Medical/Legal Reform
CONSTITUTIONAL AMENDMENT
Recommendation #1

The Wyoming Healthcare Commission recommends adoption of the Constitutional Amendment as proposed by Governor Dave Freudenthal.

NEW Article 10, Section 4A:

Any section of this Constitution to the contrary notwithstanding, the Legislature shall, in any civil action where the act or omission of a health care provider has been alleged to have resulted in death or injury to any person, have the right to:

(a) Limit the amount to be recovered for noneconomic loss arising from the death or injury;

(b) Mandate an alternate dispute resolution process or other review of the matter by a medical review panel prior to the filing of a civil action against a health care provider.

This allows for the legislature to set caps, if appropriate, for noneconomic damages in medical liability cases.

This would also allow for the creation of a medical review panel or other mechanism for determining the validity of a complaint prior to the filing of a civil action against a healthcare provider.

This approach allows the people of Wyoming to decide whether or not the Wyoming Constitution should be amended.

This approach allows the Wyoming Legislature the flexibility to set and change noneconomic cap levels according to current market conditions.

DAVE FREUDENTHAL
GOVERNOR

THE STATE OF WYOMING

STATE CAPITOL
CHEYENNE, WY 82002

Office of the Governor

October 22, 2003

Chris Muirhead
Wyoming Healthcare Commission
P.O. Box 2760
Casper, WY 82602

Dear Chris:

Thank you for the immeasurable time and effort you and the members of the Healthcare Commission have put into finding solutions for the myriad healthcare difficulties facing Wyoming.

I know that, among those potential answers, lays the question of tort reform. Whether or not such tort reform is one solution to Wyoming's troubles remains to be seen. I do know, however, that the conversation cannot advance beyond the hypothetical at this point. I believe we must amend those provisions of the Wyoming Constitution that prevent us from engaging in meaningful debate.

Time is critical to this issue. Any amendment to the Constitution must be proposed to our citizens at a general election, after being approved by the Wyoming Legislature. That means that a constitutional amendment must be approved during the upcoming legislative session (February 9-March 9, 2004) if it is to be included on the ballot next November. Otherwise, it cannot be placed on a ballot until 2006.

Attached, please find a narrowly tailored proposal for the language of the constitutional amendment, which would apply only to healthcare-related litigation. It allows the Legislature, if it chooses, to place limits on noneconomic damages in healthcare claims. The Legislature could also put into place an arbitration process or mandatory review panel. I ask that the commission consider recommending to the Legislature that the public be allowed to consider this amendment. I am not sure that this is the precise language for an amendment. It is offered as a means to get the conversation moving forward.

Again, I am not asking for a vote on whether tort reform as it relates to healthcare solves Wyoming's problems. I am asking for a vote on whether tort reform will be among the options available for consideration by the Legislature in 2005.

Best regards,

Dave Freudenthal
Governor

DDF:LA

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Medical/Legal Reform
SUBCOMMITTEE RECOMMENDATION
#2

The Wyoming Healthcare Commission supports a study to determine the feasibility and affordability of Senator Charles Scott's Worker's Compensation-Style proposal to improve the quality of healthcare in Wyoming. Further, the Wyoming Healthcare Commission is willing and able to facilitate such a study under the direction of the Wyoming Legislature.

Senator Scott's proposal aims to:

- **Identify healthcare errors**
- **Identify general causes of healthcare errors**
- **Pin-point and address systemic causes of errors**
- **Prevent future errors through systems improvements**
- **Improve the delivery of healthcare services through enhanced patient safety**
- **Compensate individuals injured as a result of a major medical error**

The Wyoming Healthcare Commission recognizes that this is an original idea, and therefore untested anywhere else. However, we see enough potential in the concept to recommend that a focused analysis be done if the Wyoming Legislature appropriates study funds.

TEXT OF PROPOSED WORKER'S COMP STYLE CONSTITUTIONAL AMENDMENT
SJR-2, Wyoming State Senate, 2003 Session

The legislature shall provide by law for a commission on health care errors. The primary purpose of the commission shall be to improve the quality of health care through the identification of health care errors, the identification of the causes of the errors and the prevention of future errors and improvement in the system of health care delivery. The commission shall have the right on its own motion, independent of any claim for benefits, to make any inquiries its deems appropriate into health care errors and quality improvement needs of the health care system. The legislature shall by law provide the commission those powers the legislature deems appropriate to achieve these purposes. Any person who, in good faith, reports a medical error or suspected error to the commission shall be immune from civil liability for having made the report. When a person suffers death or injury from health care due to a degree of negligence specified by law, the commission shall determine if health care negligence has occurred and shall determine the compensation for the death or injury according to a schedule or formula provided by law and the commission may also require the health care provider not receive compensation for the services that included the error. The legislature shall by law provide a system for any person injured as a result of a medical error to file a claim for benefits with the commission and have his claim heard and decided, including specifying the nature of any procedural rules to be followed and the degree to which proceedings shall be kept confidential to protect the privacy of the injured individual. The legislature shall provide by law for a fund or funds out of which shall be paid only the expenses of the commission, the administration and management of the commission and the fund, and the compensation authorized by this section for individuals and families suffering death or injury from health care. The legislature shall provide for the payment of premiums to the fund by all health care providers, both persons and institutions, and the amount of premiums paid may be varied by type of provider and institution, by volume of business, by claims experience, and any other factor provided by law. The right to compensation from the fund shall be in lieu of and shall take the place of any and all rights of action against any health care provider contributing as required by law to the fund. Any party aggrieved by a final action of the commission may appeal to the courts as provided by law. The appeal shall be that the action of the commission was contrary to law or constituted an abuse of discretion and shall be on the record of the final action of the commission and any other record as is provided by law. Attorneys for an appeal from an action of the commission shall be paid by the fund according to a fee schedule set by law. The legislature may by law provide for any subordinate commissions and administrative agencies as may be useful in implementing this section. Any subordinate commissions shall be deemed part of the commission as appropriate.

Sen. Charles Scott
9-21-03

THE PROBLEM

8 to 10 % MEDICAL INFLATION

12 to 20 % LARGE GROUP PREMIUM INC.

27 % SMALL GROUP PREMIUM INCREASE

MEDICAL INFLATION . . . *the Usual Suspects*

- **Rx Drugs**

- **Hospital Costs:**
  1. **Professional Wages**
  2. **New technology**
  3. **New Construction**

- **Decline of Managed Care**

- **Administrative Costs**

- **Government Regulations**

- **Medical Errors**

- **Medical Malpractice**
  1. **Direct Costs**
  2. **Defensive Medicine**

HIGHER INSURANCE COSTS

COST SHIFTING 30 %

- **MEDICARE 15 %**
- **MEDICAID 5 %**
- **BAD DEBT / CHARITY 10 %**

OTHER CAUSES

- GOVERNMENT REGULATIONS AND MANDATES
- INSURANCE COMPANY LOSS OF INVESTMENT EARNINGS
- INSURANCE CYCLE
- ADVERSE SELECTION

MEDICAL MALPRACTICE: PRESENTATION SUMMARY

Charles Scott, Wyoming State Senate, 307-473-2512

"The positions of both sides of the Medical Malpractice debate are well known and virtually calcified." Health Affairs, July/August 2003, editor's prologue to malpractice articles.

SKYROCKETING MALPRACTICE INSURANCE RATES

-- 1% to 2% of total health care costs
-- 7% to 8% of increase in health care costs
-- Concentrated in certain medical specialties
-- Hospitals and nursing homes also affected
-- Can cause key health care to become unavailable

PEOPLE RUNNING THE SYSTEM GET MOST OF THE BENEFIT

-- 25% to insurance companies
-- 25% to defense lawyers
-- 25% to plaintiff's lawyers

75% subtotal, cost of running system

25% to injured victims

TORT SYSTEM DOES A POOR JOB OF IDENTIFYING VALID CLAIMS

-- Only 2% of valid potential claims are brought
-- Many of the paid claims are not valid

see attached chart

SYSTEM IS INEFFECTIVE AT QUALITY CONTROL

-- IOM study "To Err is Human"
  -- Between 44,000 and 98,000 deaths/year in U.S. from medical error
-- 5th leading cause of death (high estimate)
-- 9th leading cause of death (low estimate)

SYSTEM CAUSES DEFENSIVE MEDICINE

-- Difficult to quantify
-- Best estimate is between 10% and 20% of total health care cost
-- Additional risk to patients
-- Defensive Medicine, administrative costs, reimbursement levels & prescription drugs can explain most of the difference in costs between U.S. and other developed countries

SOLUTIONS
-- Traditional tort reform
  --Caps
  --Collateral source rule
  --Periodic payments
  --Contingency fee limits

Idea is to limit premiums by limiting payouts. Does that if limits are low enough.

-- Enterprise liability
-- Administrative Compensation
  --No Fault
  --Worker's Comp style system

WORKER'S COMP STYLE SYSTEM
-- Create a Medical Errors Commission
-- Primary focus is on prevention of medical error
-- Commission composed of professionals
-- Not a pure no fault system, some determination of negligence or avoidable error
-- Compensation on a schedule like worker's comp
-- Must be an exclusive remedy
-- Funded by premiums on health care

ADVANTAGES OF WORKER'S COMP STYLE SYSTEM
-- Increased patient safety
-- expect 80% of money spend to go to injured victims
-- More effective compensation for long lasting injuries
-- Improved doctor/patient relationship
-- Make practice of medicine more attractive
-- Abolishes role of lawyers & malpractice insurers
-- Eliminates need for defensive medicine

POTENTIAL PROBLEMS WITH WORKER'S COMP STYLE
-- May cost more
-- Who Guards the Guardians ?
-- Difficulty of keeping tort system from creeping back in
-- Depends on skill and dedication of Commission
-- Defensive medicine may persist

Relationship between injuries & claims

