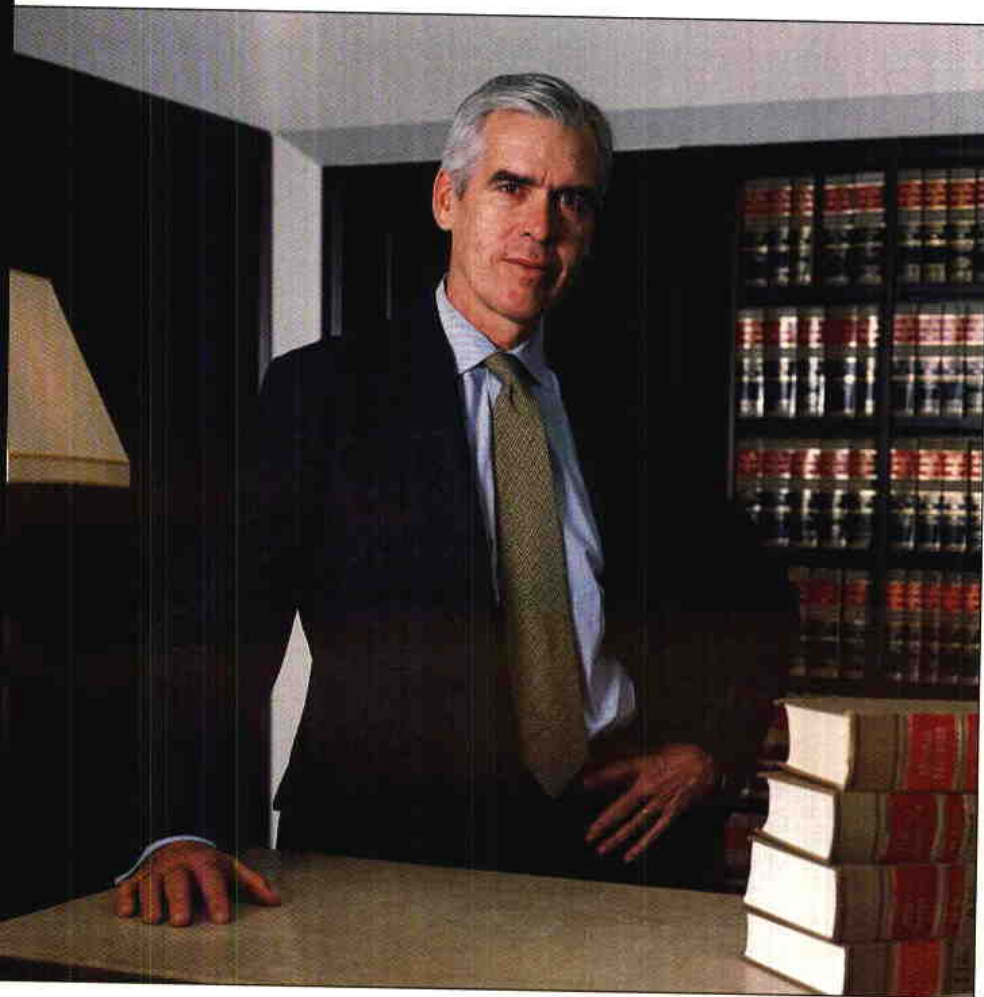


A legal crusader's solution



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

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.

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,

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

to the malpractice mess

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 well at first, even if it ends up being the right thing to do. Indeed, if you let people sue for tens of millions of dollars if something new doesn't work out, you're *not* going to get much innovation. The 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.

For more ...

Attorney Philip K. Howard is the founder and chairman of a group called Common Good; its tag line 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.

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

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—Philip K. Howard

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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.

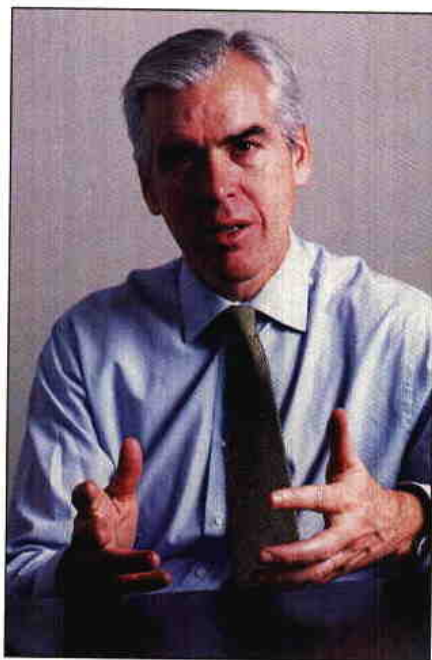
Of course, there’s no guarantee that this decision-making body will always act fairly. But if its charge is to do what most people in the profession consider reasonable, then that’s the best we can hope for.

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. ■