TESTIMONY BEFORE
THE WYOMING HEALTHCARE COMMISSION

PRESENTED BY
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I am Stephen Northrup, health policy advisor to United States Senator Mike Enzi. On behalf of Senator Enzi, I thank you for the opportunity to speak to the Wyoming Healthcare Commission on federal medical liability reform efforts and the Reliable Medical Justice Act, which Senator Enzi introduced last month.

Senator Enzi wanted to be here, but he is in Africa right now with a group of Republican Senators, including the Senate Majority Leader, Bill Frist.

Senator Enzi worked on and voted for the landmark legislation that Congress passed earlier this year to accelerate the fight against HIV and AIDS in Africa and the Caribbean. Right now, Senator Enzi, Dr. Frist and the other Senators are visiting hospitals and clinics in several African countries to see first-hand the impact that HIV and AIDS are having on African families and societies, and to make sure that the taxpayers' money is going to be spent wisely.

As you know, today's drug therapies can prevent an HIV infection from progressing to full-blown AIDS. Since pharmaceutical companies are willing to sell these drugs at or below cost in poor countries, Congress has authorized a major increase in funding to build networks that can get these drugs to people in Africa and the Caribbean.

As a member of the Senate Committees on Foreign Relations and on Health, Education, Labor and Pensions, Senator Enzi is in a unique position to see how AIDS is destroying families and societies in Africa and creating a generation of orphans. He believes that it

would be immoral for us to sit back and watch this happen when we have the ability to change the situation with simple measures. Senator Enzi also believes that keeping mothers and fathers alive and keeping families together will create a more stable and secure Africa, which will contribute to a more secure world for everyone.

Senator Enzi will be back from Africa in a few days, and Congress will be back in session after Labor Day. When Senator Enzi returns to Washington, he will begin working in earnest to pass the Reliable Medical Justice Act into law.

When I joined Senator Enzi's staff in January, he told me that one of his top healthcare priorities was medical liability reform. As you may know, Senator Enzi co-sponsored the Senate Republican medical liability reform legislation, known as the Patients First Act. He still supports the bill, because he believes that the Patients First Act is an important short-term step to controlling the excesses in our legal system that have sent medical liability insurance premiums through the roof. Skyrocketing premiums are forcing doctors to move their practices to states with better legal environments and lower insurance premiums. This is endangering the availability of critical healthcare services in many areas of Wyoming and other states.

In July, Majority Leader Frist brought the Patients First Act to the Senate floor. Though a majority of Senators wanted to begin working to pass the bill, we didn't have the 60 Senators necessary to begin the real work on the legislation. The Senate may take up a new version of the legislation this fall, but we would begin that effort 11 votes short of the 60 votes we need to shut down a filibuster.

If Senator Enzi has any criticism of the Patients First Act, it's that it's not audacious enough. Tort reform is a laudable goal, and the Patients First Act indeed would help in the short term to stabilize our medical litigation system and the liability insurance market. However, the Patients First Act would still leave a fundamentally flawed system in place.

What are the flaws in our current medical litigation system?

Well, first of all, compensation to patients injured by healthcare errors is neither prompt nor fair. The randomness and delay associated with medical litigation does not contribute to timely, reasonable compensation for most injured patients. Some injured patients get huge jury awards, while many others get nothing at all.

A series of major retrospective studies[1,2,3,4,5] found a number of interesting statistics about medical malpractice claims. First, these studies found that 2 to 3 percent of those who were injured by medical negligence file claims. Stated another way, 97 percent or more of negligent injuries do not result in malpractice claims.

The same studies also found that 80 percent of malpractice claims exhibit no evidence of malpractice. In one of the studies, the reviewers could find no evidence of any medical injury at all in more than half of the claims!

Finally, one study followed a sample of malpractice claims for a decade to determine the relationship between negligent injuries and payments to the patients. The authors of the study found that in cases with no evidence of negligence, 43 percent of the claims resulted in a payment to the patient. Of those claims where there was an injury caused by negligence, only 56 percent ended with a payment.

I should point out that these studies also serve as the basis for the oft-cited claim that healthcare errors cause 44,000 to 98,000 deaths per year. Some people use these studies to suggest that there is an epidemic of medical malpractice, and they use these statistics in their fight against changing our medical litigation system. However, those people conveniently leave out the study results that

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[1] Brennan TA, Leape LL, Laird MM, Hebert L, Localio AR, Lawthers AG, et al. Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study. *New England Journal of Medicine*. 1991; 324: 370-6.

[2] Localio AR, Lawthers AG, Brennan TA, Laird NM, Hebert LE, Peterson LM, et al. Relation Between Malpractice Claims and Adverse Events Due to Negligence. *New England Journal of Medicine*. 1991; 325: 245-51.

[3] Leape LL, Brennan TA, Laird N, Lawthers AG, Localio AR, Barnes BA, et al. The Nature of Adverse Events in Hospitalized Patients. *New England Journal of Medicine*. 1991; 324: 377-84.

[4] Thomas EJ, Studdert DM, Burstin HR, Orav EJ, Zeena T, Williams EJ, Howard KM, Weiler PC, Brennan TA. Incidence and types of adverse events and negligent care in Utah and Colorado. *Med Care*. 2000 Mar. 38(3): 261-71.

[5] Studdert DM, Thomas EJ, Burstin HR, Zbar BI, Orav EJ, Brennan TA. Negligent care and malpractice claiming behavior in Utah and Colorado. *Med Care*. 2000 Mar. 38(3): 250-60.

suggest that the current medical litigation scheme does not provide equitable compensation to the injured, nor does it provide for rational and predictable legal outcomes that would have a significant deterrent effect on negligence.

Let me summarize again what these studies found: most patients who are injured by negligence receive no compensation at all, most malpractice lawsuits have no basis in a provider's negligence, and there is no significant correlation in any case between negligence and compensation. All of these facts demonstrate that the medical litigation system indeed has fundamental flaws that tort reform alone cannot fix.

These facts suggest to Senator Enzi that the best long-term answer to our current crisis is to create a new and more reliable system of medical justice. We need to replace the medical litigation system, not just reform it. We should replace it with a system that is fairer, more predictable and more reliable, both for patients and their healthcare providers.

Today, we have a medical litigation system in which many patients who are hurt by negligent actions receive no compensation for their loss. Those who do receive compensation end up with about 40 cents of every premium dollar after legal fees and other costs are subtracted. And the likelihood and the outcomes of lawsuits and settlements bear little relation to whether or not a healthcare provider was at fault.

We like to say that justice is blind. With respect to our medical litigation system, it seems that justice is absent and nowhere to be found.

This is why Senator Enzi introduced the Reliable Medical Justice Act last month. This bill would authorize federal funding for states to create demonstration programs to test alternatives to their current medical litigation systems.

Most of us are familiar with the report on medical errors that referenced earlier. That report was issued by the Institute of Medicine, also known as the IOM. You may be less familiar with

another report that the IOM published earlier this year. That report is called "Fostering Rapid Advances in Healthcare: Learning from System Demonstrations."

Our Secretary of Health and Human Services, Tommy Thompson, challenged the IOM to identify bold ideas that would challenge conventional thinking about some of the most vexing problems facing our healthcare system. In response, an IOM committee developed this report, which identified a set of demonstration projects that committee members felt would break new ground and yield a very high return-on-investment in terms of dollars and health.

Medical liability was one of the areas upon which the IOM committee focused. The IOM suggested that the federal government should support demonstration projects in the states. These demonstrations should be based on "replacing tort liability with a system of patient-centered and safety-focused non-judicial compensation."

Senator Enzi's Reliable Medical Justice Act is in the spirit of this IOM report. By funding demonstration projects, Senator Enzi believes Congress could enable states to experiment with and learn from ideas that could provide long-term solutions to the current medical liability and litigation crisis.

Also in keeping with the spirit of the IOM's expert recommendation, Senator Enzi's bill would require participating states and the federal government to collaborate in continuous evaluations of the results of the alternatives as compared to traditional medical litigation. This way, all states and the federal government can learn from new approaches.

In introducing this bill, Senator Enzi wanted to provide some alternative ideas that would contribute to the debate. As a result, the bill describes three models to which states could look in designing their alternatives.

For instance, a state could provide healthcare providers and organizations with immunity from lawsuits if they make a timely offer

to compensate an injured patient for his or her actual net economic loss, plus a payment for pain and suffering if experts deem such a payment to be appropriate. This could give a healthcare provider who makes an honest mistake the chance to make amends financially with a patient, without the provider fearing that their honesty would land them in a lawsuit.

Another idea would be for a state to set up classes of avoidable injuries and a schedule of compensation for them, and then establish an administrative board to resolve claims related to those injuries. A scientifically rigorous process of identifying preventable injuries and setting appropriate compensation would be preferable to the randomness of the current system.

Still another option would be for a state to establish a special healthcare court for adjudicating medical malpractice cases. For this idea to work, the state would need to ensure that the presiding judges have expertise in and an understanding of healthcare, and allow them to make binding rulings on issues like causation, compensation, and standards of care.

We already have specialized courts for complicated issues like taxes and highly charged issues like substance abuse and domestic violence. With all the flaws in our current medical litigation system, Senator Enzi thinks we ought to consider special courts for the complex and emotional issue of medical malpractice.

Senator Enzi believes that one thing in the medical liability debate is absolutely clear – people are demanding change. Ten states have passed some liability reform in the past year, and another 17 have debated it. States are heeding this call for change, and Congress should support those efforts.

I know that Wyoming had a lively legislative debate on medical liability reform this year, but Wyoming has a constitutional amendment that prohibits limits on the amounts that can be recovered through lawsuits. Nevertheless, you considered a number of interesting ideas in the most recent legislative session.

One of the ideas you debated is similar to one of the models in Senator Enzi's bill. It was Senator Scott's bill to amend Wyoming's constitution and to create a commission on healthcare errors. That commission would have had the power to review claims, decide if healthcare negligence had occurred, and determine the compensation for the death or injury according to a schedule or formula provided by law. The bill died in a tie vote on the Wyoming Senate floor.

Senator Scott told Senator Enzi and me that one of the biggest obstacles to passage was the uncertainty surrounding this new idea. No one had any basis for knowing what a proper schedule or formula for compensation would be. No one knew how much the system might cost, or how much injured patients would recover compared to what they recover now.

I know that Senator Enzi believes that Congress should help state legislators like Senator Scott develop thoughtful and innovative ideas such as the one he has proposed. That's one of the reasons he offered this bill. The states have been policy pioneers in many areas – workers' compensation, welfare reform, and electricity de-regulation, to name three. Medical litigation should be the next item on the agenda of the laboratories of democracy that are our 50 States.

Few question the need to restore reliability to our medical justice system. But how do we begin the process? One way is to foster innovation by encouraging states to develop more rational and predictable methods for resolving healthcare injury claims. And that is what the Reliable Medical Justice Act aims to do.

Now that I've explained Senator Enzi's bill, you might be wondering what will happen next. Well, as you know, it can take a while for Congress to turn good ideas into laws.

The Reliable Medical Justice Act has been referred to the Senate Committee on Health, Education, Labor, and Pensions. Senator Enzi serves on that committee. He's the third most senior Republican, after the chairman, Senator Gregg of New Hampshire, and then the Senate Majority Leader, Dr. Frist.

Senators Enzi and Gregg work very well together, and I imagine that when both gentlemen return to Washington after Labor Day, Senator Enzi will encourage Senator Gregg to hold a hearing on the concept of alternatives to medical litigation. Senator Enzi might even chair the hearing himself, if Senator Gregg wants him to do so.

I think it would be unrealistic to expect that this bill becomes law before next year. There's not much time left in this session of the 108th Congress, but I think it's reasonable to anticipate that the Senate will hold hearings on the concept before adjourning for the year.

If we can pass the bill in 2004 and get funding through the appropriations process, then Wyoming and other interested states possibly could access that funding as soon as October 2004. I think that's Senator Enzi's timeline, and a not unreasonable timeline to expect.

Medical liability reform is still on the Senate Republican leadership's agenda, and Senator Enzi is committed to passing a bill to address the medical liability crisis before the next elections. He believes that patients and their healthcare providers deserve nothing less than a system that provides fair compensation to the truly injured and predictable outcomes on which healthcare providers can place their trust. This is one of Senator Enzi's top healthcare priorities, and I can assure you that he will keep working in Washington toward a more reliable system of medical justice.

Thank you again for the opportunity to speak to you on Senator Enzi's behalf. I would be happy to answer any questions you might have.