

## Patients can sue for negligent credentialing decisions

**H**ospitals may end up having to defend their decision to credential a physician because of a recent Minnesota Supreme Court ruling that allows patients to sue hospitals for credentialing physicians with less than perfect professional or personal records.

The ruling sets a new precedent in Minnesota and means that for the first time, a physician's previous malpractice history, or arguably even his or her character, can become a focus of this type of court case.

Because of the importance of the case, the MMA, the American Medical Association (AMA), and the Minnesota Hospital Association (MHA), filed an amicus brief with the Minnesota Supreme Court. The Minnesota Court of Appeals agreed with

the MMA, MHA and AMA that Minnesota law does not allow a patient to sue based on negligent credentialing decisions, but the Supreme Court reversed that decision on August 16.

The court considered the malpractice case, *Larson versus Wasemiller*,

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*Attorney Mark Whitmore*

in which a patient sued two surgeons and the hospital due to alleged complications that occurred after her gastric bypass surgery. The patient later claimed the hospital was negligent when it granted one of the surgeons operating privileges.

“Until the decision came down in August, the Minnesota courts had never recognized negligent credentialing as a type of lawsuit that can occur against hospitals,” said attorney Mark Whitmore, the MMA's outside counsel and attorney for the case who filed amicus briefs on behalf of the MMA, AMA, and MHA. “But now, it has said patients can sue a hospital because it let a licensed physician practice there.” At least 27 other states also allow credentialing suits.

### Door to the past

One of the ruling's most significant ramifications for doctors is that it opens the door to their past medical performance and arguably their moral character to be considered in negligent credentialing cases.

Malpractice cases focus on whether a physician followed standards of care during a particular treatment episode; therefore, previous performance isn't relevant, Whitmore said.

But in negligent credentialing cases, past experience is fair game, since the question is whether a hospital should have credentialed a particular physician based on public records that the hospital did or should have known about. “With credentialing being the issue, these prior cases and otherwise irrelevant infor-

### Child abuse ruling

The MMA's arguments prevailed in another case. The Minnesota Supreme Court ruled that physicians and hospitals cannot be sued in civil court for failing to report suspected child abuse. The court found that a hospital had no duty to protect children from their parents, over whom the hospital has no control, after the children leave the hospital. However, the Child Abuse Reporting Act does carry criminal liabilities for physicians who fail to report suspected child abuse.

mation become front and center to the jury,” Whitmore said.

The court even seemed to suggest a physician's personal life might be relevant. For instance, in *Larson versus Wasemiller*, the plaintiff claimed the hospital shouldn't have credentialed the surgeon not only because of his previous malpractice cases but also because he had failed to pay some of his taxes.

One thing that is unclear is whether negligent credentialing and malpractice cases may be considered during the same trial, which Whitmore fears would prejudice a jury. If such trials are combined, it could hurt a physician during his or her malpractice case, “because now all of his or her background that has nothing to do with the actual procedure may become admissible evidence as part of the negligent credentialing case and that could prejudice the physician's ability to defend the medical care that is actually at issue in the malpractice case,” Whitmore said.

The ruling could also weaken the current peer review process hospitals use to vet doctors. Under Minnesota statutory law, the current process is completely confidential, so committee members can speak frankly about colleagues.

The Supreme Court affirmed that the proceedings of peer review committees are confidential. But Whitmore fears the ruling may still discourage doctors from serving on peer review committees, when they learn they can be dragged into court and asked to testify about a colleague's fitness to practice, based not on what happened during the peer review process, but based on other documents or information.

### What comes next

Hospitals could respond to the ruling by trying to limit their liability by denying privileges to doctors previously sued for malpractice.

However, Whitmore doesn't expect a lot of doctors will lose privileges, since he believes hospitals already do a good job of policing and weeding out unfit doctors.

Instead, one result could be that hospitals—to limit their financial exposure—may start asking certain doctors to increase their malpractice coverage. In the end, Whitmore said the court made an unfortunate decision that will result in more wasteful litigation without ultimately making patients safer from medical errors.

In light of the ruling, the MMA is in the process of considering what next steps to take. ■

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The MMA is committed to providing members with timely health care news online. Visit [www.MMAonline.net](http://www.MMAonline.net) to read the latest news and member benefits.

Learn the latest news from the MMA's Annual Meeting in Mankato September 19-21.

The October 1 smoking ban is an opportunity to help patients quit. Check featured links on the home page for resources.

Get the word out about your practice by including your clinic's web address on the MMA's Physician Finder. Email a link to Charlene Williams at [cwilliams@mnmed.org](mailto:cwilliams@mnmed.org).

# Global warming, health reform, and more at this year's Annual Meeting September 19-21



Minnesota physicians have put forward more than 50 resolutions for consideration by the 2007 MMA House of Delegates, which will convene in Mankato. Here's a look at some of the actions that physicians want the MMA to take.

## Societal issues

Physicians are interested in tackling a host of big, societal issues this year. For instance, physicians want the MMA to encourage the use and development of public transportation (R102), to support efforts to reduce greenhouse gases (303),

and to support same-sex marriage to reduce health disparities that may arise because such partners cannot marry in Minnesota (R314). Resolutions, 401, 403, and 409, deal with the topic of torture and urge the MMA to define and condemn torture and to work toward creating a mechanism for investigating the involvement of military medical personnel in torture.

## Health care reform

R305 calls for the MMA to continue to support universal access to care, clinic-based chronic disease management, and the medical home concept, while championing adequate commercial level reimbursement for health care professionals. R308 says that if the MMA's current reform plan, "Physicians' Plan for a Health Minnesota," fails, then the MMA should support a single-payer universal health care plan. R310 calls for the MMA to create a task force that would establish a physician-defined benefit set. R316 calls for the MMA to develop a work group that will define accessible, affordable, financially viable health care, and oppose efforts to pass a constitutional amendment making health care a right until the work group makes its recommendation. R404 calls on the MMA to support legislative action to regulate the profits of the health insurance industry.

## Pay for performance

R201 calls for all clinics and provider organizations to disclose their pay-for-performance requirements to patients. R210 calls

for the MMA to create a committee that would track and rate pay-for-performance programs.

## Preventive medicine

R211 calls for the MMA to encourage all physicians to provide tobacco cessation interventions. R309 calls for the MMA to urge the use of tactics for preventing sexually transmitted diseases and unwanted pregnancies that are based on scientific evidence rather than religious or moral ideology. R300, R312, and R315 ask the MMA to support fair payment for purchasing and administering the adult varicella zoster vaccine by the state of Minnesota and Medicare.

## Obesity

R301 calls for a law making it mandatory for all health care facilities to remove trans fatty acids from foods served on their premises. R317 urges the MMA to support and endorse the St. Cloud area project Better Living: Exercise and Nutrition, known as BLEND, a collaborative approach to fighting childhood obesity.

## Mental health

R405 urges the MMA to advocate and support the field of psychiatry through a variety of measures.

## Care for the homebound

R408 calls for the MMA to support adequate access to health care for the homebound.

## Name changes

Both the Hennepin and Ramsey medical societies want to change their names to better indicate their regional reach. Hennepin Medical Society would change to West Metro Medical Society and Ramsey would change to East Metro Medical Society.

## Military families

Two resolutions (R100 and R106) would help meet the health care needs of military families. R100 asks the MMA to study the unique needs of military families and recommend ways the MMA can help meet those needs. R106 calls for the MMA to encourage members to accept TRICARE insurance coverage for members of the military and to work with the AMA to try to improve the insurance so it has less red tape and better reimbursement rates.

## Nonprofit reform

R200 calls for the MMA to introduce legislation requiring non-profit health care providers to show that they provide at least triple the tax benefit of their non-profit status in patient assistance programs. If they don't, they would donate the balance to the State of Minnesota, which would use the dollars to expand health insurance coverage in Minnesota.

## Streamlined administration

R202 calls on the MMA to urge insurance companies to put all of their members' health and pharmaceutical coverage details online. R205 calls on the MMA to urge insurance companies to reimburse physicians for the time needed to meet their prior authorization requirements. R209 calls on the MMA to urge insurers to cover the cost of medications for a defined period of time until a prior authorization decision is made.

## End of life

R407 calls for the creation of a statewide advanced directive repository and electronic database.

## Radiation therapy facilities

R203 calls on the MMA to oppose restrictions on the construction of new radiation therapy facilities in Minnesota by providers.

## Insurance transparency

R207 calls for an MMA resolution asking for the AMA to develop a tiering system that ranks payers based on their value and performance. R212 also calls for the MMA to lobby for a law that would require insurers to make their methods for placing providers in cost or quality tiers available to the public.

## Pesticides

R302 calls on the MMA to urge the state government to promulgate policies that would provide physicians and other providers with easy access to information about the use of pesticides in various parts of the state.

## Emergency response

R401 calls for the MMA to establish a task force to improve partnerships between physicians and state and federal agencies that respond to disasters. ■

## ■ BE HEARD

# House, Senate consider Medicare payment fix

Before leaving Washington, D.C., at the start of August, the House of Representatives passed a measure that would prevent Medicare physician pay cuts over the next two years. Senators left town without addressing the issue.

The House's proposed pay increase, 0.5 percent a year for two years, was part of its legislation to reauthorize and expand the State Children's Health Insurance Program (SCHIP). The House bill, which passed August 1, would fund the pay increase in part by reducing the subsidies that health plans receive for offering Medicare Advantage plans.

The next day, the Senate passed the Children's Health Insurance Program Reauthorization Act of 2007, which would renew and boost SCHIP funding but would not stop the 10 percent cut in physician pay rates scheduled for 2008. Both bills would fund an expanded SCHIP program

by increasing the federal cigarette tax.

President Bush has threatened to veto both the Senate and the House plans to expand SCHIP. When Congress reconvenes in September, a conference committee will try to craft a compromise between the two bills. Funding for SCHIP expires September 30. "We would hope that the House version would prevail, but with President Bush opposing a SCHIP expansion and the Senate trying to pass a SCHIP-only measure, the physician pay piece could get lost," said Dave Renner, the MMA's director of federal and state legislation. If that happens, Congress will likely decide the issue during Medicare budget negotiations that usually drag on into December, Renner said. "If that happens, we'll need members to keep the pressure on our delegation to fix the payment problem before they adjourn for the year." ■

### State Children's Health Insurance Program Expansion Proposals

|  | House                  | Senate               |
|--|------------------------|----------------------|
| <b>Program expansion</b>                           | \$50 billion/5 years   | \$30 billion/5 years |
| <b>Medicare physician pay increase</b>             | \$56 billion/10 years  | No provision         |
| <b>Elimination of Medicare health plan subsidy</b> | \$165 billion/10 years | No provision         |

Source: "Fate of Medicare pay raise hinges on contentious SCHIP negotiations," American Medical News, August 20, 2007.

# Rules cap SCHIP below MN level

The Bush administration has adopted new standards that would make it much more difficult for states such as Minnesota to extend health coverage to children in middle-income families.

The new standards—expected to affect about 18 states—for the Children's Health Insurance Program (SCHIP) were outlined in a letter from Dennis Smith, a CMS official, on August 17.

The Centers for Medicare and Medicaid notified state officials that before they can enroll children from families earning more than 250 percent of the poverty level (about \$51,625 for a family of four) they must meet the following requirements:

- They must enroll at least 95 percent of children in the state below 200 percent of the federal poverty level who are eligible for either Medicaid or the child health program. No states currently meet this requirement, according to news reports.
- They must show that providing coverage above the 250 percent level hasn't eroded the private market for children by more than 2 percent during five years.
- Relatively higher income enrollees have to pay premiums and copayments on par with those in the private sector.
- Children in families above 250 percent have to be uninsured for a full year before they can be enrolled in SCHIP. Minnesota currently has a four-month waiting period.

The rules took effect immediately, but states like Minnesota have one year to comply. The letter from Smith indicates the requirements affect children applying for the program rather than those already using it

SCHIP is a federal-state matching program designed to provide coverage to children in families earning too much for Medicaid but too little to afford private insurance.

## Minnesota impact

It's unclear how the rule will affect Minnesota. Minnesota received an SCHIP waiver in 2001 that has resulted in the state using SCHIP funds to provide coverage to about 40,000 Minnesotans. The waiver allowed Minnesota to use its SCHIP funds to cover adults, since it covered children through existing programs.

Minnesota's safety net programs, such as MinnesotaCare and Medical Assistance, currently provides access to coverage to children in families earning up to 275 percent of the poverty level. In addition, it uses SCHIP funds to insure children under two years of age in families earning between 275 percent to 280 percent of the federal poverty level.

During the 2007 legislative session, Gov. Tim Pawlenty's proposal to provide access to coverage for all children in families with incomes up to 300 percent of the poverty level failed to pass. ■

# Claim your settlement dollars

The MMA is asking physicians to consider donating settlement dollars from a class action lawsuit to the MMA Foundation, the charitable arm of the MMA, formerly known as the Minnesota Physicians Foundation. The MMA Foundation funds medical school scholarships and supports efforts to advise physicians about quality care and strengthen rural medicine.

The class action—Love et al. versus Blue Cross Blue Shield Association et al.—was filed in 2003 in U.S. District Court in Miami. In April 2007, Blue Cross resolved the suit for approximately \$130 million, \$6 million in Minnesota. The settlement resolved disagreements with physicians regarding claims payment and other business practices. Physicians who

billed Blue Cross between 1997 and 2006 can take a pay-out personally or donate it.

To donate your portion of the settlement, complete a short claim form from Blue Cross and Blue Shield of Minnesota that can be downloaded from the MMA website at [www.mma-online.net/PDFs/BCBS-Claim-Form.pdf](http://www.mma-online.net/PDFs/BCBS-Claim-Form.pdf). Go to Section D on the form and check the box to donate your share to an eligible organization. Indicate #19 as the charitable organization. Forms must be postmarked by October 19, 2007.

If you have questions, contact the foundation's director of development, Dennis Kelly, at 612/362-3767 or [dkelley@mnmed.org](mailto:dkelley@mnmed.org). ■

# The MMA responds to the I-35W bridge disaster

Representing the Minnesota Medical Association, MMA CEO Robert K. Meiches, M.D., made this statement about physicians and other providers who have responded to the bridge collapse on I-35W in Minneapolis:

The Minnesota Medical Association commends the physicians, nurses and all other members of the health care, rescue and community support teams who worked tirelessly to care for the individuals injured and otherwise affected by the collapse of the I-35W bridge. We are greatly saddened by the loss of life that occurred as a result of this catastrophe.

Physicians and other health care providers at Hennepin County Medical Center, the University of Minnesota, North Memorial Medical Center, and other hospitals worked throughout the night treating victims of the disaster.

Joseph Clinton, M.D., chief of emergency medicine at HCMC and a member of the MMA, has noted that HCMC's extensive disaster preparedness training enabled the facility to respond effectively as ambulance after ambulance carrying the injured arrived at the emergency room following the catastrophic event.

All members of the MMA Committee on Minority Affairs, who met at the MMA office, arrived safely. All MMA staff and their families are safe.

Many, like the American Medical Association (AMA), have called to offer their support to our community.

We hope all MMA members and their families are safe and offer our heartfelt sympathy to the victims and families affected by this enormous tragedy.

**Robert K. Meiches, M.D.**

Chief Executive Officer  
Minnesota Medical Association

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■ STAY INFORMED

## New resource: My Health Minnesota—Go Local

A new website offers connections for Minnesotans to all kinds of health care providers and services within their communities—physicians, hospitals, nursing homes, support groups, and more.

My Health Minnesota—Go Local is the name of the website. Just Google “my health Minnesota”. It is a service of the University of Minnesota Health Science Libraries, Mayo Clinic Libraries, and MINITEX Library Information Network, in cooperation with the National Library of Medicine and the National Institutes of Health. ■




# Don't be a lost doctor!

List your clinic or practice on MMA's online Find a Physician!

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Send your clinic's website link to [cwilliams@mnmed.org](mailto:cwilliams@mnmed.org).

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## PHYSICIAN ADVOCATE

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A Minnesota Supreme Court ruling, which the MMA fought against, now allows patients to sue hospitals based on the physicians they credential. The change is expected to result in physician's past histories being allowed in court. Page 1.

#### Congress debates Medicare payment fix

Congress faces a September 30 deadline to fund the SCHIP program. A potential Medicare physicians reimbursement fix was part of ongoing negotiations. Page 2.

#### The MMA's Annual Meeting arrives

Physicians will consider more than 50 resolutions at the MMA's 2007 Annual Meeting to be held in Mankato September 19-21. Page 2.



## Annual Meeting 2007

September 19-21, 2007  
Midwest Wireless Civic Center  
One Civic Center Plaza  
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