QUESTIONS AND ANSWERS ON CAPS

As PaTLA members deal with members of the Legislature and editorial boards around the state, it is important that you be prepared for any and all topics that may come up. Many of the topics you will be asked are based on a faulty understanding of the caps issue and defined by the rhetoric of the caps proponents who argue that something – anything – must be done to help struggling doctors and hospitals. If we are able to fully explain the issue and deflate the claims of the caps proponents, it is possible to change the minds of these key opinion makers.

Question: *There is a crisis in Pennsylvania with doctors leaving and it's high insurance rates and jackpot juries that are driving it. Don't we need caps to help doctors?*

Answer: There is no doubt that some doctors have had their insurance rates climb beyond reason or rationale, both here in Pennsylvania and across the nation.

But it is not true that doctors are leaving Pennsylvania in droves, no more than it is true that they are fleeing any of the almost 30 other states the medical community says doctors are leaving. Where would they all be going?

Major newspapers in the state have examined the data and found not only has there not been an exodus as claimed, but that we have MORE physicians practicing in Pennsylvania than we did just a few years ago.

It is especially important to note that the Pew Foundation found that Pennsylvania continues to have a higher per capita rate than the nation as a whole. And the Agency for Healthcare Research and Quality, a branch of the U.S. Department of Health and Human Services, reported that the number of physicians in Pennsylvania grew by more than 100 percent from 1970 to 2000, even though there have been periodic insurance crises.

Now, there's certainly been some anecdotal evidence that some doctors are leaving because of high rates, but when you dig a little deeper, many of the claims fall apart. In an investigation of which doctors who claimed they were leaving actually left Pennsylvania, the *Scranton Times* found just about all those doctors were still practicing – and some had even added staff. And the *Allentown Morning Call,* in their examination of the list of supposedly "disappearing doctors" found an error rate of at least 50%.

Question: *Won't caps help lower the rates doctors and hospitals pay – which you admit are too high?*

What is clear is that some physicians have seen their rates climb too high without reason. For some of them, particularly if they have been found guilty of malpractice a few times – as some have -- who can say what rate they should be paying?

But it is important to know why caps are not the answer to the problems some doctors face. The first is that there's plenty of proof that caps won't even work to lower doctors rates – because they haven't worked in other states.

And that's something even insurance execs admit. Frank B. O'Neil, a Senior Vice President of ProAssurance, a medical malpractice insurer, was quoted in the *Scranton Times* as saying, "Nobody is saying tort reform is going to reduce rates." [October 20, 2002]

But we shouldn't forget what caps really are: an attack on our legal system. The people who are behind the caps movement want to take away people's right to have a jury examine the evidence and make a determination about what is fair. That's what this is really all about.

A flat cap like the medical community is talking about isn't based on the injury received, the amount of suffering involved or the value of the injured parties' life to their family or their community. It's a "one-size" fits all approach that values the loss of a limb the same as the loss of a life.

Question: *But won't caps lower insurance companies' costs?*

Answer: Of course they will – somewhat -- but it's impossible to tell how much because no one keeps track of how much is paid out in non-economic damages at all, much less in awards over $250,000.

But that's not really the question. The question is, will caps lower the rates doctors pay? And the answer seems pretty clear: no, they won't. There are no provisions in any of the "reforms" being debated that will in any way affect how much the profit spread should be for insurance companies.

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Question: *Is there really a problem of too many medical errors?*

Answer: Yes, there is.

There is an epidemic of preventable medical errors, with estimate ranging from a low of 50,000 deaths annually to a high of 195,000. To put that in context, America lost roughly 50,000 soldiers in Vietnam. We lose AT LEAST that many Americans annually due to preventable errors. Put another way, the number of deaths annually from a preventable medical error is akin to a jumbo jet crashing every single day of the year.

And those numbers do not reflect errors that do not kill the patient.

Yet while there is no question that preventable medical errors occur in Pennsylvania hospitals, the exact number of them is unknown because doctors and hospitals have been dragging their feet about getting a real reporting system up and running.

Unfortunately, it's not only the number of medical errors that are unknown. So are the names of the doctors who commit them. The doctors lobby in Pennsylvania has

been fighting tooth and nail any disclosure of actions against doctors. So now patients have no idea if they are going to a good doctor or a bad doctor. The Medical Society's fight against disclosure protects bad doctors and hurts patients.

Question: *With insurance rates growing so quickly, don't the doctors need some help to pay their premiums?*

Answer: Absolutely. Some doctors have seen their rates double and triple over the last few years, even if they haven't been sued or found negligent. That's not right and those doctors should be subsidized.

That's why the doctors have received unprecedented support from the taxpayers over the last few years. They have received $1 billion at a time when the state is struggling to increase education and economic development funding. No other group has received that much taxpayer subsidy. But at some point, the doctors have to give something in return too – like disciplining bad doctors and reducing preventable medical errors.

Question: *But didn't doctors in Texas see rate reductions after that state passed caps this fall?*

Answer: Actually, most doctors saw a substantial rate increase in the first year. One insurance company did cut their rates, but the majority saw increases from their carrier and from the state run JUA.

Some carriers are now reducing rates as the economy and the stock market improve, just like they did in previous supposed "crises".

Question: *No amount of money can bring back a lost limb or a lost loved one. So why are you arguing about more money when money won't change things or make them better?*

Answer: It's true that no amount of money can bring back a loved one or console the survivors. Not $100,000, not $100 million. But the only group putting a price tag on this pain is the doctors and other caps proponents. They argue that the pain and suffering – including life-long, daily pain – is worth $250,000. Everyone else says juries should decide compensation based on the facts and merits of the case. It may be difficult at times, but we trust juries with all kinds of decisions in this country. Medical malpractice cases should be no different.

There's also an element of justice that is involved here as well.

It is unheard of for a doctor to be held criminally liable for any harm that comes to a patient. If they were driving a truck and were negligent, they'd go to jail. But if they are negligent holding a scalpel, there's only civil penalties. In Pennsylvania, bad doctors are rarely even disciplined.

So the non-economic damages, in addition to making the victim financially "whole", also represents some level of "justice" for the victims.

Question: *Aren't there too many frivolous lawsuits?*

Answer: There are actually very few "frivolous" lawsuits. Not only is the cost too high for lawyers – if they lose, they are out the money they put up front for costs – but there are new protections in place.

Now, not only do judges have the option of dismissing a case they find frivolous, but to file a medical malpractice case you have to have an independent medical expert certify that this is not a "bad outcome", but that there was negligence or malpractice involved. There are currently five (5) rules and regulations on the books that penalize lawyers for filing a frivolous lawsuit.

Because of these changes, Senate leader Robert Jubelier even said "there is no such thing as a frivolous lawsuit anymore."

To believe that "frivolous" lawsuits are the cause of the higher rates, you'd have to believe two things: one, that judges and juries make awards in cases that are merit-less and two, that insurance companies, which are supposedly losing money, settle merit-less claims. Does anyone believe that?

Question: *Isn't the problem a "jackpot jury" system that rewards lawyers and provides an incentive to sue?*

Answer: No one – NO ONE – is going to wish to be crippled so they can get a higher payout than they would if they had a minor injury.

There are protections in place to make it hard to file a meritless case that's based more on a potential payout than on the facts. You have to have an independent expert certify that malpractice was involved. You have judges with the options of throwing out the cases if they find them baseless.

And in med mal cases, there is a special remititur that allows judges to lower or even vacate awards they believe are too high. No other type of civil case has they special provision.

There are now 5 laws on the books that would penalize an attorney who brings a meritlesss cases. If anyone thinks there are too many "frivolous" suits, they should be clamoring for the full enforcement of <u>current</u> law.

Question: *Why should lawyers receive between 30% and 50% of damage awards?*

Answer: There is no set percentage that a lawyer receives for taking a case. Any and all agreements about payments to the lawyer are between that lawyer and their client.

But don't forget how a contingency fee system works. A lawyer who takes a case has to advance all costs for the case – they pay for any and all tests, expert testimony and any other necessary costs. And if they lose, they are out that money. So this limits the likelihood that they are going to take a questionable or "frivolous" case in the first place. But it also allows them to take difficult cases – because they will get fairly compensated in the end.

Providing an incentive to take tough cases is exactly why we have a contingency fee system in the United States: it allows poor people to participate in the legal system. If a poor person was harmed and had to pay all legal costs up front – including medical tests, expert testimony and legal fees – few could afford it and they'd be shut out of the judicial system. And no one should be arguing that the poor shouldn't have access to the courts.

Question: *But doesn't the insurance industry need some sort of stability to properly price the market – the sort that a cap will provide?*

Answer: By definition, any cap that was imposed will provide some sort of stability – whether it's $1, $250,000 or $2 million.

But the reason that the doctors want a $250,000 cap is that they know it will make them virtually immune from civil suits because the out-of-pocket costs of putting the case on may not be recoverable. Since those costs come out of a lawyers pocket up front, there's no way they'll take a case if they can't even make back out-of-pocket costs, much less a fee for their time.

Here's why a $250,000 cap is "immunity" for doctors: In Pennsylvania, if an injured party is compensated for their economic losses and medical costs by another insurer (health insurance, workers compensation, etc.) those payments are non-recoverable. That means if there is a $250,000 cap, $250,000 is the ONLY money that can be sought in a suit. $250,000 may sound like a lot, but when you have cases that can cost several hundred thousands of dollars to put on – as many med mal cases do because expert testimony and medical tests are very expensive – there's nothing left over for the injured party or the lawyer. What lawyer is going to take a case they are likely to lose money on or be paid a pittance for more than 2 years worth of work?

A low cap means that suits won't be brought – no matter how severe the injury or gross the negligence. And that's what doctors really want.

Question: *But isn't $250,000 a lot of money on top of full economic losses and health costs?/ But someone is hurt already gets full payment for lost earnings and medical costs – what else do they need?*

Answer: Whatever noneconomic damages someone who is injured receives will be the ONLY compensation they receive for their injuries. Payment of their economic losses and funds to cover medical expenses merely mean that someone who is injured is held harmless for the injury someone else caused – i.e. they aren't harmed financially by someone else's mistake. It would be different if they injured themselves, but this is about someone else hurting them. For people at the lower end of the economic scale, that means that they won't have to go on welfare.

But ask yourself: is $250,000 enough compensation for you to spend the rest of your life unable to care for yourself or walk again or anything else? If you're hurt when you're 25, that means you will spend the next 50 years living with your injury. 50 years at $250,000 is just over $13 a day. $13 a day to be a cripple.

Question: *If everyone gets the same noneconomic damages, isn't that by definition fair?*

Answer: No. The noneconomic damages are what makes compensation awards fair.

By limiting noneconomic damages, you are tipping compensation for legitimate injuries to their economic losses (you have to presume that medical costs are close, if not identical). That means that how much an injured party receives is based on their income, not their injury, their value to their family or their community. If individuals receive the same exact injury and the same pain, shouldn't they receive similar, if not exactly the same, compensation? Why is one person's life or injury more than another's?

Question: *Didn't caps work in California/Texas?*

Answer: Not according to an executive for the second largest med mal insurer in California.

Last year, James Robertson, Assistant Vice President and Associate Actuary of SCPIE Indemnity Company, said, "While MICRA was the legislature's attempt at remedying the medical malpractice crisis in California in 1975, it did not substantially reduce the relative risk of medical malpractice insurance in California." He believes that economic damages are driving rates in that state, which NO ONE is talking about capping -- nor should they be.

And in Texas, AFTER the state passed caps, GE Medical Protective, the largest insurer in the state, requested a 19% rate hike and stated in a supporting filing that "Non-economic damages are a small percentage of total losses paid. Capping non-economic damages will show loss savings of 1.0%."

We can't tell if it's economic losses that are driving rates here because no one collects good enough data to evaluate it.