


Task Force Meeting Attendance Sheet

Medical Malpractice Task Force

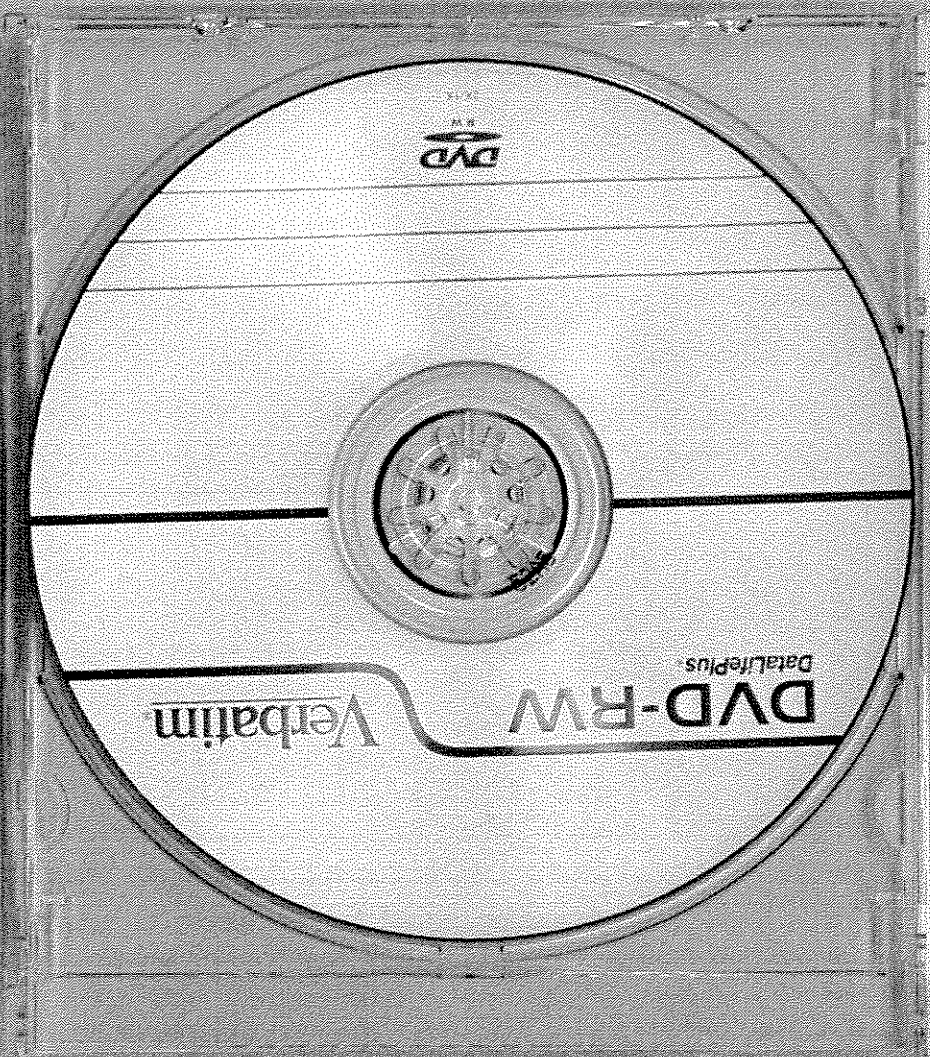
Date: 6 Oct 05 Meeting Type: Working Group
 Location: 328 NW

<u>Committee Member</u>	<u>Present</u>	<u>Absent</u>	<u>Excused</u>
Representative Curtis Gielow, Chair	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Mike Huebsch	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Ann Nischke	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Jason Fields	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Representative Bob Ziegelbauer	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mr. David Strifling	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ms. Mary Wolverton	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dr. Clyde "Bud" Chumbley	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mr. David Olson	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mr. Ralph Topinka	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Totals: 10 0 0



 John Reinemann
 Task Force Clerk



*Medical Multiproactive
Jack Forde Stearns*

10/6/05

Verbatim

Speaker Gard's Medical Malpractice Reform Task Force
October 6, 2005
Meeting Minutes

Members: Present: Rep. Curt Gielow, Rep. Mike Huebsch, Rep. Anne Nischke, Rep. Jason Fields, Rep. Bob Ziegelbauer, Mr. David Strifling, Dr. Clyde "Bud" Chumbley, Ms. Mary Wolverton, Mr. Ralph Topinka, and Mr. David Olson. Absent: None.

At approximately 1:00 p.m., the Chair of the Task Force, Rep. Curt Gielow, called the meeting to order.

The clerk called the roll.

Chairman Gielow advised the Task Force the meeting would proceed by reviewing the draft letter to Speaker Gard that had been drawn up by Richard Sweet of Legislative Council based on the previous meeting of the Task Force and which was emailed to Task Force members on October 5, 2005. Chairman Gielow insured that Task Force members each had a copy of the draft letter that was emailed on October 5th, copies Mr. Topinka's suggested changes to the draft letter and copies of Rep. Huebsch's suggested changes to the draft letter. Chairman Gielow also insured that members had copies of the PIC WI letter dated October 4, 2005 re: Reducing Fund Attachment Point to \$500K/\$1.5M. which had been emailed to members on October 4, 2005.

The meeting proceeded with Richard Sweet of Legislative Council reviewing the draft letter emailed to members October 5, 2005. Mr. Sweet's presentation was followed by Rep. Huebsch and then by Mr. Topinka reviewing the changes each had proposed to the October 5th letter. The Task Force members discussed the issues contained in the letters and the proposed changes.

Prior to adjournment, Chairman Gielow advised Task Force members that a final draft letter to Speaker Gard would be distributed to members by noon, Friday, October 7th and members would have until noon, Monday, October 10th to comment on the final draft letter. If Task Force members approved of the final draft letter and did not ask for revisions, changes or additions, the letter would be finalized and sent to Speaker Gard on behalf of the Task Force.

The hearing was adjourned at approximately 2:05 p.m.

October 4, 2005

Sent Via Email: Rep.Gielow@legis.state.wi.us

Rep. Curt Gielow
316 North State Capitol
Madison, WI 53708

Re: Reducing Fund Attachment Point to \$500K/\$1.5M

E-mailed to
T.F. members

10/04/05

Dear Rep. Gielow:

At last week's meeting of the Task Force on Medical Malpractice, you requested PIC-Wisconsin's feedback to the idea of potentially reducing the Wisconsin Injured Patients and Families Compensation Fund (Fund) attachment point for coverage above the primary insurance limits from the current \$1 million/\$3 million down to \$500,000/\$1.5 million. We are pleased to provide you with our observations:

- 1) **Reducing the attachment point would reverse what the Legislature has accomplished over thirty years.** The Fund was originally created in 1975 to cover then-catastrophic claims. The Fund was never designed to cover the initial working layer of coverage and become the primary defender of claims against covered health care practitioners – that is the role for the primary insurers, including the Wisconsin Health Care Liability Insurance Plan (WHCLIP). The Fund attachment point has increased over the years from \$200,000 to \$400,000 to today's \$1 million per occurrence/\$3 million aggregate per year. These attachment increases were intended to keep policy coverage for primary insurance competitive in Wisconsin, while updating for inflationary changes to maintain mandatory Fund coverage to very high dollar claims.

One of the terms used often in insurance is that of a "working layer", which is the typical claim value where most of the claims reside. The primary carriers are responsible for the working layer, while the Fund has always been the "excess" or "catastrophic" layer. The working layer is just that: all of the fact finding, legal discovery, depositions, expert witness findings, economic and non-economic valuations and so forth take place. Over time, due to increases in the frequency of claims and the severity, or value, of claims, that working layer has increased and the Fund threshold, or attachment point, has been increased as a result.

If the Fund attachment point were to be reduced to \$500,000, the Fund would be squarely in the middle of the working layer, if not at the lower edge. That would require duplication of effort by both the Fund and the primary carrier, and puts the entities in a potential conflict. PIC Wisconsin and the Fund went through an extended period of time, until the threshold was raised to \$1 million, where our differing views of how a claim

should be managed created a lot of stress between the two entities (and other primary carriers as well).

Reducing the Fund threshold, since it would impact most claims (the working layer), would limit our ability to impact the insurance marketplace with a vigorous claims defense, the results of which are among the industry's best. Our suggestion, especially if the legislature considers passage of a new non-economic damage cap significantly higher than \$446K, is to increase the Fund attachment point to \$1.5 million or \$2 million.

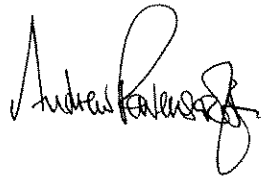
- 2) **Reducing the attachment point would likely not result in significantly lower primary insurance premiums.** Primary insurers must generate a certain level of premium to cover potential indemnity payments for claims which will be paid, necessary legal defense and other costs for all claims filed, whether ultimately paid or not, and state of the art risk management and patient safety information provided to policyholders. During the last eighteen years, PIC Wisconsin has closed over 6,700 claims and only 692, about 10%, of those claims were closed with indemnity payment. Over 98% of our claims closed with indemnity payment are attributable to payments of \$500K or less. In order to obtain these results, PIC Wisconsin paid over \$62 million in defense costs, which represents approximately 40% of all payments (both indemnity and defense). In fact, PIC-Wisconsin spent over \$41 million in defense costs to resolve 90% of all reported claims without any indemnity payment – which represents 65% of all defense costs paid. PIC Wisconsin's defense on behalf of our policyholders helps hold the line on unnecessary settlements/verdicts in excess of \$500K. If we were required to tender our limits (and defense) to the Fund at \$500K, the average cost per claim would increase by virtue of a probable increase in settlement mentality by the Fund, because of the Fund's responsibility for ALL payments beyond the primary coverage. The very nature of the professional liability tort system is that claims filed need to be thoroughly investigated and, as appropriate, fairly settled and/or vigorously defended. PIC Wisconsin's policyholders rightfully expect the positive results we have accomplished and would likely be wary of a larger Fund role in the defense and possible settlement of their case.

- 3) **The Fund will likely need to significantly increase its fees to reflect its increased exposure.** Following our recent state Supreme Court's ruling in *Ferdon v. WI Patients Compensation Fund*, which overturned the medical malpractice non-economic damage cap, the Fund will very likely need to significantly increase its fees to reflect the Fund's unlimited coverage beyond the primary limits. Now, with no reasonable limits on the amount of non-economic damages to be paid in medical liability injury actions, we have heard that the Fund will likely need to increase its actuarial reserves by somewhere between \$120 to \$180 million - with NO change in the current attachment point. If the attachment point is reduced, the Fund will likely need to further increase its actuarial reserves not only to cover the potential paid claims, but also the significant increases in legal defense and other costs which the Fund will incur to appropriately defend the increased volume and severity of future claims.

- 4) **The Fund's consulting actuaries should provide an analysis of Fund fee changes.**
We also recommend the Fund's consulting actuaries be requested to provide an analysis of Fund fee changes likely to become necessary if the Fund's attachment point is adjusted, up or down, from the current \$1 million/\$3 million level.

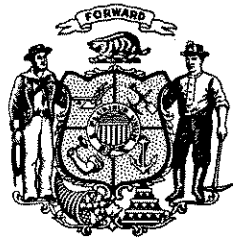
Mr. Chairman, we hope this letter has provided you with additional information which will assist you and the Task Force.

Best regards,



Andrew F. Ravenscroft, MBA
Vice President of Operations

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Rep.Gielow

From: Topinka, Ralph [rtopinka@mhsjvl.org]
Sent: Wednesday, October 05, 2005 5:15 PM
To: Rep.Gielow
Subject: RE: Draft recommendation letter for review
Attachments: draft.doc

Thank you for sending the draft letter. Here are some suggested modifications and additions.

-----Original Message-----

From: Rep.Gielow [mailto:Rep.Gielow@legis.state.wi.us]
Sent: Wednesday, October 05, 2005 1:02 PM
To: Rep.Huebsch; Rep.Nischke; Rep.Fields; Rep.Ziegelbauer; dstrifling@hotmail.com; mwolverton@pjmlaw.com; cm.chumbley@ma-hc.com; rtopinka@mhsjvl.org; dolson@bamc.org
Subject: Draft recommendation letter for review

The attached letter is for discussion at tomorrow's meeting of the Med-Mal task force. It has been drawn up by Dick Sweet of Legislative Council and reflects input from me. Please review it before tomorrow's meeting. Thank you.

Rep. Curt Gielow

<<draft.doc>>

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October _____, 2005

Speaker John Gard
Room 211 West, State Capitol
Madison, WI 53702

Dear Speaker Gard:

This letter incorporates the recommendations of the Assembly Medical Malpractice Task Force that you established following a series of Wisconsin Supreme Court decisions in June and July of this year. We believe that the recommendations made by the Task Force appropriately address those court decisions and forward them to you for your consideration and possible legislative action. Those court decisions dealt with the cap on noneconomic damages in medical malpractice cases, coverage of medical residents under the caps and the Injured Patients and Families Compensation Fund ("the Fund"), and consideration by juries of collateral source payments for injuries to plaintiffs in medical malpractice cases. In addition, we are forwarding other recommendations that we feel will improve the medical malpractice system in Wisconsin.

Noneconomic Damage Cap

As you are aware, the Wisconsin Supreme Court declared unconstitutional the statutory cap on noneconomic damages in medical malpractice cases in *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125 (2005). The majority opinion in that case held that the cap on noneconomic damages was not rationally related to the five legislative objectives summarized by the majority opinion in *Ferdon*. The Task Force has discussed those objectives and believes that the proposals that we are forwarding to you address those objectives.

In the majority opinion, Chief Justice Shirley Abrahamson summarized the five legislative objectives of a cap on noneconomic damages as follows: (1) ensure adequate compensation for victims; (2) enable insurers to charge lower malpractice premiums by

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reducing the size of awards; (3) keep the Fund's annual assessment to health care providers at a low rate and protect the Fund's financial status; (4) reduce overall health care costs for consumers of health care by lowering malpractice premiums; and (5) encourage health care providers to practice in Wisconsin, including the related objectives of avoiding the practice of defensive medicine and retaining malpractice insurers in Wisconsin. These were some of the objectives of the legislature when it enacted a cap in 1995 and they were some of the objectives of this Task Force when considering and crafting options for the legislature. In addition, the Task Force believes the legislature should recognize the following related objectives: (1) provide a legal environment capable of ensuring adequate compensation for victims of medical malpractice with meritorious injury claims; (2) provide a legal environment capable of supporting access to health care in Wisconsin; and (3) provide a legal environment capable of providing more consistent noneconomic damage awards among similarly situated plaintiffs.

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The Task Force recognized that the forgoing legislative objectives were part of a carefully-balanced approach to compensating medical malpractice plaintiffs in this state. Wisconsin is the only state that requires health care providers to purchase specified amounts of malpractice insurance coverage and also to participate in a fund that provides unlimited coverage for malpractice liability. Moreover, unlike legislative bodies in some states, the Wisconsin legislature has set no limits on recovery for economic damages. Therefore, successful malpractice plaintiffs in this state are assured of recovery of their full economic damages. As a balance to this assurance, the legislature placed a cap on what is assuredly the most unpredictable component of damages—non-economic losses, largely pain and suffering. The legislature and the Task Force recognized that this aspect of recovery is often based on emotion, not any predictable standard by which to measure damages. A reasonable cap on noneconomic damages serves as a rational balance to the legislature's plan to ensure that successful malpractice plaintiffs are able to recovery appropriate damages.

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As I noted, the Task Force believes the proposals we are forwarding to you satisfy those objectives. Any legislation that is introduced to implement a new cap on noneconomic damages should include the objectives discussed in this letter, including a recitation of the careful balance described in this letter, in a section related to Legislative Findings.

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The Task Force is forwarding for your consideration three alternative proposals relating to noneconomic caps:

- Establish a two-tiered system under which injured minors have a higher cap than injured adults. This approach is similar to the two-tiered approach to damages in wrongful death cases.
- Establish a cap on noneconomic damages as the greater of either a base-level cap, or a set amount times each year of life expectancy of the injured patient. Since caps are applied by a judge, rather than a jury, the judge would use a table that could be developed by the Director of State Courts that sets forth life expectancy for persons of different ages. The life expectancy factor would be based solely on the age of the injured patient at the time of the act of malpractice, not on his or her specific health condition either before or after the act of malpractice.
- Cap noneconomic damages at a specific dollar amount. Immunity from liability above this dollar amount could be provided either to health care providers in general, or to health care providers that are participating in the Medical Assistance program.

The Task Force is not recommending the dollar amounts that would be used in the above proposals, but it is rather leaving that for your consideration and the consideration of the

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Legislature. In determining what dollar amounts to use, we recommend that you consider what other states use as a cap on noneconomic damages, actuarial data and studies presented to the Legislature, the amounts of noneconomic damage awards in medical malpractice cases in Wisconsin, and testimony, data and other information presented to the Task Force.

Deleted: If the dollar amounts are set too low, the objective of adequately reimbursing the injured patient would not be satisfied. If the dollar amounts are set too high, the other objectives identified by the majority opinion would not be satisfied, such as lowering medical malpractice premiums, ensuring the Fund's financial status, reducing overall health care costs, and encouraging health care providers to practice in Wisconsin.

Any legislation that you might introduce should apply only to acts of malpractice that occur after the effective date of the legislation. The Wisconsin Supreme Court has previously declared invalid an attempt to apply caps on damages retroactively.

In addition, it is recommended that you consider whether any new cap on noneconomic damages be indexed for changes in the Consumer Price Index, as was the cap that was in effect prior to *Ferdon*.

Medical Residents

In June of this year, the Wisconsin Supreme Court rendered a decision in *Phelps v. Physicians Insurance Company of Wisconsin, Inc.*, 2005 WI 85 (2005). In that case, the court held that the statutory cap on noneconomic damages did not apply to a person during his or her medical residency who was not yet a physician and, in the circumstances of the particular case, was not an employee of a hospital. However, the Supreme Court sent the case back to a lower court for a determination of whether or not the medical resident can be considered to be a "borrowed employee" of a hospital.

The recommendations of the Task Force are as follows:

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- Require all unlicensed medical residents to have a temporary educational permit starting in their first year.
- Allow sponsors of a graduate medical education program the option of participating in the Fund.

Collateral Sources

The third Wisconsin Supreme Court case that the Task Force discussed is *Lagerstrom v. Myrtle Werth Hospital-Mayo Health System*, 2005 WI 124 (2005). In that case, the court noted that current statutes provide that a jury may receive information about other sources of payments for the injured patient's injuries, in addition to payments from the defendant, but the statutes are silent on how the jury is to use that information. The court held that the jury may not use the information about collateral sources to reduce the award to the injured patient, but may use the information to determine the value of medical services rendered.

The recommendation of the Task Force is as follows:

- Require the jury to reduce the injured patient's award by any collateral source payments received. [Distinctions could be made in this statute depending on the type of collateral source involved; e.g., Medicare or private insurance.] This reduction would be offset by any amount of obligations that the injured patient must reimburse the collateral sources.

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Injured Patients and Families Compensation Fund

Currently, health care providers in Wisconsin are required to maintain primary medical malpractice insurance coverage in the amount of \$1 million per occurrence and \$3 million per year. Damages above these levels are paid from the Fund.

The recommendations of the Task Force are as follows:

- An actuarial audit of the Fund should be undertaken on a periodic basis.

Currently, the Legislative Audit Bureau is required to perform a financial audit of the Fund at least once every three years. Actuaries should examine the effect that a conservative estimate of the Fund's future obligations has on premiums paid by health care providers over the long-term.

- Explore whether reducing the threshold for coverage of the Fund from its current levels would have an effect on overall malpractice premiums for Wisconsin health care providers.

Medical Malpractice Reduction

The Task Force recommends that the Legislature take steps to reduce the incidence of medical malpractice. ~~The Legislature could consider the~~ recommendations made by the Joint Legislative Council's Special Committee on Discipline of Health Care Professionals in 1999.

The bills developed by that committee have been introduced in prior sessions of the Legislature and, as a starting point, you may wish to consider the most recent version--2003 Senate Bill 227, as amended.

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Long-Range Issues

The Task Force examined other issues related to the medical malpractice system. However, since it is on a relatively short timeline, the Task Force deferred exploration of those issues to further consideration by other legislators and legislative committees.

The potential recommendations that the Task Force did not take specific action on, but rather recommended further exploration of, are as follows:

- Establish health courts that deal exclusively with medical malpractice cases.
- Provide for legislative oversight of medical malpractice insurance premiums.

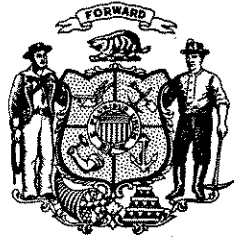
Thank you for establishing the Task Force to deal with these important issues and for giving consideration to the recommendations set forth in this letter.

Sincerely,

Representative Curt Gielow, Chair
Assembly Medical Malpractice Task Force

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END



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Sawyer, Julie

From: Rep.Gielow
Sent: Wednesday, October 05, 2005 1:02 PM
To: Rep.Huebsch; Rep.Nischke; Rep.Fields; Rep.Ziegelbauer; 'dstripling@hotmail.com'; 'mwolverton@pjmlaw.com'; 'cm.chumbley@ma-hc.com'; 'rtopinka@mhsjvl.org'; 'dolson@bamc.org'
Subject: Draft recommendation letter for review
Attachments: draft.doc

The attached letter is for discussion at tomorrow's meeting of the Med-Mal task force. It has been drawn up by Dick Sweet of Legislative Council and reflects input from me. Please review it before tomorrow's meeting. Thank you.

Rep. Curt Gielow



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DISTRIBUTED TO
TF MEMBERS & DISTR.
LIST 10/5/05.

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October ____, 2005

Speaker John Gard
Room 211 West, State Capitol
Madison, WI 53702

Dear Speaker Gard:

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In the majority opinion, Chief Justice Shirley Abrahamson summarized the five legislative objectives of a cap on noneconomic damages as follows: (1) ensure adequate compensation for victims; (2) enable insurers to charge lower malpractice premiums by reducing the size of awards; (3) keep the Fund's annual assessment to health care providers at a low rate and protect the Fund's financial status; (4) reduce overall health care costs for consumers of health care by lowering malpractice premiums; and (5) encourage health care providers to practice in Wisconsin, including the related objectives of avoiding the practice of defensive medicine and retaining malpractice insurers in Wisconsin. As I noted, the Task Force has discussed these objectives and believes the proposals we are forwarding to you satisfy those objectives. Any legislation that is introduced to implement a new cap on noneconomic damages should include those five objectives in a section related to Legislative Findings.

The Task Force is forwarding for your consideration three alternative proposals relating to noneconomic caps:

- Establish a two-tiered system under which injured minors have a higher cap than injured adults. This approach is similar to the two-tiered approach to damages in wrongful death cases.
- Establish a cap on noneconomic damages as the greater of either a base-level cap, or a set amount times each year of life expectancy of the injured patient. Since caps are applied by a judge, rather than a jury, the judge would use a table that could be developed by the Director of State Courts that sets forth life expectancy for persons of different ages. The life expectancy factor would be based solely on the age of the

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injured patient at the time of the act of malpractice, not on his or her specific health condition either before or after the act of malpractice.

- Cap noneconomic damages at a specific dollar amount. Immunity from liability above this dollar amount could be provided either to health care providers in general, or to health care providers that are participating in the Medical Assistance program.

The Task Force is not recommending the dollar amounts that would be used in the above proposals, but it is rather leaving that for your consideration and the consideration of the Legislature. If the dollar amounts are set too low, the objective of adequately reimbursing the injured patient would not be satisfied. If the dollar amounts are set too high, the other objectives identified by the majority opinion would not be satisfied, such as lowering medical malpractice premiums, ensuring the Fund's financial status, reducing overall health care costs, and encouraging health care providers to practice in Wisconsin. In determining what dollar amounts to use, we recommend that you consider what other states use as a cap on noneconomic damages, actuarial data and studies presented to the Legislature, the amounts of noneconomic damage awards in medical malpractice cases in Wisconsin, and testimony, data and other information presented to the Task Force.

Any legislation that you might introduce should apply only to acts of malpractice that occur after the effective date of the legislation. The Wisconsin Supreme Court has previously declared invalid an attempt to apply caps on damages retroactively.

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In addition, it is recommended that you consider whether any new cap on noneconomic damages be indexed for changes in the Consumer Price Index, as was the cap that was in effect prior to *Ferdon*.

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The recommendations of the Task Force are as follows:

- Require all unlicensed medical residents to have a temporary educational permit starting in their first year.
- Allow sponsors of a graduate medical education program the option of participating in the Fund.

Collateral Sources

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for the injured patient's injuries, in addition to payments from the defendant, but the statutes are silent on how the jury is to use that information. The court held that the jury may not use the information about collateral sources to reduce the award to the injured patient, but may use the information to determine the value of medical services rendered.

The recommendation of the Task Force is as follows:

- Require the jury to reduce the injured patient's award by any collateral source payments received. [Distinctions could be made in this statute depending on the type of collateral source involved; e.g., Medicare or private insurance.] This reduction would be offset by any amount of obligations that the injured patient must reimburse the collateral sources.

Injured Patients and Families Compensation Fund

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The recommendations of the Task Force are as follows:

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Currently, the Legislative Audit Bureau is required to perform a financial audit of the Fund at least once every three years. Actuaries should examine the effect that a conservative estimate of the Fund's future obligations has on premiums paid by health care providers over the long-term.

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- Explore whether reducing the threshold for coverage of the Fund from its current levels would have an effect on overall malpractice premiums for Wisconsin health care providers.

Medical Malpractice Reduction

The Task Force recommends that the Legislature take steps to reduce the incidence of medical malpractice by adopting recommendations made by the Joint Legislative Council's Special Committee on Discipline of Health Care Professionals in 1999. The bills developed by that committee have been introduced in prior sessions of the Legislature and, as a starting point, you may wish to consider the most recent version--2003 Senate Bill 227, as amended.

Long-Range Issues

The Task Force examined other issues related to the medical malpractice system. However, since it is on a relatively short timeline, the Task Force deferred exploration of those issues to further consideration by other legislators and legislative committees.

The potential recommendations that the Task Force did not take specific action on, but rather recommended further exploration of, are as follows:

- Establish health courts that deal exclusively with medical malpractice cases.
- Provide for legislative oversight of medical malpractice insurance premiums.

Thank you for establishing the Task Force to deal with these important issues and for giving consideration to the recommendations set forth in this letter.

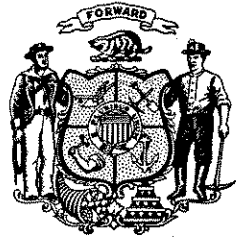
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Sincerely,

Representative Curt Gielow, Chair
Assembly Medical Malpractice Task Force

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Sawyer, Julie

From: Jensen, Jodi
Sent: Thursday, October 06, 2005 12:11 PM
To: Sawyer, Julie; Reinemann, John
Subject: Huebsch changes reviewed by TF 10/06/2005

Attachments: draft revisions.doc

This draft includes changes to the section about the 5 objectives and incorporates a paragraph proposed by Ralph Topinka.

It also eliminates some of the discussion about the amount of the cap.

It also makes a minor change to the section about physician discipline.



draft revisions.doc
(54 KB)

Handed out by Rep Huebsch
@ the hearing 10/6/05.
and discussed.

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October ____, 2005

Speaker John Gard
Room 211 West, State Capitol
Madison, WI 53702

Dear Speaker Gard:

This letter incorporates the recommendations of the Assembly Medical Malpractice Task Force that you established following a series of Wisconsin Supreme Court decisions in June and July of this year. We believe that the recommendations made by the Task Force appropriately address those court decisions and forward them to you for your consideration and possible legislative action. Those court decisions dealt with the cap on noneconomic damages in medical malpractice cases, coverage of medical residents under the caps and the Injured Patients and Families Compensation Fund ("the Fund"), and consideration by juries of collateral source payments for injuries to plaintiffs in medical malpractice cases. In addition, we are forwarding other recommendations that we feel will improve the medical malpractice system in Wisconsin.

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In the majority opinion, Chief Justice Shirley Abrahamson summarized the five legislative objectives of a cap on noneconomic damages based on eleven findings made by the

Deleted: The Task Force has discussed those objectives and believes that the proposals that we are forwarding to you address those objectives.

Deleted: as follows: (1) ensure adequate compensation for victims; (2) enable insurers to charge lower malpractice premiums by reducing the size of awards; (3) keep the Fund's annual assessment to health care providers at a low rate and protect the Fund's financial status; (4) reduce overall health care costs for consumers of health care by lowering malpractice premiums; and (5) encourage health care providers to practice in Wisconsin, including the related objectives of avoiding the practice of defensive medicine and retaining malpractice insurers in Wisconsin. As I noted, the Task Force has discussed these objectives and believes the proposals we are forwarding to you satisfy those objectives. Any legislation that is introduced to implement a new cap on noneconomic damages should include those five objectives in a section related to Legislative Findings. ¶

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Legislature in 1975 when it enacted medical liability reform. In 1995, the Legislature enacted a cap because it believed the need for reform set forth in 1975 still existed and the Task Force believes it continues to exist today. We also believe some of the Legislature's findings were misconstrued, oversimplified or simply omitted when the summary objectives were fashioned by the Court. For this reason, the Task Force believes any legislation introduced to implement a new cap on noneconomic damages should clarify the objectives embodied in the original eleven findings and include them in a section related to Legislative Findings.

The Task Force recognizes that the legislature in 1995 took a carefully-balanced approach to compensating medical malpractice plaintiffs in this state. Wisconsin is the only state that requires health care providers to purchase specified amounts of malpractice insurance coverage and also to participate in a fund that provides unlimited coverage for malpractice liability. Moreover, unlike legislative bodies in some states, the Wisconsin legislature has set no limits on recovery for economic damages. Therefore, successful malpractice plaintiffs in this state are assured of recovery of their full economic damages. As a balance to this assurance, the legislature placed a cap on what is assuredly the most unpredictable component of damages— non-economic losses, largely pain and suffering. The legislature and the Task Force recognized that this aspect of recovery is often based on emotion, not any predictable standard by which to measure damages. A reasonable cap on noneconomic damages serves as a rational balance to the legislature's plan to ensure that successful malpractice plaintiffs are able to recovery appropriate damages.

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Medical liability reform is part of a broad legislative strategy designed to keep health care affordable and available in Wisconsin. The Task Force believes capping noneconomic damages for unquantifiable harms while continuing to allow unlimited recovery for economic damages is crucial to this strategy.

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The Task Force is forwarding for your consideration three alternative proposals relating to noneconomic caps:

- Establish a two-tiered system under which injured minors have a higher cap than injured adults. This approach is similar to the two-tiered approach to damages in wrongful death cases.
- Establish a cap on noneconomic damages as the greater of either a base-level cap, or a set amount times each year of life expectancy of the injured patient. Since caps are applied by a judge, rather than a jury, the judge would use a table that could be developed by the Director of State Courts that sets forth life expectancy for persons of different ages. The life expectancy factor would be based solely on the age of the injured patient at the time of the act of malpractice, not on his or her specific health condition either before or after the act of malpractice.
- Cap noneconomic damages at a specific dollar amount. Immunity from liability above this dollar amount could be provided either to health care providers in general, or to health care providers that are participating in the Medical Assistance program.

The Task Force is not recommending the dollar amounts that would be used in the above proposals, but it is rather leaving that for your consideration and the consideration of the

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Legislature. In determining what dollar amounts to use, we recommend that you consider what other states use as a cap on noneconomic damages, actuarial data and studies presented to the Legislature, the amounts of noneconomic damage awards in medical malpractice cases in Wisconsin, and testimony, data and other information presented to the Task Force.

Deleted: If the dollar amounts are set too low, the objective of adequately reimbursing the injured patient would not be satisfied. If the dollar amounts are set too high, the other objectives identified by the majority opinion would not be satisfied, such as lowering medical malpractice premiums, ensuring the Fund's financial status, reducing overall health care costs, and encouraging health care providers to practice in Wisconsin.

Any legislation that you might introduce should apply only to acts of malpractice that occur after the effective date of the legislation. The Wisconsin Supreme Court has previously declared invalid an attempt to apply caps on damages retroactively.

In addition, it is recommended that you consider whether any new cap on noneconomic damages be indexed for changes in the Consumer Price Index, as was the cap that was in effect prior to *Ferdon*.

Medical Residents

In June of this year, the Wisconsin Supreme Court rendered a decision in *Phelps v. Physicians Insurance Company of Wisconsin, Inc.*, 2005 WI 85 (2005). In that case, the court held that the statutory cap on noneconomic damages did not apply to a person during his or her medical residency who was not yet a physician and, in the circumstances of the particular case, was not an employee of a hospital. However, the Supreme Court sent the case back to a lower court for a determination of whether or not the medical resident can be considered to be a “borrowed employee” of a hospital.

The recommendations of the Task Force are as follows:

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- Require all unlicensed medical residents to have a temporary educational permit starting in their first year.
- Allow sponsors of a graduate medical education program the option of participating in the Fund.

Collateral Sources

The third Wisconsin Supreme Court case that the Task Force discussed is *Lagerstrom v. Myrtle Werth Hospital-Mayo Health System*, 2005 WI 124 (2005). In that case, the court noted that current statutes provide that a jury may receive information about other sources of payments for the injured patient's injuries, in addition to payments from the defendant, but the statutes are silent on how the jury is to use that information. The court held that the jury may not use the information about collateral sources to reduce the award to the injured patient, but may use the information to determine the value of medical services rendered.

The recommendation of the Task Force is as follows:

- Require the jury to reduce the injured patient's award by any collateral source payments received. [Distinctions could be made in this statute depending on the type of collateral source involved; e.g., Medicare or private insurance.] This reduction would be offset by any amount of obligations that the injured patient must reimburse the collateral sources.

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Injured Patients and Families Compensation Fund

Currently, health care providers in Wisconsin are required to maintain primary medical malpractice insurance coverage in the amount of \$1 million per occurrence and \$3 million per year. Damages above these levels are paid from the Fund.

The recommendations of the Task Force are as follows:

- An actuarial audit of the Fund should be undertaken on a periodic basis.

Currently, the Legislative Audit Bureau is required to perform a financial audit of the Fund at least once every three years. Actuaries should examine the effect that a conservative estimate of the Fund's future obligations has on premiums paid by health care providers over the long-term.

- Explore whether reducing the threshold for coverage of the Fund from its current levels would have an effect on overall malpractice premiums for Wisconsin health care providers.

Medical Malpractice Reduction

The Task Force recommends that the Legislature take steps to reduce the incidence of medical malpractice in Wisconsin. The Legislature may wish to review recommendations made by the Joint Legislative Council's Special Committee on Discipline of Health Care Professionals in 1999 and subsequent legislation in conjunction with a review of any changes or reforms to the disciplinary system that have been made during the last six years.

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Deleted: The bills developed by that committee have been introduced in prior sessions of the Legislature and, as a starting point, you may wish to consider the most recent version--2003 Senate Bill 227, as amended.

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Long-Range Issues

The Task Force examined other issues related to the medical malpractice system. However, since it is on a relatively short timeline, the Task Force deferred exploration of those issues to further consideration by other legislators and legislative committees.

The potential recommendations that the Task Force did not take specific action on, but rather recommended further exploration of, are as follows:

- Establish health courts that deal exclusively with medical malpractice cases.
- Provide for legislative oversight of medical malpractice insurance premiums.

Thank you for establishing the Task Force to deal with these important issues and for giving consideration to the recommendations set forth in this letter.

Sincerely,

Representative Curt Gielow, Chair

Assembly Medical Malpractice Task Force

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