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Testimony: Nevada Senate Judiciary Subcommittee 3/4/03

Good morning. I'm Robert Kessler. I'm an osteopathic physician from Boulder City, and represent the NOMA. Thank you for the chance to testify here today. Las year, I was one of eleven people nationally who was chosen to study in a health policy fellowship. We were taught to ~~look at~~ analyze policy issues as non-partisan, academic subjects: To be dispassionate and to think more about society than ~~my~~ our stakeholder group. Given the events of this past year, we spent quite a bit of time studying patient safety and medical liability issues. My testimony here today derives from this study.

Recently, we've heard comments about ~~our~~ the efforts to further reform Nevada's tort system. These range from; "there's no crisis, the number of doctors leaving is exaggerated", to "tort reform doesn't work anyway", "to let's just wait and see the results of AB-1". I'll discuss these aspects today. The paper everyone quotes saying tort reform doesn't work is by Hunter.

He divided states up into groups according to their number of reforms. He looked at insurance rates and found the groups with the most reforms didn't have lower rates. He called this "smoking gun" evidence tort reform doesn't work. But, Hunter's wrong.

His methods are flawed in too many ways to go into today, but for those of you with extra time on your hands, I've left a critique by Foreman. ~~But~~, I'd like to discuss one limitation of his work because it demonstrates that not just any reform works.

Among other errors, Hunter just counted the number of reforms; he didn't differentiate between types or amounts. He didn't try to understand which reforms were used in states that were successful, and which reforms were used in states that weren't. But, in fact, the specific types of reforms and the dollar amount of damage limits determine the success of tort reform efforts. When you go through the Foreman paper, you'll find that recalculating the data without the errors shows partial tort reform works partially or not at all, and comprehensive tort reform works well.

Non-partisan observers all agree tort reform works. For instance, Bovbjerg (who is one of the contributors to the IOM report) wrote a recent paper titled " Patient safety, Just Compensation, and Medical Liability Reform". He states; "Most observers, excluding trial attorneys and certain consumer groups, credit tort reform for California's success". In the conclusion he calls tort reforms "necessary to stabilize the industry".

Hunter's other conclusion, that the rise in insurance premiums is due to bad investments by the insurance industry, flies in the face of reality. Insurance companies are mandated to invest in the most conservative vehicles and had 80% of funds in long-term bonds. 11% of their money was in stocks. That's why their return on investment varied only between 5.1% and 5.7% in the last five years (according to AMbest). The department of Health and Human Services calls the assertion that the crisis is due to insurance companies specious (SPEE SHUS), as does the national Association of Insurance Commissioners. But common sense tells us the argument is incorrect. The same insurance companies, exposed to the same economy, having made the same investments, offer insurance for one fourth-one half the rate in California as they do in Nevada. The crisis is due to the increase in jury awards that is occurring here and not California.

Litigation Protects Patients

It's been said ~~measures to help patient safety would solve the problem~~. But studies, including the Harvard Study, The Presidents Council of Economic Advisors Report, The Institute Of Medicine Report and Bovbjerg all agree the current litigation system decreases quality of care while interfering with patient safety. The reasons for this go deeper than discouraging error reporting. Fully 50% of physicians report that fear of litigation makes them avoid expressing their doubts about patient care..... to other physicians working on the same case. Additionally, it's been shown lawsuits are basically random. Patients who are injured usually don't sue, those that do are frequently not the patients who were injured, and the outcome of cases is unrelated to negligence. This very randomness negates any effect litigation might have to decrease errors.

Last summer's AB-1, has partial reforms. For instance, its cap on non-economic damages is from each defendant, to each plaintiff, instead of for each incident. Its collateral source reforms are written to exclude payments from other lawsuits and most insurance. And it still leaves physicians at risk for economic damages stemming from someone else's error. In fact, every provision is a halfway measure of the type that's failed elsewhere.

No matter how long we give AB-1, the results won't change. Its partial reforms will work partially,or not at all.

Since its passage in August, the situation has worsened. There have been two increases in insurance rates already. And for the first time, northern and rural patients are affected. It's impossible to know how many physicians have left or are leaving. We hear numbers from the medical society and the State Board of Examiners but neither keeps track of D.O.s. Although D.O.s represent less than 10% of Nevada's physicians, we tend to serve the rural areas. From my little town of Boulder City we've lost Dr. Leon, who left full time medicine and is performing magic while he fills in at the V.A. clinic once a month. We've lost Dr. Facinoli who is learning to deal poker, Dr. Zinni has moved to Indiana and Dr. Falvo is interviewing in other states, although we think he will stay. Dr. Weisberg left last week. All are D.O.s, all from one small town, and none are counted in the numbers you've seen so far. Among the MDs that practiced in Boulder City, Two gynecologists from Henderson (including the only one to do gynecological surgery at BC Hospital) announced they were leaving the week of your last committee meeting. And the Heart Institute lost one of their cardiologists and so they've closed their Boulder City office.

The number of doctors leaving is hard to pin down; the number restricting their practices is impossible to know. But those are just part of the problem. The other half is the physicians who aren't coming here and these numbers are much clearer.

Last month there was an article stating the State Board of medical examiners granted 335 new licenses. It implied this meant there was no problem, but this was 13% fewer than in 2001, which in turn was less than in 2000. This, despite Nevada's exploding population. The article also left out D.O.s. We had a 25% drop in new licenses in 2002. These numbers are unprecedented. In a State that started out 47th in terms of doctors per capita, they're truly frightening. Had not even one doctor left, this trend alone would indicate an impending crisis in patient's ability to access high quality, affordable health care.

This is occurring in a climate where there were 33% less applications to medical school nationally than just five years ago. The best estimate for physician manpower is by Cooper who concludes there'll be a shortage of 50,000 physicians by 2010, and 150,000 by 2020. Waiting to fix the problem not only means the hole we'll be in will be deeper, but also that there will be less ability to dig ourselves out.

Mr. Chairman, Senators, The current system interferes with patient safety as well as the quality of care. Tort reform works. The crisis is deeper than it appears on the surface. It's due to increasing jury awards. AB-1 won't do enough. This legislature must decide what its legacy will be. I urge you to pass AB-97.

As I've spent a lot of time on AB-97, I'll comment on only one part of AB 257. The legislative intent of changing the exceptions to limits on non-economic damages is well meaning, but I fear the unintended consequences. If the limits are not applicable to providers who have had three settlements in two years, several things will happen. First, no one will settle cases without a fight and encouraging early settlement is what has worked to stem the tide of this crisis in other states. It will also extend the punitive nature of

the litigation system and further interfere with patient safety efforts. Most importantly it will decrease the number of physicians who will take on a high-risk case? As has always been true, this reluctance will hurt access to care for the most vulnerable among us. Quoting the father of medical jurisprudence, James Webster giving advice to a medical school graduating class in 1850: "A remedy to avoid ....persecution, and protect yourselves from assaults upon your professional reputations as well as your peace and comfort, to say nothing of your property should you be so fortunate as to accumulate any, is to refuse all fracture cases among the poor". Some things never change.

You should have copies of all the studies I mentioned, but I will be glad to answer questions.... Thank you.