Wisconsin Medical Society

Your Doctor. Your Health.

TO: Members, Wisconsin State Senate

FROM: Mark Grapentine, JD – Senior Vice President, Government Relations

DATE: October 23, 2009

RE: Opposition to Senate Bill 203

On behalf of nearly 12,500 members statewide, the Wisconsin Medical Society requests you vote "no" when Senate Bill 203 comes before you for a floor vote next Tuesday, October 27. The bill would wantonly overturn two Wisconsin Supreme Court cases while increasing all physicians' potential medical liability exposure. As the nation debates health care reform and how to control costs, SB 203 would move Wisconsin in exactly the opposite direction. While acknowledging that the sorrow expressed by individual cases are heart-wrenching, maintaining Wisconsin's relatively stable medical liability climate leads to but one conclusion: the bill deserves to be defeated.

SB 203 Would Overturn Two Wisconsin Supreme Court Decisions

Those who profit from the medical lawsuit industry often attempt to portray SB 203 as "closing a loophole" in current state law. In reality, the bill would cast aside decades of precedent as passed by the Wisconsin Supreme Court: Estate of Wells v. Mt. Sinai Med. Ctr., 183 Wis. 2d 667, 515 N.W.2d 705 (1994), decided by a 6-1 majority, and Czapinski v. St. Francis Hospital, Inc., 236 Wis. 2d 316, 613 N.W.2d 120 (2000), decided by a unanimous court. Reading those cases shows that far from being a "loophole," current precedent is a result of the court's reasoned examination of Wisconsin's medical liability system and the need for overall system stability.

Attached to this memo are excerpts from those Supreme Court cases. The Society urges all Senators and staff to read the cases – it shows how the Court went through the always-difficult task of weighing overall stability against individual cases. As Justice Wilcox wrote in the 1994 decision:

> Limiting recovery for reasons of public policy always runs the risk of working harsh results in individual cases. For instance, people may question the logic which denies recovery to the parent of an 18 year old, but allows recovery for the parent of a 17 year old. . . . [Is] such line-drawing an indication by the legislature or this court that the parental relationships in the first instances are less significant than in the second? Of course not. But given the compelling public policy concerns in this area, a line at which liability ends must be drawn. We believe that the age of majority represents a rational place to draw that line. (Wells at 680-81)

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As the Nation Acknowledges "Defensive Medicine" Costs, SB 203 Adds to Those Costs
In his September 9, 2009 address to a joint session of Congress regarding health care reform, President Barack Obama stated that "I've talked to enough doctors to know that defensive medicine may be contributing to unnecessary costs." While quantifying defensive medicine is difficult, various studies over the last several years have attempted to put a figure to the problem caused by this country's overactive medical liability system – and the overall bill runs in the billions of dollars.

Most recently, the nonpartisan Congressional Budget Office issued an opinion on savings that could be realized if the nation's health care lawsuit environment enjoyed modest tort reforms. According to the October 9, 2009 study, the federal budget deficit could be reduced by $54 billion over the next 10 years if a small basket of reforms was passed. That CBO study is attached for your review.

While the national debate moves in the direction of trying to prevent defensive medicine costs, SB 203 takes Wisconsin in a wholly different and troubling direction by *increasing* potential defensive medicine costs.

A Better Approach: Bipartisan Reforms to Improve the Health Care System
Rather than engage in tiresome "docs vs. lawyers" fights that are seemingly ever-present (the intense fight over potential changes to the state's joint and several liability laws are still fresh in many minds), legislators could instead join together to help improve Wisconsin's already remarkable achievements in proving the nation's best health care quality (as the federal Agency for Healthcare Research and Quality recently graded Wisconsin).

- Alternative: Better Physician-Patient/Family Communication

  Instead of increasing potential liabilities, physicians wish to enact laws that will foster better communication between a physician and a patient's family when a negative outcome occurs. Physicians understand that sometimes family members feel driven to file a lawsuit when they feel that answers about "what happened" are not provided to their satisfaction. This is an unfortunate consequence of the litigation environment – oftentimes, physicians are advised by their legal counsel not to communicate with patients or their families following a negative outcome due to the fear those conversations could become evidence in a future lawsuit. To remedy this problem, physicians supported "I'm Sorry" legislation (2005 Assembly Bill 1021) to allow physicians to express sentiment of apology or condolence without fear of increasing liability exposure. Unfortunately, this bill was vetoed.

- Alternative: "Peer Review"

  Physicians also support stronger "peer review" laws, which would foster frank internal discussions at a hospital or clinic following a negative event and allow facilities to implement quality improvement activities that would be confidential and privileged. Peer review can prevent negative outcomes before they happen by identifying and improving individual or system procedures. Physicians supported a bill two sessions ago (2005 Senate Bill 578) that accomplished these goals, and the Legislature passed the bill by voice vote in the Assembly and a 29-3 Senate vote. Unfortunately, Governor Doyle vetoed the bill.

Good social policy is often difficult. Over time, the state's courts and legislature have found a balance between the interests of those who are injured by medical negligence and the many needing affordable health care. Health care resources in our country and in Wisconsin are all too limited. The State Legislature and our courts have recognized the necessity of reasonable limits for non-economic damage recovery in medical liability actions. In Wisconsin, we have done this in a bipartisan fashion and the result is current law. We urge you to continue to appropriately maintain this balance and oppose Senate Bill 203.

Senate Bill 203 – Relevant Cases

Estate of Wells v. Mt. Sinai Med. Ctr., 183 Wis. 2d 667, 515 N.W.2d 705 (1994)

Justice Jon Wilcox writing for a 6-1 majority, after citing a long line of case law where the courts have ruled that drawing a clear line regarding liability exposure is necessary:

> Of these public policy considerations, those concerned with the imposition of excessive liability are particularly germane to claims for lost society and companionship. That is because the plaintiff's recovery in such cases is predicated upon the emotional ties he or she shares with the injured party. Consequently, the possible universe of claimants is limited only by the number of persons with whom the injured person has established personal relationships. Moreover, the negligent tortfeasor in such cases faces the considerable burden of disproving the existence and/or significance of any such relationships. As a result, courts generally recognize that this particular cause of action necessitates some degree of judicial guidance. (Wells at 675-76)
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> [S]ound public policy dictates that some limit be placed on the liability faced by negligent tortfeasors. . . . To hold that same tortfeasor potentially liable to the parents (both parents, when applicable, could presumably bring separate claims) for the loss of an adult victim's society and companionship is, we believe, excessive and contrary to public policy. (Wells at 677-78)
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> Limiting recovery for reasons of public policy always runs the risk of working harsh results in individual cases. For instance, people may question the logic which denies recovery to the parent of an 18 year old, but allows recovery for the parent of a 17 year old. . . . [Is] such line-drawing an indication by the legislature or this court that the parental relationships in the first instances are less significant than in the second? Of course not. But given the compelling public policy concerns in this area, a line at which liability ends must be drawn. We believe that the age of majority represents a rational place to draw that line. (Wells at 680-81)

Czapinski v. St. Francis Hospital, Inc., 236 Wis. 2d 316, 613 N.W.2d 120 (2000)

Justice Crooks, writing for a unanimous court, described a number of reasons why recovery in medical liability cases – including the ability for adult children to recover for loss of society and companionship of a parent – can be limited:

Possible justifications . . . include the prevention of, *inter alia*, a sudden increase in the number of malpractice suits, increased medical costs or decreased accessibility to health care. Furthermore, the distinction between the adult child and minor children could be the different degree of dependency which each would be presumed to have on their parents for their continued financial and emotional support. Minor children rely much more heavily on their parents for financial and emotional support than do adult children, and this difference is substantial. Faced with the need to draw the line on who can collect for loss of society and companionship, we follow the view established by this, and other Wisconsin courts, that the availability of claims for loss of society and companionship should be limited to those who would suffer most severely from the loss of an intimate family relationship; adult children cannot be included in this classification. . . .

For the foregoing reasons, the classifications of tortfeasors and tort victims are not arbitrary or irrational, but are based on reasonable and rational criteria. (Czapinski at ¶¶ 31-32, citations and internal quotations removed)