There was a long discussion about the reporting requirements. Does it create an adverse atmosphere for physicians to settle? Some reporting requirements are for punitive purposes and some are there for the improvement of quality by identifying where the errors are incurring. This is a complicated set of circumstances. Some studies say you have a small number of doctors with a high number of malpractice cases. At the national level, reporting does affect the doctors' ability to get insured. Liability insurers are not writing coverage and those that are sometimes the settlement amounts are going down.

Judge Dembe suggested adding a recommendation that the whole issue of physician reporting be addressed in so far as it limits the ability for providers and patients to amicably and early resolve these cases. It was also noted that the Governor and Legislature need to take a look at the Insurance Commissioners office and address tightening their functions in this area.

Remittur was discussed. The power of the judge to reduce excessive jury awards. The Task Force agreed that this was a good recommendation. This issue has come up again on Governor Rendell's proposals also. This is an area that the Supreme Court could address.

There was some concern that the Task Force is only addressing medical malpractice issues. The hope is that the other issues, including elder care will be addressed sometime during this process.

Kim Gray reviewed the recommendations of the Health Care Law Committee. There were no new recommendations to add. She did want to expand on an idea that was

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presented in terms of long-term solutions. That idea was that the PBA could take the lead in getting some members of the medical profession and legal profession together to help bridge the gap and work together on some of the issues for the good of the health care delivery system. A mediator in that situation would be helpful. The Task Force members agreed that that would be a good idea. (see attached reports)

There was a discussion about the perception that the Insurance industry has been hands off with the Insurance Department. Does the Task Force want to address this? The Governor has a proposal that needs to be expanded. There are other models of Insurance Commissioner's powers and office responsibilities. Medical malpractice rates are set under the "file and use" method. That means that they ask for a rate and unless there is some opposition, they automatically get that rate. There are concerns that the department be more hands on to avert any further instances of insurance insolvency as the state has experienced in the not to distant past. The self-insurance programs present a problem for hospitals and physicians. Perhaps the PBA could try to work with the federal government to get some changes in the self-insured regulations. The final recommendation is to have the Insurance Department become more active and hands on to help resolve these issues.

Limitation on attorney fees is an issue that although it may seem reasonable in the Governor's proposal, it is an issue that the Task Force agrees that it should not comment on.

The Task Force agrees that someone should take a look at physician reimbursements. There are many things that determine what those reimbursements are, including the federal government and Pennsylvania Medicare.

The Task Force agrees to recommend that the Health Care Task Force be continued in the coming year. It is clear that there are many issues, which still need to be worked on.

Issues of the cost of medical care at end of life was discussed. There is concern that even though people are making decisions for end of life care, they are sometimes ignored because caregivers are concerned about liability. Protecting health care providers when they follow health care directives and providing immunity were suggested. It is a significant cost factor when a patient's wishes are ignored. The consensus was that the Task Force is currently handling all it can but it is a topic of discussion that could be continued in the coming year.

Harry Byrne wanted to bring up the good will and civility issue. He suggested that we look for other groups who may not be as hostile with each other to try to provide a mutual environment for meaningful discussion between the professions. The Task Force members agreed that having members of a doctor's group to come to the meetings would not be a bad idea. Harry suggested that the PBA encourage renewal of a relationship with the medical community.

The Chairs will prepare a list of recommendations from the minutes of this meeting. That list will be posted on the Task Force listserv. Your responsibility as representatives is to see that the list is distributed to your respective committees/sections. You should then indicate whether your committee/section approves the recommendations, provide any dissenting opinions and indicate whether it is the response from you or from the entire group. The time frame for response back to the Chairs is April 15.

**Health Care Law Committee**

**Health Care Task Force Recommendations**

**February 11, 2004**

The following is an outline of suggested short-term and long-term strategies developed by the Health Care Law Committee of the PBA to combat the health care crisis in Pennsylvania. The Committee draws its membership from government, private practice, health care provider institutions, insurance companies and academic institutions, among others. Thus constituted, the Committee recognizes major advantages in taking a collaborative, rather than adversarial, approach to resolving the crisis, as hopefully reflected in the outline below.

**SHORT-TERM STRATEGIES:**

**1. More effective tort procedures.**

Bifurcated system like that of limited tort option in motor vehicle cases, where pain and suffering available only for cases with permanent and substantial injuries.

Creation of special court with expertise to handle medical liability claims.

**2. Mandatory mediation/arbitration and subject matter expert arbiters.**

Statute that would provide for mandatory, binding arbitration agreements between provider and patient (would be enforceable if certain requirements are met – Securities industry has done this).

Court rule requiring that all courts establish mandatory mediation as a step in malpractice litigation, with preliminary forum that all cases must go through before being allowed to go to trial. Always consider impact on decreasing premiums and time frame to get through system. Don't develop a new cottage industry.

Non-binding arbitration would add to expense of litigations.

Properly trained decision-makers not unduly influenced by politics. Perhaps special masters or special education for judges who hear medical malpractice cases.

Study to further investigate the role each of the following plays: a) jury awards in excess of \$5 million, b) jury awards in excess of \$1 million, c) cost of defending suits with defense verdict, d) cost of defending suits with awards under \$100,000, and e) awards against doctors who are "repeat offenders."

**3. Immunity law strengthening and external peer review.**

***AGENDA ITEM "M"***

Tribunals independent of the provider assume responsibility for peer review and disciplinary proceedings.

Peer review by institutions of similar type to remove local politics from process.

Amendment of Pennsylvania Peer Review Act to clarify that it applies to institutional as well as professional providers (contrary to any interpretation of Supreme Court) and to curtail exceptions in statute.

Proposal of Ed Dench, M.D., former President of Penna. Medical Society, should be considered to permit ongoing (not just ad hoc) peer review when competence is called into question.

**4. Supreme Court Rule Revisions (4003.5 and 4003.6).**

Rule to allow defense attorneys to speak with medical providers concerning treatment for injury alleged in lawsuit.

Elimination of Conner v. Allegheny Hospital issues.

**Other Suggestions:**

**5. Legislatively imposed caps.**

MICRA type reforms – California places a cap on non-economic damages (i.e., pain, suffering, inconvenience, physical impairment, disfigurement, non-pecuniary injury) for medical malpractice cases (\$250,000).

Need for constitutional amendment recognized.

**6. MCARE – safety measures and prosecution.**

Licensure requirements tightened with multi-offenders.

Increased number of prosecuting attorneys.

Additional medical experts provided in all disciplines to assist in case review and prosecution.

Determination of which patient safety measures are effective (and how effective) – could dollars be better spent on increasing nursing staffing, etc.

**7. Rule to allow “going bare” or lower required limits.**

Consideration of removing requirement of mandatory medical liability insurance as condition for practicing medicine in Pennsylvania.

Consideration of lowering required insurance limits.

Requirement of insurance carriers to review underlying circumstances of settled cases.

**8. Quality review streamlining.**

Legislative and regulatory reforms to coordinate current quality review and monitoring system to enhance quality activities and eliminate duplicated efforts. Currently, health systems and plans are monitored by DOH, PID, JCAHO, NCQA, etc.

**LONG-TERM STRATEGIES:**

1. Creation of “parties of goodwill” in both medical and legal communities to assume role of public leadership for the long-term resolution that is involving both the medical and legal professions of public health crisis.
2. Leadership role to be taken by PBA in creating cooperative study of medical and legal issues involved in the provision of health delivery system that is accessible, affordable and of high quality. Consider “seed money” funding along with grant-providing foundations. Pennsylvania has access to much data from Patient Safety Authority and MCARE.
3. Cooperative study, through PBA and other organizations, to investigate public regulation of medical care by private torts to evaluate impact that litigation has (e.g., in modifying quality of care, driving medical costs, discouraging voluntary disclosures of accidents/iatrogenic injuries, creating adversary role between providers and lawyers).
4. Better quality control and removal of physicians whose skills or practice standards are substandard without unnecessarily punishing good physicians who may have had bad outcome or been in position of respondeat superior.
5. New medical education protocol. “Improving Patient Safety” by David Nash @ Jefferson describes provider error reduction.

Respectfully submitted,

Kimberly Gray, Co-Chair  
Lee W. Doty, Co-Chair

CIVIL LITIGATION SECTION

Health Care Task Force Recommendations

February 18, 2004

The following are several suggestions proffered by the Civil Litigation Section of the PBA in an effort to find sensible, meaningful solutions to the current structure of Medical Malpractice litigation in Pennsylvania. The Section has compiled these suggestions through "brainstorming", but without the luxury of sufficient research into the implementation of any of them. They are in no particular order or sequence:

1. **IMPROVE THE JURY POOL** There is common agreement that more educated and more diverse jury panels result in more just determinations. Any reforms that can be enacted to broaden the potential jury pool, and eliminate or restrict "excuses" from the pool would benefit ALL parties. Should the Supreme Court consider statewide standardization of jury pool qualifications? Should the Supreme Court enumerate the limited circumstances under which an excuse for a juror may be granted?
2. **MANDATORY "STATUS CONFERENCES"** Most complex litigation (i.e. asbestos cases) benefit greatly from a strict structure of "status conferences" held during the pendency of an action to keep the court involved in the case, and the matter moving forward. These status conferences should set discovery and motions deadlines, the exchange of expert reports, etc. A Supreme Court rules change would be required to make these mandatory.
3. **DEDICATED JUDGES** Larger jurisdictions have benefited from being able to commit particular judges to the role of handling exclusively Medical Malpractice cases. The judges and practitioners learn to deal with each other and the subject matter, which creates increased collegiality and improved efficiency. Medium sized jurisdictions should look to dedicating a judge or two who will specialize in these cases, even if it is not to the exclusion of everything else. Small jurisdictions should consider banding together in Judicial Districts and appointing a few judges who will "ride the circuit" in the District to handle these cases. (An experienced cast of Senior judges, accustomed to "the circuit" might be employed to assist these smaller jurisdictions).
4. **CAT FUND REPRESENTATION** Require that the CAT fund representatives be at all "status conference" or "settlement conferences" when ordered by the court. The CAT fund representative, like an insurance representative, will be required to be familiar with the case, and to have settlement "authority". This will require a Legislative change in the structure of the CAT fund, and the staffing of that fund.

5. **MOTIONS FOR SUMMARY JUDGMENT** These Motions are little used, or rarely if ever granted, in many jurisdictions. While each Motion must be evaluated on its merits, judges and parties should be reminded/encouraged to use this tool to eliminate weak cases early in the process, so as to preserve resources.
6. **"TIGHTER" PLEADINGS** All parties benefit from early notice and identification of the allegations that will be brought out in the litigation. Rules changes to further "tighten" the Fact Pleading nature of Pennsylvania's pleadings rules will result in more specific pleadings, and less discovery time and expense.
7. **FOCUS ON THE WEAK CASES** Although much public attention is focused on the HUGE verdicts, those cases generally are cases of admitted merit. Without merit, little or no verdict would have been rendered. The vast majority of cases result in a defense verdict. These cases, which have no merit, bleed the system of its limited resources (manpower and monetary) and should be eliminated as much as possible. By unclogging the system of the many meritless cases, judges, lawyers, juries, insurance companies, CAT fund representatives, and the parties themselves, can focus on those cases with actual merit.
8. **ADR** Encourage the creation of more vehicles which will allow for the speedy and just resolution of cases without the uncertainty of having untrained jurors having to decide cases of massive complexity. No specific suggestions are offered, but our litigators believe much can be gained by ALL interested parties through increase study and adoption of ADR.

**The Civil Litigation Section has over 3,400 members. The membership includes many Plaintiff, or "personal injury" lawyers, and many Defense, or "insurance" lawyers. None of the positions offered to this Task Force are intended to facilitate an advantage for either side in this debate. Our loyalties and allegiances are to BOTH sides. The Civil Litigation Section believes that meaningful reforms and improvements can be made, without compromising the inherent fairness of the adversarial process, and intends no suggestions which might be interpreted to do otherwise.**

Respectfully submitted,

Judge Thomas Kistler, Chair  
Civil Litigation Section, PBA

## Addendum

Since the draft report was circulated, we have received additional comments and suggestions which are attached for your information. If the Task Force is continued, we recommend that the Task Force review and consider any additional material.

### **From Harriet Withstandley:**

Diann- Since the recommendations do not address any Department of Aging issues directly, we have two requested additions: to add a General Note that the lack of comprehensive health care and prescription drug coverage adversely impacts the liability litigation system in Pennsylvania; and to add a General recommendation that CMS support state pharmaceutical programs, such as our PACE program, in the Medicare Prescription Drug Improvement and Modernization Act of 2003.

Like Mike Cassidy, I have some comments, based on my decade+ experience in medical malpractice litigation and as hospital counsel. I think that MCare generally has local trial counsel; it is the MCare claims examiners (attorney examiners) who may be remote (i.e., from Harrisburg). I don't believe that we or the PA General Assembly can amend the Medicare reimbursement rates. We can certainly encourage lobbying CMS on behalf of Pennsylvania providers.

### **From Mike Cassidy:**

Diann, My responses or comments are my individual comments. They do not represent a committee viewpoint.

1. I do not think more educated people are "more just".
2. Mcare should appoint local counsel for their cases. That would assure attendance at the status conferences, because the lawyer will see the judge again.
3. Legislation re insurance should include discussions with the feds to allow malpractice subsidies by hospitals.
4. Legislation re reporting of settlements is a federal issue ( National Practitioners Data Bank). We can lobby the feds, just like point # 4, but cannot amend the legislation just in PA.
5. The reimbursement comments should specifically mention DPW and Medicaid.
6. With regard to Report item Legislative#9, I do not think we should presume to think we or any other lawyers can develop standards for the practice of medicine; that's organized medicine's job.