

Ex-U of M chief pushes malpractice prevention

Editor's note: The malpractice insurance "crisis," though serious, isn't the fault of health-care providers, insurance companies, attorneys or patients, according to law professor Robben W. Fleming.

In a report for Gov. Blanchard, Fleming, a former president of the University of Michigan, urged better policing of the medical profession and recommended against a \$250,000 "cap" on jury awards for pain and suffering, as proposed in a state Senate bill.

Here is full text of the governor's summary of Fleming's report:

FINDINGS include the following: The existing situation is sufficiently serious as to warrant remedial action at this time.

GOP staff says Fleming is 'soft' on tort reform

Editor's note: A state Senate staff member analyzed the Fleming proposals and said there was "nothing new or original" in them and that the tort reform recommendations were "soft."

This analysis, presented to Senate Majority Leader John Engler, R-Mt. Pleasant, can be viewed as the Republicans' preliminary response to recommendations commissioned by the Democratic governor. Excerpts:

THE MOST striking finding is that a relatively small percentage of physicians (20 percent) is responsible for a large percentage of claims (70 percent).

The recommended tort (medical malpractice damage lawsuits) reforms are soft. They lack the strength and substance of the Senate-passed package.

— GOP analysis

The current situation is, generally, not the result of abuses of the present system by providers, insurers, attorneys or patients.

It is important to distinguish between a) malpractice and b) maloccurrences (that is, adverse clinical results) that are not the result of negligence. This distinction is in danger of being lost in the current debate.

A significantly greater amount of malpractice occurs than is implied by the number of claims filed.

With respect to malpractice claims, a preliminary analysis suggests that a disproportionately large number are attributable to a comparatively small number of physicians, and that this pattern appears to hold within each specialty.

Little systematic effort goes into the

prevention of malpractice.

THE FREQUENCY with which claims are filed has increased significantly over the past decade.

Indemnities that are paid to plaintiffs, as well as the expenses associated with the investigation and defense of claims, have grown significantly over the past decade.

Malpractice insurance premiums have risen sharply in the past two years. But in inflation-adjusted terms, the costs of insurance are generally equivalent to those of 1970.

Malpractice insurance remains generally available.

RECOMMENDATIONS:

1. The actions of the governor and

Legislature should proceed in two phases: an immediate set of actions and a set that would take place in early 1986.

2. The immediate actions should include the following set of tort reforms: Revision of the doctrine of joint and several liability; revision of the collateral source rule; mandating the use of structured payments for awards; adjustment of the prejudgment interest requirement; establishment of statutory provisions for the assignment of costs in "frivolous" cases; and refinement of the statute of limitations.

3. The following reforms should not be enacted:

- Qualification of expert witnesses.
- Mandating the use of pre-trial screening panels.
- Establishment of a limit on non-economic damages.

4. A state-administered fund should be created to serve as the source of payment for so-called "long-tail" claims — that is, claims that are filed long after the incident in connection with which negligence is alleged — and to serve as the source of payment for the portion of awards and settlements

against physicians that exceeds a certain threshold.

The fund would be financed by assessments on all of the state's physicians.

5. The recommended tort reforms and the creation of the fund should be made contingent upon the implementation of enhanced systems for assuring the competency of physicians and preventing malpractice.

These systems would be devised in early 1986 and would involve intensified efforts on the parts of the profession, the insurers and the state. Such systems are envisioned to include a much-expanded program of self-regulation by the profession under the su-

pervision of the state.

6. Malpractice insurance premiums should be frozen through June 30.

7. The actions proposed for 1986 should include inquiries into the development of alternative ways of classifying physicians for purposes of establishing risk; into the development of alternative dispute resolution techniques; into the past practice of the state's insurers and the Insurance Bureau; and into the benefits of so-called "no-fault" options.

8. The governor should designate an individual or entity to manage and coordinate the actions proposed for 1986.

WITHOUT BEING specific, Dr. Fleming calls for a vastly expanded, state-sponsored system of competency regulation.

The recommended tort (medical malpractice damage lawsuits) reforms are soft. They lack the strength and substance of the Senate-passed package.

PERHAPS MORE notable than the reforms which are recommended are those which are not. That is, non-economic damage award caps, pretrial screening panels and stricter requirements for expert witnesses (No. 3).

Dr. Fleming states that non-economic award caps, though constitutional, are "last resort" solutions to be used only if all else fails.

Since 80-90 percent of all cases tried result in no award, Dr. Fleming believes that juries are sufficiently capable of distinguishing between expert and inexperienced witnesses and, therefore, no change is necessary.

THE MEDICAL Liability Fund (No. 4) would pay awards of unlimited dollar amounts. This is significant because physicians' liability is currently limited by their policies (for example, \$100,000 or \$500,000).

With no limit on awards, the MLF could become the "deepest pocket" of all, and assessments against physicians would rise to meet the fund's obligations.

Two desirable effects would accrue to insurance companies: more predictable expenses and more predictable premium rates.

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