# The Legislative Bulletin

*A publication of the Vermont Medical Society*

Week of March 15, 2010

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## Legislation Allowing for Non-unanimous Jury Verdicts in Civil Cases Advances

Legislation that would eliminate unanimous jury decisions as the current standard of a verdict in civil cases – and potentially lead to more civil cases going to trial as opposed to being settled out of court – is one step closer to becoming law after a Senate committee voted on Friday to approve it.

Senate Judiciary Committee members voting in favor of changing verdict requirements from 12 of 12 jurors, to 11 of 12 jurors, were Senators Dick Sears, John Campbell, Kevin Mullin, and Ann Cummings. Senator Alice Nitka voted against the legislation.

The legislation, S. 279, if enacted would take away an individual's right to unanimous jury decisions in civil cases – a common law right that dates back to the 14th century. S. 279 was based on recommendations the Vermont Jury Policy Committee made in 2003. The committee cites three reasons for its recommendation to eliminate the current unanimity requirement in civil cases: likely and protracted deliberations, hung juries and compromise verdicts. However, the committee's report also acknowledged "the unanimity requirement …is deeply ingrained in Vermont jurisprudence."

In contrast, to the committee's report, a Northwestern University Law Review article from 2006 that examined 50 civil cases in Arizona reached a different conclusion: "(T)he Arizona jury deliberations reveal that some of the claims made in favor of dispensing with unanimity are unfounded. The image of eccentric holdout jurors outvoted by sensible majorities receives no support …although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity."

VMS testified against S. 279, due to concern that eliminating the unanimous requirement could lead to an increased number of cases that would otherwise be settled before being bought to trial. VMS also stated that the bill could have a direct impact on the cost of health care, since physicians may order additional diagnostic tests and making additional referrals to other physicians in order to reduce their potential exposure to lawsuits.

In testimony to the committee, Rutland trial attorney and former State Senator John H. Bloomer, Jr., expressed his belief that eliminating unanimous jury verdicts could result in increased civil cases going to trial due to the greater uncertainty of non-unanimous jury verdicts. He also stated a concern that non-unanimous jury verdicts would undermine a trial by your peers, since the views of some members of the jury could be ignored.

The bill, as introduced, eliminated the current standard of unanimous jury verdicts in civil cases and set a new lower 80-prcent requirement and thereby would have allowed verdicts to be decided by 10 of the 12 jury members. However, in recommending the bill for adoption by the full Senate, in response to the concerns raised by VMS and others the Judiciary Committee amended the bill by raising the verdict threshold from ten to eleven out of the twelve jurors, requiring the office of the court administrator to report on the implementation and effects of this act by Jan. 15, 2014; and, repealing the legislation on Jan. 15, 2015.

And while VMS appreciates the Committee's efforts to improve the bill, VMS will urge the full Senate to vote against S. 279, since it believes there is not a clear and compelling reason to make the change and due to concerns that the lower verdict threshold has the potential to increase the number of civil cases going to trial.

## House Health Care Committee Considers Health Care Reform Strategies

The House Health Care Committee is considering how to move Vermont's health care reform initiatives forward in a year in which there is almost no funding available for expansion of coverage or quality efforts. Adding complexity, the much-awaited federal legislation that could set parameters for Vermont's health care reform efforts has not passed.

Earlier this year, the committee heard testimony on H. 627, a bill introduced by chairman Steven Maier, which included provisions addressing the Blueprint for Health, Vermont's chronic care initiative, information technology, a study of the primary care delivery system, and limitations on hospital advertising. Last week, Rep. Maier presented a two-page framework to guide the committee as they develop health care reform legislation, organized to address the following issues:

- Universal access and universal coverage;
- Slowing the growth of health care costs;
- Cost and quality initiatives;
- Increasing the primary care workforce;
- Enhancing prevention and wellness; and
- Insurance reform.

One of the initiatives the committee is considering that is of interest to VMS is the creation of a single statewide formulary, which public and private payers would be required to use. Medicare programs and self-insured plans would not be required to use the formulary. The formulary would be created by a group of pharmacists and physicians such as the drug utilization board that created the preferred drug list for the Office of Vermont Health Access (OVHA)

To expand the primary care workforce, the committee is looking at maintaining, and if possible expanding, existing initiatives such as the AHEC health care workforce pipeline programs and state loan repayment programs. The committee has also discussed creating a state tax deduction or credit for loan repayment awards. While the state tax portion is only a small part of the total tax bite for loan repayment, AHEC has requested this as a way to encourage adoption of a similar federal tax deduction or credit.

On Friday, VMS testified against a provision in H. 627 that would tie eligibility for the $63,750 in Medicaid electronic health record incentives to physician participation in the Blueprint for Health and the use of the states health information exchange. While VMS strongly endorses these initiatives, it believes they should not be linked to the adoption of certified health record technology and meeting the yet to be determined federal standards for the meaningful use of EHRs.

## House Appropriations Committee Addresses Prior Authorization for Imaging, Loan Repayment and Tobacco Prevention Funds

The House Appropriations Committee completed its first run through of the Human Services sections of the FY 2011 budget last week.

**Prior Authorization for Imaging**
As of Friday, the committee appeared to be likely to accept the administration's proposal to initiate a prior authorization program for certain types of imaging including CT and CTA scans, MRIs and MRAs, PET and PET-CT scans. Imaging ordered when a patient is in an emergency room or has been admitted to a hospital would be exempt from prior authorization as would x-rays, ultra-sounds, mammograms and DXA scans.

VMS opposes adding a prior-authorization program for imaging to Medicaid because of the increased administrative burden it would create for physician practices. Additionally, VMS does not believe that OVHA will be able to achieve the estimated savings due to the fact that the rate of CT scans and MRIs ordered by Vermont physicians is reported to be among the lowest in the country.

Should this program be included in the budget, as recommended by the administration, VMS has provided the House Appropriations Committee with proposed language that would establish the following operational standards for the prior authorization program. They include:

1. Prior authorization approval criteria should be transparent, readily available, based on peer-reviewed published clinical standards and include citations for the sources of the standards;

2. Responses to prior authorization requests should be acted on in a timely manner and the program should have sufficient physician staff to include timely access to physician peers or medical directors;

3. Physicians who order imaging consistent with evidence-based guidelines and whose prior authorization requests are always granted, should be exempt from the prior authorization process (Gold Card);

4. OVHA should form a physician advisory committee to assist in the development of contract standards, the selection of the vendor, comment on the evidence-based criteria for prior authorization, and the process, forms and timelines of the prior authorization process with the goal of minimizing the administrative burden on physician practices;

5. The terms of the contract should not include financial incentives to deny requests for imaging services;

*Continued on page 3*

## House Appropriations Committee Addresses Prior Authorization

*(cont'd from pg. 2)* 6. The prior authorization process should be aligned with other prior authorization imaging processes within the state, as long as the alignment is consistent with the goal of minimizing the administrative burden on practices and it should be informed by the imaging-related findings from the Act 49 report that found Vermont physicians' imaging rates are among the lowest in the country ;

7. OVHA (HP or vendor) should conduct training about the prior authorization program no later than 60 days prior to the implementation of the program. Training should include:

- Face to face regional meetings and demonstrations;
- Webinars; and
- Other training as requested by practices;

8. OVHA should distribute the prior authorization approval criteria to all participating providers 90 days prior to the implementation of the prior authorization program and it should provide an on-line tool to allow physicians to determine if prior authorization is required for a particular service; and,

9. OVHA should track and report imaging rates (including imaging in emergency departments), imaging expense and administrative expense for the prior authorization program, including administrative expenses incurred by physician practices.

**Loan repayment and AHEC Funding**

In a run through of the Department of Health budget, the House Appropriations Committee placed the funding that the administration proposed to cut from the loan repayment ($300,000 reduction or 34.5 percent) and Area Health Education Centers (AHEC) program ($250,000 reduction or 50 percent) on a long list of budget items that the committee will try to restore once they have finished their review of the entire budget.

These two reductions will only save the state $196,000, not the full $550,000 in the budget, since the federal matching funds that will be lost if the cut goes into effect account for the remaining $354,000 of the total proposed reduction.

The loan repayment loss is particularly problematic since private foundation funding for loan repayment is ending in 2012 and because state loan repayment funding was already reduced last year from $1.4 million to $870,000.

State loan repayment funding is shared by primary care physicians, dentists, nurses, and nurse faculty. Available funding for primary care, including family physicians, general internists, ob-gyns, pediatricians, psychiatrists, nurse practitioners, nurse midwives and physician assistants was reduced from about $700,000 to $445,000 last year and if the proposal being discussed is adopted it would be further reduced to about $285,000.

**Tobacco Prevention Funding**

The House Appropriations Committee agreed to a proposal recommended by the Vermont Coalition Against Tobacco that the $1.5 million the administration proposed to cut from the tobacco programs, including cessation funding, community grants, and media funding for counter-advertising, be restored with money from the Tobacco Trust Fund. The Tobacco Trust Fund is a fund designed for use to address tobacco use when money is no longer available from the settlement of the tobacco class action lawsuits. The tobacco trust fund has about $33 million and only about $1.5 million of that will be needed this year to maintain level funding for the tobacco programs. The tobacco trust fund was also used last year to support the tobacco prevention and cessation programs.

## Senate Committee Advances Bill that Would Create New Vermont Health Care Board

On Friday, the Senate Health and Welfare Committee, chaired by gubernatorial candidate Senator Doug Racine, reported out favorably a new draft of S. 88 laying out a process for the design of a new health care system.

The revised bill calls for the creation of the Vermont Health Care Board consisting of three individuals who demonstrate expertise in health care systems. The board is authorized to retain consultants to provide expertise necessary to do the required analysis and design.

The bill directs the board by Jan. 1, 2011 to propose to the general assembly at least three design options and implementation plans for creating a health care system that meets the bill's principles and goals. One option shall include the design of a government administered and financed single-payer benefit system. Each of the three design options should be in sufficient detail to allow the general assembly to adopt the design in order to achieve implementation by no later than July 1, 2012.

Recognizing the importance of including public payers and employers in any new system, the revised S. 88 directs the board to propose strategies for compliance with federal ERISA rules covering self-insured employer sponsored health benefit plans, as well as obtaining federal Medicare and Medicaid waivers.

Since the board will require significant funds in order to carry out its work, the bill will be referred to the Senate Appropriations Committee, chaired by gubernatorial candidate Senator Susan Bartlett, for its review. Under the bill, the board would be repealed on June 30, 2011.

## OVHA Seeks Telemedicine Pilot Project Participants

The Office of Vermont Health Access (OVHA) is seeking primary care physicians who are interested in participating in a telemedicine pilot project. The project, in partnership with the Department of Psychiatry at Fletcher Allen Health Care, will use interactive telecommunications to provide access to medical services that otherwise would not be available in some Vermont locations.

The delivery of medical care via telemedicince uses interactive communication between the patient and the physician or practitioner at the distant site, allowing patients to receive care without having to travel long distances.

Primary care physicians who already have the infrastructure for telemedicine in place (i.e., audio and video equipment permitting two-way, real time interactive communication) and who would like to participate are encouraged to contact OVHA. Interested practices can contact OVHA's Russell Frank at (802) 879-5932 or russell.frank@ahs.state.vt.us.

## Vermont Medical Society 197th Annual Meeting

**Saturday, November 6, 2010**
**Equinox, Manchester, Vermont**

**Make your reservations today! Call 1-877-854-7625.**
*(Make sure you tell them you are with the VMS)*

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