By Nick Healey, JD, Dray, Dyekman, Reed & Healey, P.C.

The 2012 Tort Reform Panel Discussion at the Wyoming Medical Society’s Annual Meeting at Jackson Lake Lodge seemed poised to answer that question. The traditional pro-(traditional) tort reform and con-(traditional) tort reform. Notwithstanding the convincing arguments on each side, the legislative perspective (like the one ring that rules them all) was simple and equally compelling: the political will does not exist to implement a change to the current tort reform system, so irrespective of the merits, its not going to happen in the near future. So, essentially pro-and-con came to a stalemate, cemented by a realpolitik acknowledgement that there is no present governmental stomach to break the tie.

A potential solution was presented by a fourth perspective, one that has been underrepresented to date in the tort-reform debate: patient safety. Like many good solutions to intractable problems, the patient-safety perspective neatly sidesteps the difficult question of whether caps on non-economic damages are appropriate. Instead, proposes the patient-safety perspective, what if we (physicians) simply injured less patients, told patients when we injured them and didn’t charge them for it? Wyoming already suffers in many areas from a physician shortage, and at least anecdotal evidence shows that physicians are both leaving the state and declining to relocate to Wyoming because the American Medical Association (AMA)’s “medical malpractice crisis” map shows that Wyoming is both an anesthesiologist and a license attorney. Using these powers (which may not exist between the plaintiff and the insurer, providing a unity of purpose and solidarity that may not exist between the physician and the hospital system), the physicians have stabilized at what has been described as an “obscene” level, thus supporting Bryan’s premise: there is no guarantee that premium savings, even if they materialize, would ever be passed onto providers. Likewise, whether Wyoming’s possibly higher premiums are offset by other more favorable economic conditions in Wyoming (such as a lack of state income tax) may not have been adequately explored.

The legislative perspective

It fell to the legislative perspective, provided by 30 year legislative veteran Senator Charlie Scott of Casper, to break the stalemate. Right or wrong, Senator Scott argued, the argument is essentially moral: it’s right when patients aren’t frivolous, they are real people who have really been hurt by a provider’s negligence. In some part, Bryan argued, these people’s injuries aren’t simply economic, and artificially capping compensation for those injuries tells those people, “you haven’t really been injured.” Bryan insisted that the best safeguard against unjustifiably large awards is the common sense of Wyoming juries, who are the friends and neighbors not just of the plaintiffs in these cases but also the providers that are the defendants. Bryan also rightly questioned whether capping non-economic damages would lead to reduced premiums for providers, and whether those savings (if they materialized) would ever be realized by providers and not retained by insurers as profit.

And Bryan is right. In 2006, the New England Journal of Medicine published a study of medical malpractice claims that indicated that most frivolous medical malpractice claimants don’t receive compensation. Moreover, the same study showed that a surprisingly large percentage of patients injured by clear provider negligence weren’t compensated either. In addition, the AMA’s position is that while medical malpractice premiums have risen sharply, hospital systems are in “crisis.” Also, the AMA has published several reports indicating that capping non-economic damages has lowered the expense of contesting medical malpractice lawsuits and the ultimate awards paid out, and stabilized medical malpractice premiums. Logic dictates that this cannot help but improve the Wyoming practice climate for physicians, thus keeping physicians in Wyoming and encouraging relocation, ultimately helping Wyoming’s citizens get necessary healthcare.

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