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**TO:** Temporary Co-Chairpersons Representative Kraig Paulsen, Senator Bob Brunkhorst, and Senator Keith Kreiman and Members of the Medical Malpractice Interim Study Committee

**FROM:** Rachele Hjelmaas, Legal Counsel

**RE:** Background Information

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**I. Introduction.**

The purpose of this memorandum is to provide background information to the members of the Medical Malpractice Interim Study Committee. The memorandum and its attachments include the charge of the Committee, the tentative meeting agenda, proposed rules, an overview of medical malpractice law generally and in Iowa, the most recent Iowa and federal medical malpractice legislative proposals, and additional documents that provide comparative information on how other states have responded to the medical malpractice insurance issue. References to the Code are to the 2005 Iowa Code.

**II. Committee Charge.**

The Medical Malpractice Interim Study Committee was established with pursuant to a request contained in House Resolution 50. This resolution requested the Legislative Council to establish this Committee to provide regulatory agencies and the General Assembly with possible solutions to alleviate problems regarding the availability and affordability of medical liability insurance in Iowa and to submit a report to the General Assembly regarding the committee's findings and recommended solutions, including proposed legislation, to make medical liability insurance more available and more affordable in Iowa.

**III. Attachments.**

The following documents are attached to this background statement:

Attachment A Tentative Agenda for October 5, 2005 meeting

Attachment B Proposed Committee Rules

Attachment C Legislation Requesting the Committee--HR 50

Attachment D Proposed Legislation on Noneconomic Caps in Medical Malpractice Cases--HF 704

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Attachment E Proposed Legislation-Patient Compensation Fund- HF 598

Attachment F Council of State Governments (CSG): Evaluating State Approaches to the Medical Malpractice Crisis

Attachment G CSG Transcript from April 2004 Council of State Governments Teleconference (Evaluating State Approaches to the Medical Malpractice Crisis)

Attachment H National Conference of State Legislatures (NCSL) Medical Malpractice Tort Reform--Background

Attachment I NCSL State Medical Malpractice Tort Laws

Attachment J NCSL 2005 Enacted Medical Liability Legislation-States

Attachment K NCSL State Medical Malpractice Reform Action 2005

#### IV. The Medical Malpractice Insurance Concern.

According to the Congressional Budget Office, medical malpractice insurance premiums for all physicians nationwide increased an average of 15 percent between 2000 and 2002, with some specialties increasing as high as 33 percent.<sup>1</sup> Many reasons have been cited for the increase in premiums including the withdrawal of medical malpractice insurers from the market, the cyclic nature of the insurance industry, the economy, and the frequency and severity of medical malpractice claims.<sup>2</sup> The concern that physicians will no longer be able to afford malpractice insurance and will be forced to streamline or discontinue certain services is coupled with the concern that a fair and equitable system be in place for justly compensating persons who have been injured as a result of medical malpractice.

#### V. Medical Malpractice Law Generally and in Iowa.

Medical malpractice, also known as medical negligence, is derived from a more general body of law known as tort law. A tort is a civil wrong in which one party (the plaintiff) is injured by an intentional or negligent act or acts of another person (the defendant). Tort law is a combination of both common (judicially created) and statutory (legislated) law, and is and has been primarily a product of state law, although Congress has been working in recent years to establish uniform standards in this area (see below). In a medical malpractice lawsuit, an injured person must prove that they received substandard care from a health care provider that caused their injury in order to receive monetary compensation, or damages, for their injury.

States vary in their enactment of different types of medical liability laws with some states regulating access to courts, other measures emphasizing procedural and evidentiary reform once a lawsuit has been filed, and other measures emphasizing reform aimed at the transaction costs of pursuing a claim such as limits on attorney fees and damage awards.<sup>3</sup> Iowa medical malpractice law has focused on comparative fault principles and other substantive and procedural reform. The following list provides an overview of tort laws applicable to medical malpractice cases in Iowa:

- Iowa Code section 147.135- Nonliability of a person who serves on a peer review committee; privileged and confidential nature of peer review records and reports.

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<sup>1</sup> Congressional Budget Office, "Limiting Tort Liability for Medical Malpractice," January 8, 2004.

<sup>2</sup> Council of State Governments, "Medical malpractice Crisis Trends Alert," p .4, May 2003.

<sup>3</sup> Congressional Budget Office, "The Effects of Tort Reform: Evidence from the States," pp. 3-16, June 2004.

- Iowa Code section 147.136- Scope of recovery in a medical malpractice action; excludes actual economic damages incurred or to be incurred by the claimant in the future or that have been or will be replaced or indemnified by insurance.
- Iowa Code section 147.138- Contingent fee of attorney in a medical malpractice case reviewed by the court.
- Iowa Code section 147.139- Qualification of expert witness in a medical malpractice action where standard of care in issue.
- Iowa Code section 614.1- Two-year statute of limitations for filing medical malpractice actions based upon date upon which claimant knew or reasonably should have known of injury.
- Iowa Code section 614.8- Statute of limitations period in a medical malpractice case extended to one year from date disability removed (minors and persons with mental illness).
- Iowa Code section 668.3- Modified comparative negligence where claimant's action barred if claimant's negligence exceeds combined negligence of all parties, otherwise claimant's recovery diminished in proportion to attributed negligence. Payment method of judgment or award may be structured, periodic, or other nonlump sum amount
- Iowa Code section 668.4- Joint and several liability; multiple defendants proportionately liable according to percentage of fault (less than 50 percent at fault, no joint and several liability, 50 percent or more at fault, jointly and severally liable for economic damages)
- Iowa Code section 668.5 and 668.6- Right of contribution among two or more persons liable on the same claim for same injury.
- Iowa Code section 668.11-Disclosure and certification of expert witness.
- Iowa Code section 668.13-Prejudgment interest from date action commenced allowed to successful claimant.

## VI. Federal Medical Malpractice Law.

Attempts by Congress to implement federal medical malpractice legal reform in recent years have been somewhat controversial. Proponents of such reform measures argue for the need for uniform laws to reduce costs, limit venue shopping, and address specialized litigation areas. Opponents of such legislation cite the concern about the need for states to self-regulate in this area taking into account factors that may be unique to a particular state, as well as concerns about state autonomy and preemption issues.

H.R. 5, the Help Efficient, Accessible, Low-Cost, Timely Healthcare Act (HEALTH) of 2003, which passed the United States House of Representatives on July 28, 2005, and is due for consideration again this fall, contains the following federal legislative proposals:

- Caps on noneconomic (pain and suffering) damages at \$250,000.
- A 3-year statute of limitations to initiate lawsuits, or one year from discovery; statute of limitations for children until age 8.
- Limits on attorneys fees whether in settlement or judgment.
- Collateral source benefits allowed to be introduced into evidence in court.
- Periodic payments ordered for future damages exceeding \$50,000.
- Standard guidelines for awarding punitive damages (clear and convincing evidence) and limitations on the amount awarded.
- Prohibitions on instructing a jury about any limitations to damage awards.

- Punitive damages may not be awarded against the manufacturer or distributor of a medical product approved by the Food and Drug Administration.
- A specific statement that the provisions would preempt all state laws not in conformance with the standards presented.<sup>4</sup>

#### VII. 2005 Iowa Legislative Proposals.

In addition to the legislation requesting this study committee, the 2005 Iowa General Assembly proposed two pieces of legislation dealing with the issue of medical malpractice. House File 704 by Committee on Commerce, Regulation and Labor, proposed a limit on the award of noneconomic damages (pain & suffering costs) against health care providers. The bill provides that in any action for noneconomic damages for injury or death against any health care provider arising out of an act or omission in connection with the provision of health care services an injured plaintiff shall be entitled to recover noneconomic damages not to exceed \$250,000 except in cases of actual malice on the part of the defendant. This bill was introduced on March 11, 2005, and was referred to the House Judiciary Committee on March 16, 2005. Proponents of "caps" on the award of noneconomic damages argue that caps would lower malpractice premiums, reduce overall health care costs, deter certain defensive medicine practices by physicians, and reduce frivolous lawsuits, while opponents of such legislation argue that such caps do not substantially lower health care premiums and would be an ineffective means of compensating injured persons.<sup>5</sup>

The General Assembly also proposed House File 598 by Petersen, et al., relating to the creation of a patient compensation fund for the payment of certain medical malpractice claims. Patient compensation funds, also known as excess coverage or excess liability funds, are state-run funds that pay for medical malpractice judgments or settlements that exceed a statutorily established amount. The bill allows certain health care providers to purchase from the fund created in the bill an excess amount of medical malpractice coverage beyond what is required by statute or the maximum liability limit for which the health care provider is insured through either an insurer authorized to do business in the state or through self-insurance. The legislation further provides that participation by a health care provider defined in the bill is voluntary. Other features of the legislation include the establishment of a patient compensation board, provisions relating to fees and fee accounting, claim procedures, proof of financial responsibility, and reports on claims paid. This bill was introduced on March 4, 2005, and referred to the House Judiciary Committee on March 8, 2005.

#### VIII. Additional Information.

Included with this memorandum are additional sources on how other states have responded to the medical malpractice issue. This material includes information relating not only to legal reform initiatives, but initiatives proposed by the medical community and insurance industry as well.

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<sup>4</sup> National Conference of State Legislatures, "Medical Malpractice Tort Reform," Updated July 25, 2005.

<sup>5</sup> KaiserEdu.org, Background Brief, Medical Malpractice Policy.