

**A Legislative Draft Proposal For Tort, Medical and Insurance
Malpractice Reform
Presented By
Save Our Doctors Protect Our Patients Coalition**

“M A C R A”

Medical Access Comprehensive Reform Act

1. Abolish Health Claims Arbitration Process

- a. Saves money and time.
- b. Salvage certain concepts, such as certificate of merit.

2. Establish Health Claim Court Within Circuit Court System

- a. Require all parties to go through an Alternative Dispute Resolution (ADR) Procedure of their choosing.
- b. Procedures are described in Title 17 of MD Rules: Arbitration, Mediation, Neutral-Case Evaluation and Neutral Fact-Finding. House Bill 1299 last session and the Governor’s Task Force Recommendation deals only with Mediation as a means to resolve disputes before trial. We believe that the full remedies of ADR will reduce the number of cases that proceed to Court and lead to quicker and fairer resolution for many of the parties.
 - 1. Arbitration shall be non-binding to protect jury trial rights.
 - 2. Arbitration allows for presentation of evidence and arguments in support of their position. The impartial arbitrator may make an award that is non-binding unless agreed to by the parties. Its primary benefit is that it can reach an enforceable agreement.
 - 3. Mediation is the process to assist the parties to reach their own voluntary resolution of the dispute. There is no fact finding and the Mediator does not recommend the terms of an agreement.

4. Neutral Case Evaluation is the process where the parties appear and summarize their evidence and arguments of their respective positions and the independent person renders an opinion of the likely outcome of the dispute if the dispute is tried.
 5. Neutral Fact-Finding is the process where the parties present evidence and arguments and the impartial person makes findings of fact. Those findings of fact are not binding, unless the parties agree.
- c. After ADR is completed and if the dispute is not resolved, the Judge shall set the malpractice case on a “Rocket Docket” and the date of the trial shall be within 180 days from the date of the conclusion of the ADR process. This will give both parties “speedy trial rights.”
 - d. The Chief Administrative Judge of each County shall specially assign judges with previous malpractice experience on the Bench as the trial judges. This simple process can be used until a more formalized “Health Care Court” system is in place.

3. Establish Two Qualified Expert Certificates (ADR & JUDICIAL)

- a. The first Qualified Expert Certificate shall be filed in the ADR Process. (ADR Qualified Expert Certificate). It shall state what the standards of care are and whether any departure from the standard of care was the proximate cause of the injury.
- b. The second Qualified Expert Certificate shall be filed in Court after the Conclusion of the ADR Process. It is an enhanced certificate or a Judicial Qualified Expert Certificate.
 1. The Judicial Certificate will require greater specificity as to the standard of care, the expert’s qualifications to testify to the standard of care, and how the specific standard of care was breached.
 2. The Judicial Certificate certifies to the court that the expert’s opinions are scientifically valid, has been and can be tested for validity, is consistent with peer review and accepted science and has been objectively reviewed for any error. (This wording is in concurrence with the US Supreme Court decision in Daubert concerning scientific expert testimony. In addition it gives support to the court and Board of Physicians should it later be found that an expert

intentionally rendered an error-prone opinion for the purpose of misinforming a jury).

- c. Any Qualified expert will not be able to spend more than 20% of the expert's annual TIME on matters related to preparation or actual testimony. This is a change from the current law that describes 20% of an expert's "activities" cannot be engaged in preparation or actual testimony. "Activities" is a very loose standard and we believe this will restrict the out-of-state, "traveling road show of Plaintiff's hired-gun experts". Experts must be same specialty and certification. Hence a board certified neurosurgeon must provide the certificate for a board certified neurosurgeon, etc.

4. Venue

The venue for actions against the insurer by the health care provided for failure to settle (bad faith) claims is in the county where the malpractice action was brought.

5. Practice of Medicine

- a. Practice of Medicine is defined to include those experts testifying in Medical Malpractice cases and therefore can be brought before the Board of Physicians for wrong or false testimony in a malpractice action.
- b. Define retired physician who wants to retain license to volunteer care.

6. Number of Jurors

No less than constitutionally protected 6 jurors and chosen alternates shall serve and render a verdict.

7. Benevolent Gestures

All expressions of apology, forgiveness, sympathy, etc. are not admissible in any proceeding.

8. Uncompensated Care

Evidence that a Plaintiff has received uncompensated care may be considered in assessing damages.

9. Collateral Source

All evidence that a Plaintiff has or will receive third-party benefits or has or will receive governmental benefits shall be considered in assessing damages.

10. Good Samaritan – Emergency Room and Volunteer Care

- a. No liability in Federal Emergency Medical Treatment and Active Labor Act (FEMTALA) unless grossly negligent.
- b. Protect patient's right to access to care by allowing retiring volunteer doctors to give their services without liability, unless grossly negligent.

11. Offer of Judgment

Defendant may serve on Plaintiff an offer for judgment no later than 45 days before trial. If rejected by Plaintiff, and verdict comes in below the offer amount, the Plaintiff is liable for all costs incurred by the offering party after the offer is rejected.

12. Damages – Calculation of Lost Wages and Tax Consequences

- a. A verdict for past or future earnings shall include a calculation of what the Plaintiff would have paid in taxes at the time of the verdict.
- b. There shall be an offset for any earnings that could have been deferred or sheltered.

13. Damages – Calculation of Past Medical Expenses

The verdict for past medical expenses shall be the actual medical expenses expended by the Plaintiff to the health care provider(s).

14. Damages – Calculation of Future Medical Expenses

- a. Verdict for future medical expenses is to be based on 140% Medicare rates in effect in locality where care is to be provided, subject to inflation.
- b. Verdict for future medical expenses for a Hospital Facility Services shall be at Health Services Cost Review Commission Rates, subject to inflation.

- c. Verdict for future medical expenses for Nursing Facility Services shall be at Medicare Assistance Program rates established by DHMH, subject to inflation.
- d. Verdict for future medical expenses for which there is no Medicare reimbursement rate, hospital facility rate or statewide average payment shall be based on actual cost, subject to inflation.

15. Damages – Non-Economic

- a. In Medical Malpractice, the cap is \$500,000 for all claims regardless of number of Plaintiffs or beneficiaries, except in Wrongful Death.
- b. In Wrongful Death actions, the cap is 150% of the \$500,000 (\$750,000) for two or more beneficiaries, regardless of the number of causes of actions or the number of beneficiaries who could share in the verdict.
- c. This latter provision will allow large families to receive more than the cap allows but will not allow each to receive the cap amount.
- d. Additionally, by including the concept that “regardless of the number of causes of action” the cap applies, this will eliminate the “double cap” problem of receiving the cap amount for a “survival action” and a “wrongful death” action.
- e. There is no statutory escalator or COLA to increase the amount of the cap.

16. Judgments -- Periodic Payments

- a. Allows awards to be in the form of annuities or other financial instruments that will be paid in periodic installments. However, this will not apply in survival actions or wrongful death actions.
- b. The Plaintiff shall receive all past medical expenses in a lump sum and receive up to \$100,000 of economic damages in a lump sum. The remainder shall be annuitized.

17. Attorney Fees -- Contingency Fees -- Fair Victim Recovery

The victim shall receive 60% of the first \$500,000 of a verdict and 75% of any amount in excess of \$500,000. Costs of litigation are included in this calculation.

18. Attorney Fees -- Fee Splitting

- a. Allows fees to be split only if Plaintiff is advised in writing and agrees.
- b. Allows fees to be split only if the client is informed in writing of the services and the amount of time expended by the splitting attorneys.
- c. Any action that violates this is actionable by the Attorney Grievance Commission.

19. Insurance Rate Stabilization Fund -- "Stop Loss"

- a. We believe that this is a very short-term economic solution to a problem that needs systemic, comprehensive reform. The State should not be in the business of subsidizing private insurers.
- b. We favor elimination of the HMO premium tax credit as the recurring revenue source to fund this short-term "stop loss" program with any excess being used for the Medicaid program. This program must sunset within 3 years. At that time, the entire HMO premium tax credit should be used as a dedicated source for the Medicaid program.

20. Hospital & Patient Safety -- Adverse Event Reporting

- a. Adverse events at a hospital or occurring from a treating physician should be reported to DHMH, Patient Safety Center, the Board of Physicians, and other relevant entities. (Look to NJ Reporting Statute).
- b. Failure to report an adverse event by a health care provider is subject to a fine and discipline.
- c. Use funding recovered from abolition of health claims arbitration to help fund last year's safety initiatives instead of relying on volunteer donations.

21. Board of Physicians -- Evidentiary Standard

Standard should be a preponderance of evidence to show a physician violated the standard of care in a disciplinary proceeding.

22. Insurance Reforms

- a. Create People's Insurance Counsel that would allow Doctor's to intervene and offer evidence at Medical Liability Insurer's rate hearings.
- b. Require jury verdicts to be itemized on information sent to MIA by Insurer, (claim type, severity, amount of non-economic and economic damages including past medical expenses, future wages etc.)
- c. Post Price Comparisons of Malpractice Insurance Premiums on MIA interactive website.
- d. Authorize an Insurer to offer MedGuard policy but to price and sell separately.
- e. Cap commissions on Medical Malpractice Insurance renewals.
- f. Increase Medicaid Reimbursement Rate for E & M (Evaluation and Management) Codes.

23. Life Care Planners -- Licensing

- a. Required Life Care Planners to be licensed in the State with defined qualifications.
- b. Create a "blue ribbon" roster of licensed Life Care Planners to be called by the Court as its expert to establish reasonable parameters of assessing damages.