

## **Health Care Courts for New York**

President Obama has demonized insurance and drug companies, and accused Medicare and Medicaid of inefficiency and waste in his speeches, town hall meetings and op-ed pieces on health care reform. Yet neither he nor Congress have explained how current legislative proposals would wring significant cost savings from any of these sources. Assuming that the government has any ability to do so seems speculative at best.

That is why, even if there are some savings available from insurers, drug companies and current government programs, it is puzzling that the President has given only token mention to a reform that has the potential for eliminating billions of dollars of wasteful expense from inefficient medical malpractice litigation.

Fear of litigation results in needless and duplicative medical procedures; burdens our courts with specious lawsuits; burdens hospitals and medical practices with excessive insurance costs and administrative expenses; and deprives deserving claimants of fair compensation. Remarkably, only an estimated 2% of patients injured by medical negligence are compensated, and 25% of malpractice plaintiffs receive compensation where no negligence occurred. [Of the latter group, of course, lawyers receive upwards of one-third of the compensation the health care system pays to plaintiffs.]

Why would such an inefficient system of dispute resolution not be seriously discussed by a President who champions medical malpractice reform and pledges to pursue all means of reducing health care costs in order to pay for the added health care coverage he promises? How can protection of the trial bar, the principal beneficiary of the current system, improve health care or reduce health care costs? The experience of other industrialized nations and data from our years of uncontrolled malpractice litigation tell us that it cannot.

Existing courts are overloaded and largely unqualified to adjudicate medical matters. Expensive experts are hired on both sides, leading to delays and massive court costs. On average, malpractice cases require 4 years for resolution and litigation costs often exceed \$100,000 before trials begin. Few injured patients have the time and the resources to prosecute their claims. Meanwhile, wrongful awards instill fear of malpractice claims in doctors, discouraging the reporting of medical mistakes and preventing the learning and innovation that come from discussing mistakes. Fear of malpractice lawsuits also leads to so-called defensive medicine. Doctors exhaust all potential procedures in order to avoid the risk of potential litigation. Defensive medicine alone increases the cost of healthcare services in the U.S. by 10%.

To deal with the problem, we support the American Medical Association's proposal for new, administrative "health courts," as outlined in the AMA's June 1st letter to President Obama. Administrative health courts were developed by Philip Howard at Common Good and have the potential to improve the system dramatically. Recently, in his address to Congress, the President noted the need to reduce defensive medicine and

suggested pilot programs. However, the Secretary of Health and Human Services failed to make any further mention of the problem of defensive medicine or potential pilot projects and only \$25 million has been allocated. We believe that a pilot program for health courts in New York has the potential not only to improve medical justice in the Empire State, but also to provide an example for practicable reform for the country as a whole.

The President's observation about defensive medicine was very important in having recognized the problem and its cost. He also opened the door to meaningful pilot projects to demonstrate the benefits of a health court system. Health courts, especially in combination with initiatives such as caps on non-economic damages, procedural safe harbors and early-settlement programs, could have a number of benefits to claimants and to the health care system generally. Health courts could ensure that more of the right people are compensated and that they are compensated with the right amount of money.

Under a health court system, adjudicators would be trained specifically to hear and settle malpractice cases with the help of impartial experts. In a national system, malpractice decisions would be reliable across jurisdictions and therefore facilitate settlement in similar cases in different states. There would be more accurate verdicts and fairer, more consistent compensation, thus decreasing defensive medicine. In turn, these improvements would lead to lower malpractice insurance premiums and lower health care costs.

In a health court system, liability would be based on a broad, national standard of care as opposed to a negligence standard which varies by state and by plaintiffs' lawyer. Currently, doctors practice medicine by envisioning the worst-case scenario from a litigation perspective, rather than the scientifically justified scenario from a medical perspective. In a system of health care courts, unexpected outcomes would be recognized as such and physicians would be more likely to report them, thus expanding the body of medical reference. The health court system would also create specific guidelines for non-economic losses in order to normalize compensation throughout jurisdictions. Decreases in litigation costs and defensive medicine practices would lead to a significant reduction in health care costs, and improving the culture of medicine would increase our health care system's efficiency.

There would be several legal requirements for such a system. First, the process should be mandatory for all potential claimants, no matter their age or the nature or cause of their alleged injury. Second, the right to recovery should be based on an scientifically justified standard of "avoidability". Third, discovery processes should be fair and reasonable for individual claimants and designed to build a database benefiting the system as a whole. Finally, healthcare judgments should be reasoned and in writing so that they may be considered as precedent and reviewed, if necessary.

We have to start with state-level pilot programs, as suggested by President Obama. In New York, a world leader in medical research and care, several hospitals have expressed interest in participating in a pilot program. It should be pointed out that while the trial

bar has been dismissive of the idea of health courts, a precedent for specialized arbitral or court tribunals can be found in a variety of areas including traffic violations, consumer claims of securities law violations, bankruptcy, tax and family matters, workers compensation, etc. [Some of these areas involve tribunals where plaintiffs can proceed without a lawyer and some claimants might be able to bring claims in a health care court system without a lawyer as well.]

New York has made a tentative move toward alternative dispute resolution in the health care area with the concept of voluntary arbitration. However, a variety of statutory and other impediments have prevented the current law from providing helpful guidance for a full-scale pilot program. For example, cases involving children require actual litigation or the equivalent in an arbitration proceeding because of local laws limiting the right of minors to be bound by contract and to waive their right to litigation. (See CPLR Sec. 1209; Article 75-A.)

Health care tribunals could operate under an omnibus exemption from the restrictions of State law, where needed. The simple amendment of New York law to say, "Notwithstanding any other provision of this or any other Chapter ...", would make it possible to implement health care tribunals. The tribunals could be part of the New York State court system, with adjudicators similar to magistrates, with their own rules of procedure and appeal. Or, they could be established as independent tribunals similar to the arbitration and mediation services that exist today.

In either case, such a pilot program would improve medical justice in New York State, reduce litigation and health care costs, and provide empirical data upon which to measure its success.