A MUST READ FOR PHYSICIANS
"THE CASE AGAINST LAWYERS" BY KATHERINE CRIER

LEE COUNTY MEDICAL SOCIETY

Bulletin

THE VOICE OF LEE COUNTY MEDICINE

VOLUME 27, NO. 01 | FORT MYERS, FLORIDA | John W. Snead, M.D., EDITOR | MARCH 2003

GENERAL MEMBERSHIP MEETING

March 20, 2003

Royal Palm Yacht Club
2360 West First Street

6:30 p.m. – Social Time/Pictures
7:00 p.m. – Dinner/ Program

TEAM OF EXPERTS WILL SPEAK
ON
WEALTH PROTECTION PLANNING FOR PHYSICIANS IN FLORIDA
Presenters:
Edward Barrett, CFP, ChFC, CLU
Steven C. Glenn, CLU, ChFC, MSFS, MSM
Thomas P. Clark, Attorney with Henderson & Franklin Etal

PBS studios will be offering pictures at a reasonable cost at this meeting. Bring your best smile.

RSVP: LCMS, PO Box 60041, Ft Myers, FL 33906
Tel: 239-936-1645 Fax: 239-936-0533

Inserts

1. MARCH MEETING NOTICE
2. RALLY IN TALLAHASSEE
3. CME REQUIREMENTS
4. CONTACT YOUR LEGISLATOR

In This Issue. . .

Happy St. Patrick's Day

President's Message

HERE IT COMES AGAIN

Ralph Gregg, M.D.

In case you haven't heard, for the first time in a long time, organized medicine is having a significant positive impact in both Washington and Tallahassee. President Bush and the Congress have halted the 5.4% cut in Medicare reimbursement at least until September. In addition, the President has publicly recognized the error in the method of calculation, which led to the cuts in the first place. These errors resulted primarily from underestimates of the GDP over several years. The President has advocated a system of calculation, which will use actual GDP figures. This system as proposed by the President will actually result in a fee schedule increase. When was the last time you heard anyone seriously talking about being paid more by Medicare? These positive developments are due overwhelmingly to the efforts of organized medicine.

In Tallahassee, the Governor's Task Force has formally presented its recommendations for Health Care reform. The report recognizes the failure of the current system to contain malpractice costs, and, among other things recommends a cap of $250,000.00 for non-economic damages in medical malpractice cases. Governor Jeb Bush and the Florida House of Representatives appear poised to enact such legislation. Again, this is primarily due to the efforts of organized medicine.

As Steve West keeps reminding us: "We have to keep the pressure on." The Florida Senate is still largely opposed to Tort Reform and the President's Budget Proposals have not yet been enacted. As you may have feared, this is where preaching to the choir comes in. The people reading this are already doing the bulk of the work to support organized medicine and already provide the majority of the financial support, but we cannot let up. These critical times call for increased support while we have momentum.

First, we need a grassroots effort to educate our patients. Make sure they know that Florida has malpractice premiums more than 50% greater than the national average. The Lee County Medical Society can provide you with additional information to provide to your patients. If properly educated, they can become our greatest supporters. Secondly, we need to rally financial support for "People For A Better Florida." This organization supports pro-Tort Reform candidates and initiatives across the state. You can contact them at P.O. Box 16158, Tallahassee, FL 32317. Members of the Florida Senate are watching very carefully to see how strongly organized medicine will support candidates who support Tort Reform. We need to actively campaign for our colleagues to support this organization.

Lastly, each of us needs to spread the word about the necessity of joining organized medicine. Incredibly, just when our efforts are most critical, the LCMS and FMA are experiencing declining membership. Many young physicians and a few older ones complain about the cost of membership. Others just couldn't be bothered, however, there seems to be no lack of outrage over the cost of malpractice premiums or Medicare reimbursements. Physician to physician contact is our most effective means of impressing upon these people the importance of organized medicine's efforts. **Talk to them.**

LESS THAN 45 DAYS LEFT UNTIL THE HIPAA COMPLIANCE DATE

by Linda R. Mink, Esq.

The HIPAA Privacy Rules which mandate health care providers to protect patient privacy are now in final form. The Privacy Rules are the first ever federal regulation of medical records and health information. **The Privacy Rule compliance date for health care providers is April 14, 2003.** While the Privacy Rules address many topics, the major areas of compliance include:

- **EVALUATION OF OFFICE PHYSICAL SPACE, MEDICAL RECORD ACCESS, AND OTHER AREAS OF POTENTIAL EXPOSURE:** The health care provider should review current space and procedures, i.e. check in and check out to evaluate whether there are any incidental disclosures of health information that could be avoided with reasonable safeguards in place.
- **APPOINTMENT OF A HIPAA PRIVACY OFFICER:** The HIPAA Privacy Officer is a high level individual in the physician practice who is ultimately responsible for overseeing patient privacy.
- **NOTICE OF PRIVACY PRACTICES**: The health care provider must make a good faith effort to obtain **written** acknowledgment of patient receipt of notice.
- **AUTHORIZATION:** Authorization from the patient is required to share the patient's health information for any reason other than for treatment, payment and health care operations ("TPO"). Consent for TPO is no longer necessary under HIPAA. However, medical record release forms are recommended to comply with ethical standards and state law.
- **BUSINESS ASSOCIATES:** The health care provider must have written agreements with third parties or business associates (i.e. claims processing or auditing services) in compliance with the Privacy Rule. Existing business associate contracts may be eligible for an extended compliance date.

The foregoing is intended to simply remind you of the HIPAA Compliance Date and provide the major areas in which you must be compliant by April 14, 2003. Failure to comply could result in both civil and criminal penalties. This article should be used as a reference only as it is not exhaustive. You may obtain more information and view the Privacy Rule as well as guidelines issued to clarify the Privacy Rule on the U.S. Department of Health and Human Services Website at: http://www.hhs.gov/ocr/hipaa.

Linda R. Minck is an attorney with the firm of Porter, Wright, Morris & Arthur, LLP, in Naples, Florida, practicing in the area of business and health care law for physicians and other health care professionals. The Collier County Medical Society selected Linda as a Preferred Vendor in 2002 and 2003. Visit www.porterwright.com for more information. Linda R. Minck may be reached at (239) 593-2967 or (800) 876-7962.

As I Recall...

Roger D. Scott, M.D.

PHONES

It so commonly happens that after I write an article, information that was unfamiliar to me appears from somewhere. After *THE BOOK* (AIR Nov. 2002) article, additional information was supplied by Mr. and Mrs. J. B. Bocock (Mr. B worked for the local telephone company for many years arranging the contents of the telephone books). Phones have become such an integral part of our lives that one might wonder if we could exist without them today, which brings about this article.

The first phones in Florida were very limited, and in Pensacola and Jacksonville 1877-1880, on short direct lines in each city. The first telephone exchange (going through an operator) was in 1880 in Jacksonville by Southern Bell Telephone Co., and in 1884, women replaced men as operators. (Men have recently been returning to this position.) The first dial telephones were in Tampa (Peninsula Telephone Co.) in 1913 and Peninsula (1915) was the first company to be completely dial operated.

A 19 year old (Gilmer Heitman) founded the Lee County Telephone Co. on 2/21/1900 with 20 subscribers, two operators, and daylight service only! At that time there were only 6285 phones in Florida. By 1904 there was a wire connection to Tampa (Peninsula Telephone Company) and in 1905 a connection to Marco along with "night service until 10PM". With increasing subscribers in 1906, 24-hour telephone service was made available.

Barron Collier in 1924 (the same year that Collier and Hendry counties were cut from the big Lee County) purchased the Lee County Telephone Company and established the InterCounty Telephone and Telegraph Co. Smaller telephone companies were incorporated into his system and in 1925 his lines crossed the state to West Palm Beach connecting to Bell System to gain a more expansive area of coverage.

InterCounty Telephone & Telegraph (IT&T) began changing in 1950 from manual (calls through an operator) to dial phones and this was completed to 100 percent in 1956. Direct dial long distance was introduced to Florida by IT&T and by 1956 all IT&T exchanges were direct dial — the first in our state. In 1968 IT&T had 13 counties (10,300 square miles) with 109,000 phones in operation.

In 1958 twenty-two phone companies serviced Florida, the largest was Southern Bell followed by General Telephone and then InterCounty (I have a large beautiful colored map showing the area covered by telephone companies throughout Florida). The IT&T Co. was taken over by United Telephone Company and that taken over by Sprint and the open market for telephone service.

I have many memories of my personal experiences with the telephone from the manual (no dial but calling through an operator) through all of the multiple improvements that have occurred over the years and there have certainly been a great number. There are fond memories of going to the telephone office in Live Oak and visiting with the one operator who would allow me to route the calls using the switchboard. In those days everybody knew everybody else's business because the operators listened in on conversations. Daddy had a long distance call one night and our operator told the NY operator that we were at the movies & wouldn't be home till 9 P.M.! Daddy had not told anyone what we were doing. Much gossip and news originated from the telephone operators in small towns, but it sure was a good life.

Remember President William Howard Taft? Well, his 3rd cousin (also named William Howard Taft) was just seen in my office — Coincidence??

Correction (typo in physician's last name): We are saddened by the death of Wes Westervelt.

LEE COUNTY MEDICAL SOCIETY BULLETIN
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The editors welcome contributions from members.
Opinions expressed in the *Bulletin* are those of the individual authors and do not necessarily reflect policies of the Society.
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MEMBERSHIP ACTIVITY

REACTIVATED
Scott Geller, M.D.

RESIGNED
Lane Carlin, M.D.
Christina Diaz, M.D.
Paul Driscoll, M.D.
Brian Longendyke, D.O.
John Pletincks, M.D.
Nick Sharma, M.D.
Joseph Zeterberg, M.D./Retired

NEW PRACTICE
Evelyn Kessel, M.D.
Brent Myers, M.D.
Digestive Specialists, P.A.
13685 Doctor's Way #170
Fort Myers, FL 33912
Tel: 561-7337
Fax: 561-0244

LCMS STATS
January 16, 2003 - February 11, 2003

	Current	YTD
PHONE CALLS RECEIVED	**544**	**1128**
From Physicians and Office Staff	103	239
For Referrals	217	434
For Background Checks	22	55
Filing Complaints	5	10
Regarding Non-Members	18	44
Regarding Alliance	8	16
Regarding CMS, FMA, and AMA	23	44
Miscellaneous Calls	148	286
APPLICATIONS SENT TO PHYSICIANS	**3**	**12**
MEETINGS	**12**	**15**
Attended on behalf of LCMS	0	2
Society Meetings	12	12
DIRECTORIES DISTRIBUTED	**21**	**31**

LEE COUNTY MEDICAL SOCIETY ALLIANCE NEWS
Ann Shah, PhD, Corresponding Secretary

"$5K Reaching Out Race"

Please give to the LCMSAF "Reaching Out" Endowment Fund before May 1, 2003!

We're half way there! With proceeds from the Holiday Basket Raffle and individual donations to date, we have raised $2,500 towards our Endowment Fund matching grant. If we raise a total of $5,000 by May (only another $2,500 to go), an anonymous donor will match that amount. With our initial anonymous donation of $5,000, this would mean a total of $15,000 raised in the first year! A great start to this fund, which was established through the Southwest Florida Community Foundation in the summer of 2002!

Please help us reach this goal by sending your donation of $25, $50 or more to: LCMSAF, 13300-56 S. Cleveland Avenue, #112, Fort Myers, FL 33907.

The names of all "Founding Friends" will be printed in the May issue of the Alliance newsletter and also appear in the "Best of Times" Gala, 2003 souvenir program.

"Best of Times" Gala, 2003

On May 3, 2003, the LCMSAF will be hosting a major fundraising event — "The Best of Times" Gala, 2003 — on the lush, tropical grounds of the Henry-Ford Winter Estate!

Since 1945, the Alliance has played an active role in improving the health and well-being of our citizens. We are proud to say that more than $1,000,000 has been raised for local health charities through our annual fundraisers over the past 20 years. As in years past, all proceeds from this event will be used to fund our Foundation's health-related programs and other charitable endeavors in Lee County.

Please help this year's fundraising effort by becoming a ***Gala SPONSOR*** by purchasing space in our **Souvenir Program** for your business promotion, special announcement, or personal message. You'll receive special acknowledgements and other valuable benefits depending on the Sponsorship Level you choose. **Your donation is fully tax-deductible and will go *directly* toward the health-related needs of our community.**

Please call Glynn Garramone at 938-0231 before March 15, 2003 to make your Sponsorship Donation. We hope you will help make this a successful and memorable fundraising event.

Highlighting a Social Service Agency...

SOUTHWEST FLORIDA ADDICTION SERVICES
Diane Clayton, Director of Outpatient Services, SWFAS

The medical community has been dealing with people who have addiction problems for many decades. One of the more dramatic examples are those patients who report vague aches and pains and appear to be seeking pain medication. They may go from physician to physician seeking medication, and often show up in emergency rooms complaining about everything from migraine headaches to back pain. While there are many people with legitimate pain issues and need for pain management services, it is extremely challenging for many professionals to distinguish between the legitimate request for assistance and the individual with addiction issues.

The addicted individual's use is illustrated by a compulsion to use mind altering substances, a loss of control over the use of said substances, and continued use of these substances despite adverse consequences resulting from said use. This compulsion to use will cause the addicted individual to engage in a variety of drug seeking behaviors, and may be upsetting to staff in medical office settings. Oxycontin has become the "drug of choice" for many individuals abusing pain medications. Individuals may present to the doctor that this is the **only** pain medication that works for their presenting ailment.

A patient with alcohol addiction present to the physician quite differently. Generally they are not medication seeking but present usually in the later stages of the addiction process with hypertension, flushed face, and other visible signs of long time alcohol abuse. Often they minimize the amounts of alcohol they consume and are more concerned with other health problems that have occurred as a result of their addiction.

Resources for treatment have diminished over the past several years in the addiction area with programs like the Cloisters and Charter Glade no longer in business. Southwest Florida Addiction Services (SWFAS) is pleased to offer a new program, Intensive Outpatient Treatment designed to fill the void in our community. Intensive Outpatient Treatment (IOP) is a structured treatment program for adults who need substance abuse treatment, but can still function in their environment. Compared to residential treatment, it is inexpensive with a cost of sixty-five dollars per day. The patient spends three hours a day, three days a week in a comprehensive treatment program after completing an assessment that addresses his/her need for psychiatric, marital and family services. The length of stay is individualized. The IOP is under the direction of SWFAS Director of Outpatient Services, Diane Clayton, LCSW. If you have questions or need further information Ms. Clayton can be reached at her office at 332-6937, ex. 120.

Referrals for the program can be made directly to Southwest Florida Addiction Services at 332-6937, ex. 103. Donna Walker will be coordinating admissions.

Southwest Florida Addiction Services provides services to adults and adolescents and their families impacted by substance abuse in Lee County from six locations. Services include detoxification, residential, day and outpatient treatment for adults; and residential, day and outpatient treatment for adolescents. All of the above listed treatment programs are CARF (which is the Rehabilitation Accreditation Commission) accredited – call 332-6937 for more information.

ALERT RX FRAUD

In Lee County we have had a rise in fraudulent prescriptions in the last year. We are working on several ideas to help curb this trend. The Pharmacist will be starting a program called "ALERT RX FRAUD" notice to each other about forged or tampered prescriptions. We are going to provide you with information in the future about some ideas on how to work with our area pharmacists to stop this abuse. If you have any ideas, please share them with our office. LCMS – 936-1645

HIPAA Tip:

SUGGESTED DRUG ABUSE PREVENTION LANGUAGE FOR HIPAA GUIDELINES

Drug Abuse Prevention:

"We may use or disclose personal health information (PHI) about you if we are contacted by a pharmacy because the pharmacist suspects that you altered, forged, or otherwise tampered with a prescription. If it is determined that the prescription has been altered, forged or tampered with, all pharmacies in the Lee County area will be alerted and your PHI used or disclosed in order to prevent the filling of a prescription that has been forged, altered, or tampered with in violation of state and federal law."

Place this in the Section of the Notice of Privacy Practices that discusses Uses and Disclosures of PHI Without Specific Consent or Authorization. This section will come after the section that discusses uses and disclosures for treatment, payment and healthcare operations.

This information has been written as suggestion for your HIPAA Guidelines for your patients. Kathleen Blickenstaff Hill, ESQ., Attorney at Law, Porter Wright Morris & Arthur LLP, 41 South High Street, Columbus, Ohio 43215-6194

Opinion: Letters to the Editors

RESPONDS TO ARTICLE IN FEBRUARY BULLETIN


Burton Rubin, M.D.

Dr. Susan Alderman, "They Got Us Where They Want Us" Feb. 2003, has in effect outlined the Hillary Clinton Healthcare Taskforce's 1600 page socialist manifesto for implementation by Congress in 1993. As Dr. Alderman adroitly points out, IT'S HERE! The incremental incursion by government has flummoxed our entire organization, both AMA (inept and retroactive) and regional societies (ever optimistic that increased membership will cure all ills). What to do?

Patients want free medical care, but, there ain't no such thing in the present market place. We all pay something for health insurance with the possible exception of Medicaid's recipients and the Social Security Disabled. Premiums for commercial health insurance for a family cost thousands yearly, while seasoned citizens on Medicare have a hefty deductible and 20% co-pay to meet somehow.

Let's fight back with a common sense approach that will appeal to the average citizen. Pick your physician and pay him a reasonable premium for your healthcare. Encourage the medical community to be competitive vis-à-vis Wal-Mart. Remember folks, Susan Alderman's one-payer system will grind you down to the level of our European counterparts who subsist on wages that would make hamburger flippers in the U.S. look like entrepreneurs. Go for "Boutique" practice in which you are the HMO making healthcare decisions and the patient is benefiting from good old fee-for-service attention. An all out push to educate the public to the impending socialistic disaster is only the beginning. Many brave physicians need to opt out and promote Boutique care. We must pre-empt the socialists and promote ourselves as caring, unselfish members of the old-fashioned school of Doc's so well remembered by millions of Americans.

Burton Rubin, M.D.

GOOD NEWS! APPOINTMENTS FOR FLORIDA BOARD OF MEDICINE

The Governor has made his appointments for the Board of Medicine. Governor Bush reappointed Elizabeth Tucker, M.D. of Pensacola and Raghavendra Vijayanagar, M.D. of Tampa. The new members include Terrence McCoy, M.D. of Tallahassee, Mark Avila, M.D. of Miami and Manuel Coto, M.D. of Orlando.

The FMA and LCMS wish to congratulate all the appointments of Governor Bush and especially Past President, Dr. McCoy.

2003 FLAMPAC BOARD NAMED

The FLAMPAC Nominating Committee named the following Board members as FLAMPAC officers for the 2003-2004 election cycle: Steve West, M.D., President; Frank Farmer, M.D., Vice President; David Becker, M.D., Secretary; and Madlyn Butler, M.D., Treasurer. The nominees were approved by the FLAMPAC Board on Saturday, February 8, 2003.

The Lee County Medical Society would like to congratulate **Dr. Steven West.**

THE FIRST IMPRESSION OF YOUR OFFICE

By Cliff Rapp, LHRM, Vice President of Risk Management FPIC

It is well acknowledged that the first impression is a lasting one. It therefore follows that the first encounter with the physician's office plays a major role in determining a patient's opinion of the physician and staff's credibility. The reception area can make a strong statement about how much physicians care about their patients through its general appearance and atmosphere.

It is important for physicians to determine what their office is saying to patients. There are several key factors to consider.

Color Scheme

The color scheme you choose for your office decor will set the mood and create the general feeling of your office atmosphere. To create a sense of comfort use soft, soothing colors throughout the office. Cool colors such as blues, peaches, pinks, soft teals, and sea foam greens tend to have a calming effect; whereas, bold colors such as bright reds, oranges, and yellows tend to project tension and aggravation.

Lighting and Atmosphere

Good lighting is a must. An office with poor lighting can appear dingy and depressing. Windows in an office allow natural sunlight inside, which produces an appealing atmosphere. Many practices have installed skylights and atriums to enlarge this effect and brighten a patient's attitude.

Flooring

The office flooring must be maintained and kept clean for safety reasons as well as general appearance. Carpeting or wooden flooring creates a sense of luxury in comparison to vinyl flooring or tile. However, carpet should be steam-cleaned periodically to eliminate soiled traffic patterns and may not always be practical in surgical offices for sanitary reasons.

Focal Points

Strive to create an interesting decor. Embellish the office with objects that attract the patient's attention. Common focal points include:

- Colorful fish tanks that are soothing as well as entertaining for the patient.
- Unique wall decorations.
- Creative artwork.
- Framed poems.
- Atriums and plants.
- Display cases with artifacts and/or collectibles.
- Photographs of the physician and staff, which help to create a friendly atmosphere.
- TV and VCR featuring medical education material that highlights your patients' needs.

Reading Materials

Magazines and reading materials should be arranged neatly and updated frequently. Supply reading material that is geared toward your patients' needs and interests. Consider ordering the publication with oversized print for easy reading. Depending on the demographics of your practice, bilingual publications may be appropriate.

Temperature

The office should be well ventilated and comfortable. Many times reception areas and examination rooms are extremely cold. If the office tends to be chilly, supply warm blankets for the patients to use while waiting for the physicians in the examination room. Small gestures such as these communicate a caring feeling to your patients.

Smell

The odor of the office can create either a positive or a negative image in a patient's mind. The office should smell crisp and clean, instead of antiseptic and sterile. Plants can help remove formaldehyde odors and freshen the air. Also, proper ventilation will eliminate moldy and musty odors. An office with an odor communicates an unkempt and uncaring feeling to the patient.

Noise Level

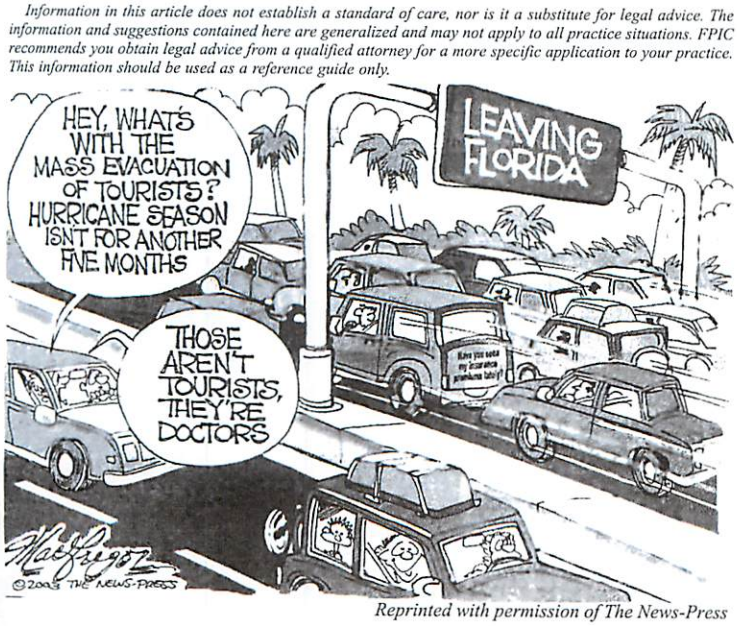
Invest five minutes of your busy day to sit in the reception area to monitor office sounds. Are you able to hear the receptionist's telephone conversations? Patients can easily be offended if confidential conversations can be overheard by other patients in the office. If conversations can be overheard in the reception area, consider playing soft background music to cover up office noise. If this is not effective, install a clear glass window to separate the reception desk from the patient lobby to buffer the sound level. In light of the new HIPAA privacy provisions, it may even be necessary to have the phone located away from the reception area.

Staff Attitude

A patient should always be greeted with the receptionist's full attention and be treated with warmth and care. A simple smile, a reassuring look, or a small gesture of kindness can make all the difference in the world to a patient, especially if he/she is feeling anxious or nervous.

All of these factors play a major role in determining the patient's first impression of your office – an important factor establishing physician credibility that is often overlooked.

Information in this article does not establish a standard of care, nor is it a substitute for legal advice. The information and suggestions contained here are generalized and may not apply to all practice situations. FPIC recommends you obtain legal advice from a qualified attorney for a more specific application to your practice. This information should be used as a reference guide only.



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BOOK REVIEW

UNRELIABLE, ERRATIC, AND UNPREDICTABLE

by REMIGIO G. LACSAMANA, M.D.

PUNITIVE DAMAGES

How Juries Decide

by Cass R. Sunstein, et al. University of Chicago Press, 285 pages $35

"There is no branch of the law more exposed to the influence of a just and manly and honorable indignation than that which involves the subject of damages for a malicious wrong, nor any branch of the law more liable to be warped and perverted by violent hatred of evil and corrupt motives and deeds."

That observation did not come from the AMA, Philip Morris, or McDonalds. Nor did it flow from the biting pen of George Will, who had passionately written about what is wrong with the tort system and the need to radically revise it. But all these parties would agree about how the tort process has become warped and perverted because of the transfer of huge amounts of money that has corrupted the original intent to deter and punish those at fault.

That trenchant opinion was rendered by the New Hampshire Supreme Court. And the same court rendered it back in 1872 when it criticized excessive punitive Damages then as a "monstrous heresy," To think that magistrates of the high bench could see the potential evils of the tort system 130 years ago is telling and speaks volumes about how little or nothing has been done to curb a system that has gone astray further. Only the circumstances have changed: Greed (and a lot of it) is now powering the system.

Now the spotlight once again is on what to do with the problem. Amid widely publicized reports of increasing multi-million (and multi-billion) awards for apparent frivolous suits, where individual responsibility is completely forgotten, and where a few lawyers win unconscionable awards, the bugle call for reform of the system is getting louder and louder.

Just consider: A 64-year old woman in California who has continually smoked two packs of cigarettes daily won a $28 billion judgment from Philip Morris after developing cancer of the lungs, never mind that she was repeatedly advised by her doctor and her family to drop her habit. What about the immigrant from New York who attempted suicide by lying down on the railroad tracks but survived and won a multi-million dollar suit because the driver could not put the brakes on in time? Or the thief who entered a house through the garage, got locked in, got caught, but then sued the homeowner for starvation and dehydration after not eating and drinking for two days? While these examples do not constitute the majority of lawsuits, they exemplify the absurdities of the tort system and why it has become, in the observations of many, a casino and an instrument to funnel huge amounts of money to a chosen few, with the trial lawyers of course the big winners.

To shed more light on this mess, a distinguished five-man group in law, human behavior and economics decided to take a critical look on punitive damages and how jurors and judges arrive at decisions about liability and punitive awards, and what can be done to make the tort system a just instrument of the law. The book essentially is a product of empirical experiments involving more than 8,000 jury-eligible citizens in more than 600 mock juries, which studied cases similar to those in the actual world of torts.

The findings, while revealing, are not unexpected. They document previous similar but scattered observations about punitive damages, and just add another compelling layer of evidence on why physicians (among other groups) are making this issue the focus of their efforts at tort reform. Specifically, physicians are trying to place a cap on non-economic damages, usually for pain and suffering, either through state constitutional amendments or legislation.

While punitive damages and damages from pain and suffering are conceptually distinct, they are in many ways also similar — the products of juries and decisions made by these same juries. In states where limits on punitive damages are in effect, trial lawyers are shifting their tactics by basing their demands for awards to pain and suffering.

In light of the multiple and complex findings discussed in this book, it is well to focus on the most important ones since they give an over-all view of the subject which then can serve as a locus for further discussion, particularly in relation to what realistically can be done in the current tense atmosphere.

MOST JURY AWARDS ARE VARIABLE, IRRATIONAL, WITH NO ESTABLISHED NORMS ON HOW TO GUIDE JURORS, Even though jurors — regardless of age, gender, ethnicity, or occupation — agree most of the time on what constitutes negligent behavior, they often do not agree on how to translate this behavior into dollars. Lack of standards, inability to understand the intricacies of the law and absence of consistent precedents contribute to erratic and sometimes shocking judgments that virtually make a mockery of the law. Numbers are tossed out like they were drawn from a toss of the dice. Remember the $144.8 billion awarded in Florida against tobacco manufacturers? (Two of those lawyers in the suit — one from Orlando, another from Jacksonville — ran for Congress and both lost).

THE HIGHER THE NUMBERS SUGGESTED BY THE TRIAL LAWYERS, *THE HIGHER THE AWARDS* TEND TO GO. That's right, folks. It's a trick of the trial lawyers that few people know about. Always start with a high number and, presto, the jurors tend to gravitate to that number. Jurors also appear more sympathetic to local plaintiffs in the local setting, though they don't make any distinction where the defendants come from (the money, after all, comes regardless of where defendants found guilty live or are based at). Furthermore, jury deliberations tend to amplify the numbers given by individual jurors prior to these deliberations

JURORS MOST OFTEN EXHIBIT A HINDSIGHT BIAS, TENDING TO FAULT DEFENDANTS FOR ACTIONS (AND CONSEQUENCES) THEY SHOULD HAVE KNOWN BEFOREHAND. This Monday-morning quarterbacking is of course unrealistic, especially in medicine. We all live in a complex world where the best laid plans of men cannot always guarantee complete success. A model like this inevitably will fail because perfection can never be made the standard, no matter how much we try to achieve it. No wonder "somebody must be at fault" when something goes wrong, as countless number of physicians can testify who have been victimized by frivolous suits. And defending these suits now costs more money.

JURORS OFTEN FORGET INSTRUCTIONS FROM THE JUDGES, WITH ONLY 20% FOLLOWING THESE INSTRUCTIONS. Is there any question why we see runaway juries when they barely adhere to the instructions given to them by judges? The jury system has been defended as a way to overcome biases inherent in a system where decisions are made by individuals. Empiric results from these studies suggest that collective jury judgments are not any different from individual judgments. No wonder Philip Morris is appealing the $28 billion judgment against it, particularly when jurors completely ignored individual accountability and then arrived at such an outrageous figure because "they want to send a message." Justice is what we need, not a screwed up message like this.

IN CASES INVOLVING REASONING ABOUT RISKS AND UNCERTAINTY, JURORS PERFORM POORLY AND ARE TAINTED BY BIASES. A lot of cases brought before juries, including malpractice cases, are complex and technical that require more than a modicum of knowledge about certain subjects. Empiric results from these studies showed that jurors can be swayed by irrational expectations that risks can be reduced to zero (called zero-risk mentality), that they judge harshly defendants employing safety policies but who are in fact not legally negligent, and that they display an anti-defendant bias with their inability to balance costs against benefits in dealing with uncertainty. I believe this is one reason why the U.S. Supreme Court has required trial and appellate judges to review punitive judgments, though such reviews have not been as strictly enforced in medical malpractice judgments for pain and suffering.

JUDGES PERFORM BETTER THAN JURORS, BUT ONLY SLIGHTLY, AS A RULE. This is to be expected considering their superior education and legal experiences. Judges scored better in reasoning about uncertainties and risks, judgments of liability with punitive damages, and were less liable to be swayed by hindsight and zero-risk mentality. This is not to say that there are no exceptions. Mississippi is an example. Jefferson County, with a

See BOOK REVIEW, page 4

MY DAY IN COURT

by H. Frank Farmer, Jr., M.D., Ph.D.

In November 1999 I was served with a notice of a suit being filed against me for supposed "medical negligence". In October 2002, I went to trial in Deland, Florida. This trial lasted 8 days before the jury was excused to decide my fate. They deliberated for one (1) hour and brought back a verdict in my favor. I learned a lot during those 3 years and 8 days of trial and thought that other doctors may benefit from my experience. I want to give some of the points that I consider important for physicians to remember facing this ordeal. These are in no particular order of importance but are issues that I came to consider important in being a defendant in an "accused malpractice case". I will list these issues one by one and then discuss why I consider them to be important and my thought process.

HAVE THE BEST ATTORNEYS. I realize that it may be out of the control for doctors to decide who your attorneys will be as the insurance companies decide this, but you do have some input. Find out about the defense attorneys in your area that your insurance company uses. Research them, talk to your colleagues. Talk to your fellow physicians who have been defended by these attorneys. All attorneys have reputations. Find out what these reputations are. You are about to go through a process - a system of justice. This does not mean that you will receive justice, it only means that you will be accorded the system. This may not be fair, but it is what you have. The way you will get a shot at real justice is to have excellent attorneys who can present your case. The law firm of Smith and Schoder, which has an excellent reputation, defended me. I was fortunate. I had superb legal representation. I thought throughout the trial that my attorneys were better than the plaintiff's attorneys who were trying to skewer me. Even though your attorneys may be better and excellent, it does not mean you will win at court but at least you will have a better than average chance of not losing.

ACCEPT THE FACT THAT THIS IS THE DECK OF CARDS YOU WERE DEALT. It will do no good to lament that what is happening to you is unfair and should not be occurring. It probably is unfair and it should not be happening to you - but it is. Don't waste your time and efforts on the unfairness of the situation. It will only take away time from your defense and create a weakness you do not need. You cannot change the fact that you are involved in this situation and to dwell on it will do you no good.

ACCEPT THE FACT THAT YOU ARE AN ADVISER. BUT YOUR LEGAL TEAM IS THE CAPTAIN OF THE SHIP. You are not in charge of your defense, your attorneys are and fortunately for you, that is the case. Your attorneys understand the system. They are not emotionally attached as you are but obviously they want to win. They do want your advice. After all, you understand the case better than anyone. You are the expert in the case. However, your attorneys are the experts in the legal field. Do not hesitate to give them information about the case, especially when you sense that something is not being presented correctly. Educate your attorneys. Let them know exactly what your thinking was when you made the decisions that you did. If your attorneys are like the people who represented me, they want you to give your opinion, they want your input, and whether or not they will use that input or opinion(s) depends on what they think is best for you and for your legal defense. Do not try to become your own defender. Let your attorneys defend you and let them guide you through the process. You cannot expect them to act on everything that you think they should act upon. If you do not trust them, then go to your insurance company and ask to have another attorney. However, if they are going to defend you, they have to have your complete trust and confidence and you have to let them guide you.

PUT YOUR FEELINGS ASIDE, AND DO NOT LET EMOTIONS PLAY ANY PART IN THE PROCESS. This whole process and especially the trial is one where your emotions cannot become evident. You have to remember as you sit in the trial that there are six (6) people on the jury, plus a judge, plus the plaintiff's attorneys who are watching you at all times. There is always someone in the jury box who watches you, your body language and your expressions. Let your attorneys speak for you and let your expressions say nothing. Your best defense is your knowledge and your ability to not become emotionally involved. Do not get into an argument with the plaintiff's attorney and do not get into a sparing match with them. They will always win in this venue and you will have reduced your chance of coming out of this with a verdict in your favor. It is a very difficult thing not to become emotionally involved because obviously you are emotionally involved. Take that emotion and turn it into a deliberate process in which you are analyzing the answers, the questions of the attorneys and give as much information as you can to your attorneys to help them as they defend you.

DETERMINE EARLY ON IF YOU ARE REALLY WILLING TO GO TO TRIAL. I learned some interesting things about physicians and the legal system as my case went through years of depositions and eight (8) days of trial. I learned from the insurance company that almost 100% of all doctors when they are first sued wish to vigorously defend the case, they do not want to give any money to the plaintiffs and they tell the insurance company to go to trial. After years of depositions, mediation and the emotional turmoil that this extracts from physicians, almost 80% of physicians by the time they reach the trial have changed their mind and start putting pressure on the insurance companies to settle rather than go to trial. If you are not emotionally equipped to go through a trial, you should determine that early on and talk with your insurance company. It is an emotional struggle and absolutely gut wrenching when the jury walks out to decide your verdict as you consider some of the multi million dollar verdicts that have been returned. However, if your insurance company and your attorneys have given you the advice that this is a defensible case and they wish to go to trial, then in my opinion you should follow that advice and go to trial. However, as I stated above, if you feel that this is something that you cannot emotionally go through, then you really need to determine that early on and save the insurance company and yourself a great deal of emotional stress and strain. It also will not endear the insurance company to you if, over their advice, you pressure them to settle when they feel that this is a defensible case. This is one of the most important principles in my mind and it is one that I came to grips with when the trial started. This principle is:

ACCEPT THE FACT THAT YOU MAY LOSE. If your insurance company and your attorney feel that you have a defensible case and you go to trial, you have a better than average chance of walking out of that courtroom being found "not at fault". However, there are still 20-30% of physicians who go to trial who will have some judgment brought back against them. There is apparently no way of knowing all the factors that go into what determines what a jury is going to decide. I have heard stories of cases in which the attorneys and insurance company thought they had a sure-fire case, and the jury has brought back multi million dollar verdicts for the plaintiffs. I have heard other cases in which it was felt that the case may be somewhat "iffy" and the jury has come back very quickly with a verdict in favor of the physician(s). In either case, you stand and accept that you may lose this case when the jury verdict comes back. If you cannot live with that, then that is another reason for you to talk with the insurance company and talk with them early to prevent all the work that may lead up to a jury trial. In my case, I had decided early in the trial that I may lose. This was not because I thought we had a weak case because I did not think we had a weak case, but I also knew that juries can do strange things and I also knew that in a complex medical case that the jury may not understand all the issues and may not always bring back a verdict in favor of the physician. However, I had accepted this and in my own mind I was, I think, emotionally equipped and ready to accept if that were to occur. Fortunately it did not in my case, but it does in 20%-30% of the cases that go to trial.

UNDERSTAND THAT IT IS THE JURY THAT IS GOING TO GIVE YOU A DECISION AND NOT THE PLAINTIFF'S ATTORNEY OR ANYONE ELSE. The jury has got to understand what went into your thinking and your thought process when you came to the decisions that you did. Your attorney will give you the opportunity to tell that jury what happened. You have to understand that you are educating non-medical people in medical issues and you are also taking them back to that point in time. Your decisions are not made in a vacuum and they are made at the point in time in which you had certain information available to you. The jury of course is going to hear information that occurred later which you did not have access to. The plaintiff's attorneys are going to try and paint that information as something that you did know, should have known and which would have given you a different perspective from which you make your decisions. You need to speak to the jury directly, you need to look at them and you need to explain to them exactly what happened at that point, at that time, when you made those decisions, and what information was available to you in making that decision. Those are the people who are going to decide your fate and they want to hear your story. They want to hear you explain what it was that was going through your mind when you made that decision. My attorneys gave me some very good advice. They said that I should be thankful that this system exists that I could explain to the jury exactly what happened. I am not sure that I fully believed I was fortunate enough to have this system when I was sitting in a courtroom being accused of something that I did not feel was medically negligent, but it was good advice for me to understand that I had the opportunity to explain to the jury what occurred when I made my decision.

The last principle and another one that is extremely important is, WHEN IT IS ALL OVER REVIEW THE CASE TO SEE WHAT YOU WOULD HAVE DONE DIFFERENTLY. No matter if you did everything that was perfectly appropriate medically, there are always some things that you may have done differently. In retrospect, you may have spent more time talking with the patient or the family and explaining what the situation was. You may have spent more time outlining the various options that were available even though you certainly went through them in your mind in making your decisions. If upon reviewing, the case, you felt that there was absolutely nothing you would do different, then God Bless You. If you discover that there were things that perhaps may have made a better relationship between you and the patient and the family, then that is a lesson to be learned and to carry over into the future.

These are just some of the things that occurred to me as I thought back about my case and the trial. I realize of course that everyone handles things differently and everyone may have a different approach. However, I found these thoughts to be helpful to me. I would be glad to talk with anyone who wishes to talk with me or to give them any support they may need, or give them any advice who may be going through a similar situation. You can call me and talk to me at any time either at my office, at my home or my cell telephone which is (386) 212-0324.

In summary, I do believe that things will get better in the near future as far as medical liability is concerned. I think the public is now starting to side with the medical profession against lawsuits that threaten to cripple and hinder their access to medical care. Do not lose heart and do not become discouraged, but continue to work toward this goal.

Taken from the Winter 2002 issue of the Stethoscope. Reprinted by permission of the Volusia County Medical Society.

Continued from page 3

BOOK REVIEW

population of just over 9,000, has attracted 21,000 lawsuits between 1995 and 2000, because of the popular perception of a judge as being friendly to plaintiffs.

And let us not forget that judges have not overturned widely publicized cases where the public perception has been that of outrage, including that famous Bronco case in California where a teenager who had been driving all night swerved to avoid another vehicle, causing it to tumble and cause the death of three passengers. He was awarded $290 million in punitive damages despite Ford exceeding all safety standards for light trucks at that time. A trial judge threw out the verdict because of juror misconduct and faulty evidence, but an appeals court restored the original verdict.

And so where does that leave us? Still in ground zero. Battle lines are again being drawn as a new liability crisis is threatening to cut through wide swaths in medicine and business. The U.S. House of Representatives has passed legislation putting a $250,000 cap on non-economic damages (pain and suffering), but the old liberal geezers at the U. S. Senate still have not broken their love ties with the trial lawyers. Twenty states have been identified by the AMA caught in the liability squeeze, with Florida standing out in the forefront along with New York, Nevada, Mississippi (there you go again), and Texas.

Cass R. Sunstein, the lead author in this book and a distinguished scholar from the University of Chicago, and his colleagues propose some solutions that should be looked at as an incremental step in cleaning up the inequities of the current tort System. They make these proposals amid the difficulty of resolving the question of whether punitive damages should be given for deterrence as opposed to punishment or retribution, and only for good reasons, cognizant of the costs and benefits to society.

One proposal calls for more active involvement of judges in deliberations of these cases particularly in determining the dollar amounts doled out for punitive damages. But there is one drawback: Judges, as was already mentioned, may be subject to the same biases as jurors, making predictability in the system just as impossible as in the current system.

A complementary proposal to judicial oversights is to base punitive damages along the lines of the Workmen's Compensation System, which would somewhat make the system more predictable. Along with this, judicial comparisons of analogous casesmay refine the system further. But such proposals again do not address the problem of gigantic awards, which have been the bane of the tort system.

Caps along the lines of the House Bill recently are mentioned but with little fervor. In their own words: "Perhaps the best that can be said about a cap is that with little administrative cost, it will eliminate the most egregiously large judgments. But the virtue comes with a vice: If the cap is too low, it will prevent large judgments that are entirely justified." One can counter this argument that if California, for example, has had a cap since 1975 and has been successful in stabilizing premiums, why not try it elsewhere?

His best proposal is to eliminate juries altogether and assemble a body of experts knowledgeable in the subject on trial, with judicial guidelines of course. That is a pipedream and is not likely to happen in our lifetime, or at least until America stops its mass production of lawyers.

I was quite disappointed that the authors only briefly mention contingency fees, feeling as many people do that these generate most of the greed that now motivates many trial lawyers to roll the dice even in cases where there is absolutely no merit. Equally disappointing is the absence of any discussion of frivolous lawsuits and a means to curb these with counter lawsuits which are extremely expensive and difficult to mount at present.

But even with these failings, this book is a load of information that physicians and business interests can find mighty useful particularly if they are in the frontlines of the tort reform battle. Politicians along with legislators also should profit from knowing more about what is at stake for their constituents. Two of the five authors are lawyers but, to their credit, they exhibit no partiality towards their profession. If anything, they have made a cogent argument on why tort reform is needed more than ever.

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RALLY IN TALLAHASSEE

Florida physicians will unite together to rally at the State capital in Tallahassee at the front steps of the Old Capitol. **Please see the enclosed insert.**

OPERATION VACCINATE FLORIDA AND THE INDIVIDUAL PHYSICIAN

by Michael Barnaby, Public Information Officer, Lee County Health Department

By the time you read this article, the first phase of Operation Vaccinate Florida will be well on its way to completion, and you will have received an informational CD-Rom directly from the Florida Department of Health regarding smallpox vaccination in our state. Officially begun on February 10, Phase I ensures the vaccination of key county Health Department personnel, and following a fourteen day waiting period designed to ensure the health of those first vaccinated, the immunization of select hospital personnel. In Lee County, the number of selected physicians and staff vaccinated initially is estimated to reach between 700 and 800. Throughout, the guiding philosophy behind Vaccinate Florida is to assure our abilities to respond to crisis, care for patients and conduct public health investigations.

Phase I is expected to take approximately two months to complete. Phase II, to include the voluntary vaccination of "first responders," including law enforcement personnel, EMS, firefighters and others considered to be essential infrastructure support and healthcare personnel, will follow closely the completion of the first phase. Phase II may entail the immunization of up to 400,000 Floridians.

At the office level, as Operation Vaccinate Florida progresses, physicians can expect to see an increase in patient interest in smallpox, requests for the physician's opinion on whether or not to choose vaccination, and possibly a patient with an actual adverse reaction. A sound resource (apart from the informational CD packet being sent to every physician in the state) is the CDC's physician link, reached at http://www.bt.cdc.gov/agent/smallpox/index.asp. Click the link marked "Clinicians." Also, should the need arise, Dr. Judith Hartner, Lee County Health Department Director, can be reached twenty-four hours a day at 470-7268. For general physician information on smallpox disease, vaccine administration, and assessing adverse events, calls the CDC Hotline at (877) 554-4625. A vast store of information for laymen is also available at the CDC website, much of it geared to help the patient make an informed decision on this important subject. The Hotline for laymen is (888) 246-2675.

Medico-Legal View

TORT REFORM 101

Barbara Harty-Golder, M.D., J.D.

Sometimes it takes a crisis to create action and this just might be the year. With malpractice premiums doubling and tripling for physicians, and more physicians finding it harder to find insurance at all, the civil litigation system has finally begun to impact Joe Ordinary in his medical care. All over the state, hospitals have closed emergency rooms and trauma centers, obstetricians have quit delivering babies, mammography centers are having difficulty recruiting physicians and neurosurgeons are retiring or leaving the state. Ordinary medical care is beginning to be affected by the crisis in civil litigation.

This might just be the year we make some headway. We have a governor interested in litigation reform and legislators who are willing to address the issue. On the other hand, we have a Trial Bar that takes any limitation on litigation as an assault on democracy and too many legislators influenced by those vocal, self-serving lawyers.

Now, more than ever, it's important for physicians to take up the task of civil litigation reform. Get over your reluctance to be involved with things political, take the opportunity to educate your patients, and let's get some action on this issue.

In order to be effective, physicians have to be concise, relevant and united. Take the following talking points.

(1) This is a crisis in access to care, not in insurance premiums. Patients don't really care what you pay for your malpractice insurance, they care whether they can get care when they need it. The cold hard fact of the matter is that when physicians are too squeezed by the civil justice system, they seek to limit their liability. That means they stop doing things people get sued for. In Florida, that means: stop seeing Medicaid patients (fastest growing area of lawsuits is indigent care; and no physician is going to risk his livelihood to care for a patient who is high risk, for whose care he doesn't get paid adequately, or at all, and who is more *likely* to sue), mammography, high risk and complicated surgery (including head and neck surgery and gyn cancer surgery) trauma, OB, and emergency room care.

(2) A remedy exists. There's no need for panels, studies or tailor made solutions. The MICRA reforms in California controlled the rate of premium increase without affecting the rate of suit (so much for the lawyer's claim that access to the courts is reduced if reforms are made). MICRA involves setting caps on non-economic damages, providing for procedural reform, including periodic rather than lump sum payments, and permitting physicians and patients to select arbitration as the way to settle lawsuits. They work, we know it, and we should enact them in Florida in the same form they were enacted in California, where malpractice premiums are about 1/3 the cost of the same coverage in Florida – before the hike.

(3) Failing to solve the problem now will reduce access to care for all Floridians. Health care costs will increase. Insurance costs for health coverage will increase, meaning more employers will drop or lower coverage on employees. Physicians highest hit by malpractice woes will stop practicing or leave the state and it will be harder to recruit (ask any physician in West Virginia who has recently tried to recruit a new partner).

(4) Controlling the cost of civil litigation doesn't mean an inadequate remedy for injured patient – it means that the system has to be more efficient and it means that – horror of horrors – lawyers will just have to learn to get along with being paid less for doing the same job. We've all struggled as physicians to ensure that limiting the remuneration in health care not mean that patient care decline - and we've done it because we have learned efficiencies and cut costs. The costs of the civil litigation system are outrageous: less than HALF of the money awarded to patients actually reaches patients. The remainder goes to attorney fees and costs. It seems that gets spent on the system, and it's possible to do so without limiting the amount of money it takes to restore an injured patient to "wholeness."

NEW MEMBER APPLICANTS

Application for Membership

Active members are requested to express to the Committee on Ethical and Judicial Affairs or Board of Governors any information or opinions they may have concerning the eligibility of the applicants.

EDWARD HUMBERT, D.O. – ORTHOPEDIC SURGERY

Medical School: NOVA Southeastern University, Fort Lauderdale, FL (1992-96)
Internship: Ohio University Doctor's Hospital, Columbus, OH (1996-97)
Residency: Ohio University Doctor's Hospital, Columbus, OH (1997- 2001)
Fellowship: Joint Implant Surgeons, Columbus, OH (2001-02)
Dr. Humbert is in practice with John B. Fenning, M.D. at 2780 Cleveland Avenue, Ste 709, Fort Myers, FL 33901.

ANTHONY ERIC GIOIA, M.D. - NEUROSURGERY

Medical School: University of Mississippi, Jackson, MS (1974-79)
Internship: Baptist Memorial Hospital, Memphis, TN (1979-80)
Residency: University of Tennessee, Memphis, TN (1997-2001)
Board Certification: American Board of Neurological Surgery (1988)
Dr. Gioia is in group practice with Lee Neurosurgery at 2780 Cleveland Avenue, Ste 819, Fort Myers, FL 33901.

Gifts to Physicians from Industry

THE AMERICAN MEDICAL ASSOCIATION'S CLARIFICATION OF GIFTS TO PHYSICIANS FROM INDUSTRY

Scope

Opinion 8.061, "Gifts to Physicians from Industry" is intended to provide ethical guidance to physicians. Other parties involved in the health care sector, including the pharmaceutical, devices and medical equipment industries and related entities or business partners, should view the guidelines as indicative of standards of conduct for the medical profession. Ultimately, it is the responsibility of individual physicians to minimize conflicts of interest that may be at odds with the best interest of patients and to access the necessary information to inform medical recommendations.

The guidelines apply to all forms of gifts, whether they are offered in person, through intermediaries, or through the Internet. Similarly, limitations on subsidies for educational activities should apply regardless of the setting in which, or the medium through which, the educational activity is offered.

Guideline 2

Individual gifts of minimal value are permissible as long as the gifts are related to the physician's work (e.g., pens and notepads).

(a) May physicians, individually or through their practice group, accept electronic equipment, such as hand held devices or computers, intended to facilitate their ability to receive detailed information electronically?

Although Guideline 2 recognizes that gifts related to a physician's practice may be appropriate, it also makes clear that these gifts must remain of minimal value. It is not appropriate for physicians to accept expensive hardware for software equipment even though one purpose only may pertain to industry-related activities of a modest value.

Guideline 3

The Council on Ethical and Judicial Affairs defines a legitimate "conference" or "meeting" as any activity, held at an appropriate location, where (a) the gathering is primarily dedicated, in both time and effort, to promoting objective scientific and educational activities and discourse (one or more educational presentation(s) should be the highlight of the gathering), and (b) the main incentive for bringing attendees together is to further their knowledge on the topic(s) being presented. An appropriate disclosure of financial support or conflict of interest should be made.

Guideline 4

Subsidies to underwrite the costs of continuing medical education conferences or professional meetings can contribute to the improvement of patient care and therefore are permissible. Since the giving of a subsidy directly to a physician by a company's sales representative may create a relationship which could influence the side of the company's products, any subsidy should be accepted by the conference's sponsor who in turn can use the money to reduce the conference's registration fee. Payments to defray the costs of a conference should not be accepted directly from the company by the physicians attending the conference.

(a) Are conference subsidies from the educational division of a company covered by the guidelines?

Yes. When the Council says "any subsidy," it would not matter whether the subsidy comes from the sales division, the educational division or some other section of the company.

(b) May a company or its intermediary send physicians a check or voucher to offset the registration fee at a specific conference or a conference of the physician's choice?

Physicians should not directly accept checks or certificates which would be used to offset registration fees. The gift of a reduced registration should be made across the board and through the accredited sponsor.

This article was continued from November 2002 issue of the Bulletin. Gifts to Physicians from Industry will be an ongoing series of articles that was taken for the AMA's Council on Ethical and Judicial Affair Clarification on Gifts to Physicians from Industry (E-8.061). Issued

A LEGAL CRUSADER'S SOLUTION TO THE MALPRACTICE MESS

Juries and most judges may be obsolete in deciding tough medical cases, says a lawyer whom doctors have come to love.

By Wayne J. Guglielmo
Senior Editor

Attorney Philip K. Howard thinks we'd all be better off with fewer laws—and fewer lawsuits.

In his first book, *The Death of Common Sense: How Law is Suffocating America* (Random House, 1995), Howard described a culture in which rules had replaced thinking and process had usurped responsibility. In his most recent book, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (Ballantine Books, 2001), Howard pushes his thesis one step further. He took his message to the AAFP's scientific assembly in San Diego last October and it was welcomed heartily.

In pursuit of fairness at any cost, Howard says, we have created a society paralyzed by fear and distrust of the legal system. "For every legal claim, there are millions of daily decisions not made, or not made reasonably, because of anxiety over possible lawsuits," he notes.

We talked with Howard about how this anxiety has affected doctors and the practice of medicine.

Q *Medicine has been transformed, you say, by America's lawsuit culture. Would you explain what you mean?*

A Many health care providers don't trust that the justice system will protect them if they do what's right. As a result, medicine has suffered a kind of nervous breakdown.

Take, for example, the doctor-patient relationship. Many doctors see patients as potential plaintiffs. That leads to defensive medicine, which costs society billions of dollars a year.

Professional interaction is another casualty of the current system. Physicians aren't candid with one another; for fear that any admission of uncertainty might have legal consequences down the road. This is a serious problem in a profession that's as much art as science—and in which professional interaction can materially advance the quality of care.

Distrust of the system also makes people unwilling to innovate. They fear that any change can be criticized if it doesn't work out v ll at first, even if it ends up being the right thing to do. Indeed, ou let people sue for tens of millions of dollars if something doesn't work out, you're *not* going to get much innovation. e list could go on.

Q *As a giant step toward fixing these problems, you've called for a new medical court, staffed by full-time judges who have the expertise and authority to evaluate medical treatment. How would this new court make things better?*

A First, consider the fact that rulings under the current system don't automatically serve as precedent. Indeed, even if a doctor wins a lawsuit, someone could still bring the same suit against him tomorrow. A medical court would either toss out such claims or award reasonable damages, when appropriate. Over time, physicians would better know where they stand and would thus become more comfortable in the practice of medicine.

Second, since medicine has become so technical, a court staffed by judges who had medical expertise could actually make informed judgments about the right standard of care in a given circumstance. Right now, it's very hard for any lay judge or jury to do that.

Third, a reliable medical court could provide incentives for improvements in health care—in systems or in the use of modern technology—without the heavy hand of regulation.

And fourth, given the current level of physician distrust of the justice system, a new medical court would be a clean and welcome break from what we currently have.

Q *So you would eliminate jury trials in medical malpractice cases?*

A Yes, I would. That's because medical malpractice cases aren't factual disputes, but rather disputes over the proper standards of care, and that requires experts.

Q *But don't state medical boards, which are essentially courts of experts and physicians' peers, now serve at least some of these purposes?*

A I'm told that they're extremely ineffective at weeding out doctors who, for whatever reason, are no longer up to the task. Also their primary job is to sanction doctors who've acted unlawfully, rather than just incompetently.

To protect the public, perhaps we could put licensing or credentialing under the jurisdiction of the medical court.

Q *Consumer advocates have criticized physician-run state medical boards for being too lenient. But doctors complain that some boards are overly punitive, particularly in the areas of pain management and prescribing. How would a new medical court walk the narrow line between leniency and heavy-handedness?*

A It's pretty clear that a lot of bad physicians keep their licenses. So I think there has to be more effective and more up-to-date credentialing.

At the same time, I'm aware that medical boards are sometimes hard on doctors with regard to pain management. They should have decision makers who understand that palliative care is sometimes the right care, even if that means giving somebody who's going to die plenty of narcotics, despite what the guidelines might say. Under such circumstances, you need a decision-making body that recognizes what's reasonable, given the current values of the profession.

Of course, there's no guarantee that this decision-making body will always act fairly. But if its charge is to do what most people in the profession consider reasonable, then that's the best we can hope for.

Q *Who would serve on these new medical courts?*

A Judges with medical expertise, or physicians, or a three-person court with an attorney and two physicians. Whatever their backgrounds, people who sit on the court should have the expertise to understand the language of medicine and what the guidelines say about acceptable standards of care. They must also understand the differences between being a solo practitioner in the middle of Montana and being at New York-Presbyterian Hospital.

Q *Are there any alternatives to the idea of a new medical court?*

A There are many options, including, perhaps, a government agency. But whatever we come up with, we need an authoritative mechanism that stands for right and wrong, because without that, everything is subject to a lawsuit—and the system kind of falls apart.

Q *If we do establish a medical court, would one of its purposes be to hold down large awards?*

A We must always balance the alleged predicament of an individual against the broader interests of society. Of course, sometimes it may be appropriate to have a very large award. But in such cases, the decision makers need to understand that the money isn't coming from some secret cache—it's coming out of the health care system. So making someone rich because his 92-year-old grandmother died due to inadequate care isn't very sensible.

In such a case, it might make sense to put somebody in jail or take away his license. But giving a claimant millions decreases the amount available to care for everyone else. A medical court would be able to ask the essential question: What's best for all of society?

Q *Under such circumstances, would the trial bar be reluctant to take on cases, even legitimate cases, leaving at least some injured people out in the cold?*

A Plaintiffs' lawyers might still take on cases. Or we might have a special fund for compensating lawyers who accept cases on a noncontingency basis, as England has. All of these things can be worked out. But, in the end, you want a system that enables injured people to have access to justice in a way that's efficient and fair to all parties. The current system is more of a lottery: You win, or—more often—you get nothing. And if you have an injury that's worth less than $50,000—actually the number is more like $200,000—it's hard to even find a lawyer who will represent you.

For More . . .

Attorney Philip K. Howard is the founder and chairman of a group called Common Good; its tagline is "Reforming America's Lawsuit Culture." From the group's Web site (*www.drawing-the-line.com*), you can download a "Fear of Litigation" study commissioned by Common Good and conducted by Harris Interactive. The study details the cost of defensive medicine