

## Joint Commission on Health Care

### Staff Update: HJ 101 Task Force on Adverse Medical Outcomes

October 7, 2009

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## House Joint Resolution 101 (2008)

- ❖ Directed JCHC, in conjunction with the Virginia Bar Association, to study, in the case of medical errors and adverse medical outcomes:
  - The use of:
    - disclosure
    - apologies
    - alternative dispute resolution and
    - other measures.
  - The impact of such measures on:
    - the cost and quality of care
    - patient confidence and
    - the medical malpractice system.



## 2008 Study Recommendation

- ❖ The JCHC should convene a Task Force consisting of representatives of the primary stakeholders to include the Medical Society of Virginia, Virginia Hospital and Healthcare Association, Department of Health, Department of Health Professions, Board of Medicine, Virginia Trial Lawyers Association, Virginia Association of Defense Attorneys, the medical malpractice insurance industry, and broader physician, health care provider and consumer representation. We recommend that JCHC charge this task force with:
  - building upon the work already done by the 101 Study Committee;
  - developing agreed-upon working definitions of key terms such as adverse outcome, medical error, and disclosures, to facilitate discussions in Virginia;
  - tracking results and developments in disclosure and resolution programs now operational in Virginia and other states, and federal developments in this area;
  - crafting a model or models for disclosure and early resolution programs that could be offered to Virginia health care providers, insurers and attorneys for their use;
    - should such a model or models be developed, considering ways to incentivize health care providers to try use of such models and to report outcomes of their use;
    - should the Task Force decide not to offer such model(s), explaining the reasons.



## Year Two Study Process

- ❖ Form Task Force.
- ❖ Review Federal developments and programs in other states.
- ❖ Draft legislation for Pilot Project for Disclosure Programs (Pilot Disclosure Program) in cases of adverse medical outcomes and distribute to Task Force.
- ❖ Meet to discuss draft legislation and to determine if agreement could be reached on the necessary elements for a Pilot Disclosure Program in Virginia.



## Proposed Pilot Disclosure Program

- ❖ Task Force agreed to the elements of the Pilot Disclosure Program:
  - Voluntary participation by health care providers in 5 year pilot program.
  - Oversight by the Virginia Department of Health (VDH), with cooperation and support from the Virginia Board of Medicine.
  - Guidelines or conditions of participation developed by VDH with advice and consultation from stakeholder groups.
  - Broad flexibility for programs to develop their protocols within agency parameters.
  - Bifurcated process provided for:
    - Disclosure
    - Resolution process for patient compensation that includes a right to counsel
  - Insurance carriers prevented from penalizing participants.
  - Requirement for participants to report evaluation of experiences to VDH.



## Dissenting Views over Privilege

- ❖ The Task Force agreed on the concepts of the Pilot Program, except for dissenting opinions from the two Virginia Trial Lawyers Association (VTLA) representatives regarding privilege provisions.
- ❖ Privilege as set forth in the Disclosure Pilot Program:
  - Would cover information developed, activity, and communications in the disclosure program process
  - Would NOT privilege or prohibit use of “fact.”
  - Is NOT drafted to affect what may or may not be privileged information concerning activities outside of a participating pilot program.
- ❖ The VTLA representatives expressed that they could not support the privilege provision.
- ❖ The remaining Task Force members agreed that a pilot program cannot exist without allowing for privilege, and voted to recommend the pilot program with the 2 dissenting votes.



## Federal Developments

- ❖ On September 16, the day of our Task Force meeting, the White House announced \$25 million in grants for states and health systems that carry out and evaluate evidence-based patient-safety and medical-liability demonstrations.
  - The US Department of Health and Human Services (HHS) will make grants available within 30 days for “the development, implementation and evaluation of alternatives to our current medical liability system” consistent with certain “goals and core commitments.”
  - Such reform is designed to reduce preventable injuries; improve communication between physicians and patients; ensure patients are compensated for injuries in a fair and timely manner; reduce frivolous lawsuits; and reduce premiums for liability insurance.
  - Three-year grants of up to \$3 million will be available for applicants to implement and evaluate demonstration projects, and one-year grants of up to \$300,000 and technical assistance will be available for states and organizations that want to plan demonstrations.
  - States and health systems have two months to submit applications. Grant decisions will be made in early 2010.



## Federal Developments (Cont.)

- ❖ Senate Finance Committee Chair Max Baucus included in his health reform bill a Sense of the Senate “encouraging” states to test alternatives to civil litigation in an effort to:
  - improve patient safety and reduce medical errors,
  - encourage the efficient resolution of disputes,
  - increase the availability of prompt and fair resolution of disputes,
  - improve access to liability insurance, while preserving an individual’s right to seek redress in court.
  - Additionally it expresses that Congress should consider establishing a state demonstration program to evaluate alternatives to the current civil litigation system.
  - A “Sense of the Senate” is not legally binding.
- ❖ The House Energy and Commerce Committee accepted an amendment that included a liability reform measure that calls on states to implement “certificate of merit” and “early offer” programs as a measure to reform medical malpractice.



## Policy Options

- ❖ **Option 1:** Take no action.
- ❖ **Option 2:** Introduce legislation to amend the *Code of Virginia* § 8.01-581.20:1 to authorize a Disclosure Pilot Program as discussed in the Task Force’s proposal.
- ❖ **Option 3:** Request by letter of the Chairman the Secretary of Health and Human Resources pursue federal grant funding for technical assistance or the implementation of a Disclosure Pilot Program or demonstration project, as outlined by the US Department of Health and Human Services.



## A Special Thanks to the Task Force Members!

- |  |   |
|--|---|
| ❖ <b>Hon. John M. O'Bannon, III</b>  | ❖ <b>Larry Hoover</b>                           |
| ❖ <b>Jeanne F. Franklin</b>  | Of Counsel, Hoover Penrod PLC                   |
| Mediator and Attorney at Law   | ❖ <b>W. Scott Johnson, Esq.</b>                 |
| ❖ <b>Jacqueline M. Beck</b>  | Medical Society of Virginia                     |
| Med BSN, CPHQ, CPHRM Risk Management & Patient Safety Consultant, Mag Mutual Insurance Company | ❖ <b>Russell C. Libby, M.D.</b>                 |
| ❖ <b>Susan Betts</b>   | Medical Society of Virginia                     |
| Consumer   | ❖ <b>Heman A. Marshall, III, Esq</b>            |
| ❖ <b>Thomas C. Brown, Jr. Esq.</b>   | Woods Rogers PLC                                |
| McGuireWoods LLP   | ❖ <b>Malcolm "Mic" McConnell, III, Esq.</b>     |
| ❖ <b>Eileen Ciccotelli, M.P.M.</b>   | Allen Allen Allen & Allen                       |
| VIPCS Representative   | ❖ <b>Kate M. McCauley</b>                       |
| ❖ <b>Sally S. Cook, M.D.</b>   | Virginia Association of Defense Attorneys       |
| Chief Medical Officer  | ❖ <b>Steve Pearson</b>                          |
| Virginia Health Quality Center   | Virginia Trial Lawyers Association              |
| ❖ <b>John Dent, M.D.</b>   | ❖ <b>J. Jeffery Shawcross</b>                   |
| UVA Health System  | Claims Supervisor, Mag Mutual Insurance Company |
| ❖ <b>Patrick C. Devine, Jr., Esq.</b>  | ❖ <b>Alan Simpson, M.D.</b>                     |
| Williams Mullen  | UVA Health System                               |
| ❖ <b>Michael L. Goodman, Esq.</b>  | ❖ <b>Susan C. Ward, Esq.</b>                    |
| Goodman, Allen & Filetti PLLC  | Vice President and General Counsel, VHHA        |
| ❖ <b>Keri Hall, M.D., M.S.</b>   | ❖ <b>Rebecca W. West</b>                        |
| Director, Office of Epidemiology   | Piedmont Liability Trust                        |
| Virginia Dept. of Health   | ❖ <b>Thomas Williamson, Jr.</b>                 |
| ❖ <b>William L. Harp, M.D.</b>   | Virginia Trial Lawyers Association              |
| Executive Director, Virginia Board of Medicine   |   |



## Public Comments

- ❖ Written public comments on the proposed options may be submitted to JCHC by close of business on November 4, 2009.
- ❖ Comments may be submitted via:
  - E-mail: [sreid@jhc.virginia.gov](mailto:sreid@jhc.virginia.gov)
  - Fax: 804-786-5538
  - Mail: Joint Commission on Health Care  
P.O. Box 1322  
Richmond, Virginia 23218
- ❖ Comments will be summarized and included in the Decision Matrix considered by JCHC during its November 12<sup>th</sup> meeting.



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## Internet Address

Visit the Joint Commission on Health Care website:  
<http://jhc.state.va.us>

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