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# Memorandum

Date: January 6, 2010

To: Malpractice Study Task Force Members

From: Abbie French

Subject: Review of the Malpractice Study

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This memorandum provides a quick review of several areas within the Malpractice Study that may be helpful to the task force during our January 13, 2010 meeting. Full documents, from the Malpractice Study, have been provided to you.

AB 2342 (Nakanishi; Chap. 276, Stats. of 2006) added Business and Professions Code section 2023, requiring the Medical Board of California (Board) to study the issue of providing medical malpractice insurance for physicians and surgeons who provide voluntary unpaid services. The study was to include, but not be limited to, the cost and process of administering such a program, options for providing medical malpractice insurance and how the coverage could be funded.

## **The Current Physician Volunteer Environment in California:**

The number of uninsured and underinsured Californians continues to grow. In 2001, the number of uninsured was estimated to be 6.3 million; this increased to 6.6 million by 2003. In 2007, approximately 7.6 million Californians relied on a "safety net" of community health centers, public hospitals and clinics for regular care.

Across all disciplines, California does not have a high percentage of individuals who volunteer their time. According to the website, [www.volunteeringinamerica.gov](http://www.volunteeringinamerica.gov), California has 6.7 million volunteers, who provided 896.4 million hours of service per year between the years 2005 and 2007. Even though this sounds like a great amount of hours and money, California's volunteer rate ranks 42nd among the 50 states and Washington, D.C.

The Medical Board of California reports there are 125,014 licensed physicians in California. Despite this number, there is an inadequate supply of physicians to care for the ever-increasing California population, especially those patients that have no insurance.

### Implementation Models; Other States' Programs:

According to the malpractice insurance study, one of the below liability protection models would work best for the state of California:

- **Statutory Immunity: Change in the Standard of Care.** In this model the provider is not liable for common negligence, but only for gross negligence or willful misconduct. For an example of this model, refer to the state of Arizona handout (Arizona has approximately 20,300 licensed physicians).

Negligence: Generally, negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. (Rest.2d, Torts, § 282.)

Gross Negligence: The want of even scant care or an extreme departure from the ordinary standard of conduct. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 941, [citation], quoting from *Van Meter v. Bent Cons. Co.* (1956) 46 Cal.2d 588, 594.)

- **Sovereign Immunity: Physicians are considered "State Actors"**. Under circumstances prescribed by the state, a physician volunteer would be considered a state employee when providing uncompensated care. For an example of this model, refer to the state of Florida handout (Florida has approximately 56,177 licensed physicians).
- **State-Run Liability Coverage Program or State-Purchased Insurance.** In this case, the state either purchases insurance for physician volunteers or establishes a self-insured pool. For an example of this model, refer to the state of Washington (Washington has approximately 19,000 licensed physicians).

### Program Costs, Policy Concerns and Potential Funding Sources:

In the Arizona model, a physician would only be liable if he/she committed gross negligence. The cost of insuring the volunteer is substantially less than if the volunteer would be liable for common negligence. The Mutual Insurance Company of Arizona (MICA) offers volunteer insurance coverage to retired physicians who wish to continue providing medical care. The policy only provides coverage to the physician when he/she provides care on a voluntary basis with or without direct remuneration. Guidelines have been established to limit the scope of practice and liability exposure (see page 29 of the study for more information).

If California considered a model like Florida, the "State Actor" model, then the report suggests there would be no cost to the state, but the professional liability risk exposure would increase. Since California currently does not purchase medical malpractice insurance for its physician employees, nor does it maintain a risk pool for professional liability claims, it would be difficult to assess a cost of liability for the "state actor" model. The state of Florida does maintain good data about its claims



history. Florida reports that the Program's total patient visits for fiscal year 2006-07 was 290,026. In 2006-07, Florida reports nine claims were filed against the Volunteer Health Care Provider Program. Defense costs were just over \$550,000. Settlement costs were \$293,000 (see page 30 of the study for more information).

If California adopted legislation that would enable the state to purchase (or reimburse providers for) professional liability insurance premiums, similar to the state of Washington model, then there would be additional cost to the state. The state of Washington has an immunity statute. The cost for providing insurance to providers who rendered more than \$50,000 encounters was approximately \$145,000 for 2008.

A policy concern to take into consideration would be if a volunteer physician insurance program was developed in the state of California, who would it be administered by? If it were administered by the Board there may be a perceived conflict of interest if the Board must determine whether to take disciplinary action against a licensee to whom it has provided medical malpractice insurance

In conclusion, please take a look at the entire report for additional details on the above topics. This memorandum provides a brief summary of some of the documents that were passed out today in hopes to stir up some discussion on this important topic.