

## OPINION

### ■ MEDICAL MALPRACTICE ■

# Let's create health courts

By *Paul Barringer* SPECIAL TO THE NATIONAL LAW JOURNAL

**W**ITH AMERICAN health care in meltdown, bipartisan momentum is building for the creation of special health courts. Special courts already exist for tax disputes, workers' compensation and vaccine liability, among other issues. Isn't health care at least as important?

The crisis in health care is crying for attention. Costs are skyrocketing, as the number of uninsured Americans exceeds 45 million. Doctors are quitting the practice of medicine or abandoning specialties, like obstetrics and neurosurgery, which are especially susceptible to lawsuits. And "defensive medicine"—in which doctors order unnecessary medical tests and procedures to protect themselves rather than their patients—now costs the nation tens of billions of dollars per year.

Underlying the crisis is the fact that our system of medical justice is unreliable. Jury awards vary wildly, leaving patients and doctors virtually unprotected. Few patients injured by medical mistakes actually file suits, in part because costly legal proceedings can drag on for years. Of claims brought forward, 80% involve situations where experts believe the doctor did nothing wrong. A poor medical outcome, rather than negligence on the doctor's part, is often the key to the size of the award. Nor does the current malpractice system foster quality improvement. Doctors and nurses, fearful of being sued, are reluctant to admit to mistakes. Patient safety experts generally agree that most medical errors result from breakdowns in health care delivery systems rather than from individual wrongdoing. But the current system assigns liability to individual doctors, inhibiting the open communication necessary to catch errors and make improvements.

Proposals to cap malpractice awards would address one symptom of the problem, but they fail to address the underlying problem itself. That's why, earlier this year, more than 80 of the

most prominent leaders in American health care and law endorsed the creation of special health courts.

Those leaders include 10 university presidents; 11 medical school deans; 10 former high-ranking government officials from both political parties; and six current or former heads of health care policy, health care quality or patient safety organizations. Among them are former U.S. Attorney General Griffin B. Bell; former U.S. Deputy Attorney General Eric H. Holder Jr.; former U.S. senators Dennis DeConcini, David F. Durenberger, Warren B. Rudman and Alan K. Simpson; former House of Representatives Speaker Newt Gingrich; and former governors Richard D. Lamm of Colorado and Thomas H. Kean of New Jersey.

The hallmark of special health courts would be full-time judges dedicated solely to addressing health care cases and trained in the issues that they would be facing. These judges would define and interpret standards of care in malpractice cases, relying on neutral experts hired and examined by the judge. The experts would be paid by the court so as not to be beholden to either side.

Today, juries and trial judges have no medical or scientific training. Yet they must consider medical issues that are complex and technical, including the key question in most malpractice cases: Did the doctor comply with the appropriate standards of care? It is not surprising, therefore, that without training, and with medical experts on both sides confusing the issues, juries often arrive at different—and inconsistent—conclusions based on similar facts.

Today, few patients injured by medical mistakes receive any compensation at all. Special health courts would ensure that more injured patients are compensated and that they get a higher percentage of awards. Along with reliable decisions about standards of care, which would set precedent from one case to another, health court judges could award noneconomic damages (over and above medical costs and lost wages) in accordance with a schedule of benefits that would

provide predetermined amounts for specific types of injuries.

Health courts would also help increase candor among health professionals. With judges making reliable decisions about standards of care, and awards no longer varying so wildly, doctors and nurses would have less to fear from admitting to mistakes made in providing treatment.

### **Bipartisan support**

Intriguingly, the momentum that is building for health courts is bipartisan—even at a time when so many issues are polarized. U.S. Senate Majority Leader Bill Frist, R-Tenn., has endorsed the concept, as has the Progressive Policy Institute, known in the 1990s as President Clinton's "idea mill."

U.S. Senator Michael Enzi, R-Wyo., now chairman of the Senate Committee on Health, introduced legislation last year to authorize funds for individual states to begin creating health courts; similar legislation may be introduced later this year in the Senate. A health court bill has already been introduced this year in the House of Representatives. Not surprisingly, two in three Americans support the creation of special health courts, according to a Harris Interactive-Common Good survey released last summer.

The law is meant to punish those who do the wrong thing and support those who act appropriately. Its reliability guarantees our freedom. Medical justice is no longer reliable, and, therefore, undermines the quality of our health care. Special health courts would restore that reliability and let doctors and patients once again trust each other and have confidence that justice will prevail. **NLJ**

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