Rethinking Medical Liability: A Challenge for Defense Lawyers, Trial Lawyers, Medical Providers, and Legislators: An Introduction to the Symposium

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The 2007 University of Memphis Law Review Symposium, *Rethinking Medical Liability: A Challenge for Defense Lawyers, Trial Lawyers, Medical Providers, and Legislators*, was held on February 16, 2007, at the University of Memphis FedEx Institute of Technology in Memphis, Tennessee. It was co-sponsored by the University of Memphis Cecil C. Humphreys School of Law, the University of Memphis Masters of Health Administration Program, and the Memphis Bar Association.

The Symposium brought together a group of thoughtful and accomplished scholars and practitioners to assess the traditional malpractice system and to discuss alternative mechanisms for ensuring patient safety and quality of care. Both the Symposium, and the articles published in this issue of the *University of Memphis Law Review* that stemmed from presentations at that event, make significant contributions to a critical and topical concern for contemporary society.

This Symposium could not have taken place without the contributions of many people. The Law School and I wish to thank the leading scholars and practitioners who participated. We also wish to extend appreciation for the extraordinary efforts of E. Haavi Morreim (the University of Tennessee College of Medicine) and Charles M. Key (The Bogatin Firm, Memphis, Tennessee) for

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their help in both planning and moderating the conference, and for the work of Bryce W. Ashby (Editor-in-Chief) and Laura S. Martin (Symposium Editor) in organizing and executing the conference.

In addition to presentations by authors Peter Jacobson and William Sage represented in this issue of the *University of Memphis Law Review*, the live Symposium event also included a presentation by Alice G. Gosfield (Alice G. Gosfield & Associates, Philadelphia, Pennsylvania) and a panel discussion with William H. Haltom (Thomason, Hendrix, Harvey & Mitchell P.L.L.C., Memphis, Tennessee) and Marty R. Phillips (Rainey, Kizer, Reviere & Bell P.L.C., Jackson, Tennessee).

Alice Gosfield's opening address, *PROMETHEUS Payment: Getting to Better Quality and Outcomes of Care*, provided a succinct history of the development of quality policy, leading up to the now-popular pay for performance (P4P) programs. While Gosfield conceded that some data show P4P payments affect physician behavior, she argued that P4P is not sustainable as a payment reform model.

To get beyond the limitations of P4P, Gosfield and her design team have developed PROMETHEUS: Provider Payment Reform for Outcomes, Margins, Evidence, Transparency, Hassle-reduction, Excellence, Understandability, and Sustainability.[1] Unlike prior forms of payment, PROMETHEUS uses evidence-based clinical practice guidelines to determine the amount of payment. PROMETHEUS thereby ensures that the price for delivering good care is based on a reasonable assessment of the level of resources that are required to deliver that care.

In the closing session, Charles Key moderated a panel session titled *Patients and Providers: Defense Techniques and Alternatives to Litigation.* Experienced medical malpractice defense attorneys William Haltom and Marty Phillips addressed alternatives to litiga-

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1. *See generally* Alice G. Gosfield, *The PROMETHEUS Payment Program: A Legal Blueprint*, *in* HEALTH LAW HANDBOOK (Alice G. Gosfield ed., forthcoming 2007); Alice G. Gosfield, *PROMETHEUS Payment: Better for Patients, Better for Physicians*, J. MED. PRAC. MGMT., Sept.–Oct. 2006, at 100; http://gosfield.com (collecting publications); http//www.prometheuspayment.org (same).

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tion and defense strategies that can be used to help providers avoid litigation, while still compensating injured parties.

While optimistic about ADR, Haltom and Phillips colorfully illustrated some of the practical realities of medical malpractice litigation that may limit some alternatives to litigation. For example, some studies suggest that malpractice litigation can be averted if the health care provider just apologized to the patient or family.[2] But Haltom and Phillips explained that they could not effectively counsel their clients to apologize, because they typically do not either learn of or get involved with a case until after a lawsuit is filed, months after the injury-causing event.

The following articles were submitted by the Symposium participants. The articles are either original essays (Charles Key) or in transcript form (Peter Jacobson, William Sage).

In the first article, *Toward a Safer Health System: Medical Injury Compensation and Medical Quality*, Charles M. Key argues for more effective reporting of medical error. He explains how the current negligence-based legal system discourages such information, thereby inhibiting corrective efforts. State peer review privilege statutes and the federal Patient Safety and Quality Improvement Act of 2005 have been only modestly successful in encouraging error reporting. Key criticizes these efforts as too limited.

Key argues that we must move beyond efforts aimed merely at imposing limitations on the scope of civil discovery. Specifically, drawing on the positive experience of the Virginia Birth Injury Fund and the Florida Neurological Injury Compensation Association, Key argues that we must switch from a fault-based to a non-fault-based compensation system. Such a system, argues Key, not only would reduce errors but also would improve efficiency and access to compensation.

2. *See generally* Pam Baggett, *I'm Sorry: Apologizing for a Mistake Might Prevent a Lawsuit*, TEX. MED., Jan. 2005, at 56; Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 463 (2003); Charles Vincent et al., *Why Do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action*, 343 LANCET 1609, 1612 (1994) (reporting that thirty-seven percent of civil medical malpractice claimants would not have filed suit if the physician had offered an apology).

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Addressing a different issue in *Mutual Distrust: Mediating the Conflict Between Law and Medicine*, Peter D. Jacobson vividly illustrates the depth of animosity between the medical and legal professions. But his primary thesis is more positive and optimistic. Jacobson identifies a set of core values shared by the two professions and argues that while these shared values cannot wholly eliminate long-standing rivalry and resentment, they can serve as a basis for collaboration. Constructively, Jacobson not only charts some routes by which the professions' shared values can help transform the nature of their relationship but also offers some concrete examples of national and local collaborative efforts.

Finally, William M. Sage advocates that the path to improving the quality of and access to care is through testing comprehensive malpractice reforms. Malpractice crises may end but improvement should not. In *Why Are Malpractice Reform Demonstrations So/At All Controversial?*, Sage reviews recently proposed and implemented state, federal, and private projects for removing medical injuries from conventional tort litigation, and placing them instead into a compensation system that is more closely connected to patient care and clinical quality assurance. In particular, Sage emphasizes the desirability of conducting demonstration projects within the Medicare program, given both its central role in setting standards for the health care system and its experience in sponsoring demonstrations of health policy innovations.

Americans are engaged in an earnest and profound debate about how to improve and rethink medical liability and improve the quality of medical care. The Symposium presentations and the resulting articles in this issue not only advance the ongoing debate but also offer a number of fresh ideas on the subject.

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