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## News Story

# Benefits and drawbacks of 'health courts' debated

### From Staff reports

Doctors and others are pushing legislation in both houses of Congress to fund pilot projects in 10 states that would create administrative panels known as "health courts."

The legislation, which is intended to mend what some say are flaws in the medical malpractice system, is based on existing systems in Scandinavia and New Zealand as well as administrative programs in Florida and Virginia for dealing with birth-related neurological injuries.

### ADVERTISEMENT

The features shared by these programs include:

- No juries.
- All decisions made by specialized judges in consultation with a panel of

experts.

- "Avoidability" — not negligence — is the standard patients must meet in making claims against health-care providers.

- Damage schedules specify value ranges for specific kinds of injuries, much like those employed by state workers' compensation panels.

"There's a potential with this new approach to enhance patient safety, to be more predictable for health-care providers and patients alike, and to be more efficient in how resources are allocated," said Paul J. Barringer III, general counsel for Common Good, the bipartisan group that is a primary backer of the legislation.

"Also, we believe it will put more money in the pockets of patients," he said.

Common Good was founded by New York City lawyer Phillip Howard, best known as the author of "The Death of Common Sense." Its membership spans the political spectrum from Bill Bradley

to Newt Gingrich.

The identical bills, known as the Fair and Reliable Medical Justice Act, were introduced in May and both have bipartisan sponsorship.

One med-mal lawyer, Burton Craige of the Raleigh firm of Patterson Harkavy LLP, says the noise about health courts is artificial.

"The 'buzz' appears to be created by Common Good in furtherance of its tort reform agenda, regardless of the facts," Craige, a former president of the N.C. Academy of Trial Lawyers, wrote in an e-mail to North Carolina Lawyers Weekly. "The legal media should disregard the hype about health courts when there has been no showing of need and no realistic chance of this moving politically in North Carolina."

Health courts have also drawn criticism on constitutional grounds.

"The Bill of Rights includes specific, articulated rights for citizens to have their disputes resolved in court," said Cheryl Niro, executive director of the Illinois Supreme Court's Commission on Professionalism and a member of the American Bar Association's Standing Committee on Medical Professional Liability. "What this bill does is create an alternative to the court."

"I think that if [health courts] were voluntary, it would be a perfectly reasonable thing," said Don Beskind, of the Twigg, Beskind, Strickland & Rabenau personal injury law firm in Raleigh. "If it were mandatory, it would be a denial of the right to trial by jury and would be a violation of the Constitution."

Barringer said that health-court legislation has been introduced in Maryland, Massachusetts, New York and Pennsylvania. There is also interest percolating in several other states, including Colorado, Wisconsin, Wyoming, and South Carolina.

#### **DO MODIFICATIONS GO FAR ENOUGH?**

Similar bills were introduced in 2006 but were modified and reintroduced this year following intense scrutiny during Congressional hearings. Niro testified at those hearings and believes that the criticisms improved the current version.

"Some of the most onerous aspects of the last proposal have been softened," she said, noting the previous version's "no-sue" requirement has been replaced by an opt-out clause stating that patients may "voluntarily withdraw from participating" in the program.

Even so, Niro argues that the opt-out clause doesn't go far enough because it makes no mention of the right to a trial by jury.

Michael S. Greco, immediate past president of the ABA, criticized the 2006 version on constitutional grounds and said his opinion remains unchanged.

"Essentially, what I said then still holds," he said. "Even if it's voluntary, there are still problems. We're talking about [patients] who, without a lawyer, aren't sophisticated enough to know they're giving up their rights. And for more sophisticated people, there's pressure to give up their rights."

Another modification in the current bill is an expansion of the review panel membership. In the old version, the review panel was made up entirely of health-care professionals. The current bill calls for the panel to include lawyers with experience representing patients and health-care providers, patient advocates, medical-malpractice insurers, state officials and patient safety experts.

The old version prohibited the use of experts by patients and, although that prohibition is absent in the new bill, it does not specify that such experts are allowed.

#### **BUILDING A 'SAFETY CULTURE'**

The bills are intended to address two problems — medical malpractice insurance rates for doctors and escalating health care costs due to the practice of "defensive medicine."

"Physicians are ordering tests or even procedures that are not medically necessary or appropriate because they don't want to sit in court two years from now and answer 'Why didn't you give the MRI?'" said Dr. Alan C. Woodward, who practices at Emerson Hospital in Concord, Mass.

Last year, the Harvard School of Public Health issued a report concluding that health courts are worth a try — at least on a pilot basis. The report — "Health Courts and Accountability for Patient Safety" — was published in the *Milbank Quarterly*.

"Plaintiffs' attorneys wonder whether the tort system's corrective-justice function can be served equally well by an alternative that does not lay blame and shame on individual physicians," wrote Harvard professor Michelle M. Mello, chief author of the article.

Supporters say health courts would boost patient safety efforts and prevent injuries by removing the threat of litigation and opening the door for doctors to talk honestly about what went wrong. They contend that if the courts track medical errors, the medical community could evaluate new preventive measures.

"I think patient safety would be a good driver for this system," said Allen Kachalia, an internist at Brigham & Women's Hospital in Boston and one of the authors of the Harvard study. "If it makes it easier for the patient to file claims, then we can do a better job of reporting injuries, [and with that] we can build a database and then learn where errors are occurring."

Barringer, of Common Good, argues that there's already evidence that health courts work.

"We know, for example, in the Scandinavian systems, that the administrative compensation systems typically compensate patients in well under a year," he said.

Niro counters that America and Scandinavia is an apples-to-oranges comparison "because those nations have health and welfare benefits that are paid for by their governments before consideration of the injury claim takes place."

Greco, a partner in the Boston firm K&L Gates, said the quick payouts may come at the expense of a fair resolution.

"One of the carrots here is the claim that there's a quick path to getting an award," he said. "But that's at the expense of the integrity of the award. It's like saying, 'We're giving you peanuts, but you'll be getting them fast.'"

## **UNFOUNDED FEARS?**

One of the prime arguments in favor of health courts is that juries lack the knowledge needed to resolve medical negligence claims fairly.

Philip G. Peters Jr., a professor at the University of Missouri School of Law, recently completed a study that refutes this contention. After examining three decades of studies on jury decisions in medical malpractice cases, he concluded that juries actually perform very well. Reporting his findings in a recent issue of the *Michigan Law Review*, Peters found that in cases with weak evidence — the category that most worries critics of malpractice litigation — juries agreed with the assessments of expert reviewers nearly 90 percent of the time. He also found that juries overwhelmingly favor defendant doctors, even in cases where the evidence against them is strong.

"Doctors simply don't trust lay people deciding their fate," he said. "They want peer review. In addition, they don't trust any outcome produced by the adversarial process, which they see as a search for angles, rather than a search for the truth."

Craige, the North Carolina med-mal lawyer, agrees with Peters.

Medical malpractice case filings in North Carolina have steadily decreased since 2003, when 646 were filed. Last year, 510 cases were filed, according to a recent study by the N.C. Academy of Trial Lawyers.

North Carolinians filed an average of 600 medical malpractice suits per year from 1998 through 2006, the study said. Meanwhile, the number of civil case filings averaged 215,357 per year —

meaning that malpractice filings accounted for 0.28 percent of all civil filings.

"That hardly suggests the need to establish some new bureaucratic structure to deal with malpractice cases," Craige said.

Also, North Carolina has a new law setting up a voluntary arbitration procedure as an alternative to lawsuits in medical malpractice cases. The law caps damages - economic and non-economic — at \$1 million in each case, regardless of the number of plaintiffs and defendants.

The law should reduce litigation costs and speed up the resolution of cases by channelling into arbitration those disputes that otherwise would go into litigation, Craige said. (See our story below).

Although doctors have legitimate concerns about skyrocketing malpractice insurance premiums, the focus of their dissatisfaction is misplaced, according to Robert L. Sachs Jr., a plaintiff's medical lawyer in Philadelphia.

"Filings [of med-mal suits] have been down for years," he said. "You'd think that would reflect itself in lower premiums, but it hasn't."

In fact, direct losses paid per doctor dropped 30 percent from 2000 to 2005, while insurance premiums per doctor rose 32 percent, according to an analysis performed by Americans for Insurance Reform released this spring.

"The question remains: Why health courts?" Greco said. "What's the point? Are we saying that courts are bungling this? I doubt it. I think it's more likely that some interest groups are trying to limit people's rights for their own gain."

Niro agrees.

"There's no question that the current system has issues that make us question whether it's working as well as it could," she said. "But there are sound constitutional alternatives that exist now: arbitration, mediation, and settlement conferences, all of which are appropriate means of alternative dispute resolution."

**Editor's note:** This article is based on reports from Dolan Media Newswires and North Carolina Lawyers Weekly. Freelance writer Amy Johnson Conner also contributed to this article.

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