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No. 5

## The AMC/NOMA Co-Sponsors an Ohio Supreme Court Candidate Forum

On Thursday, August 26, more than 170 physicians, nurses and healthcare administrators attended an Ohio Supreme Court Forum co-sponsored by the Academy of Medicine of Cleveland/Northern Ohio Medical Association (AMC/NOMA) and the Center for Health Affairs (CHA). The forum provided an excellent opportunity for participants to learn more about the candidates' ideas, backgrounds and philosophies so they will be informed when they cast their vote in November.

Introductions were provided by Mr. Bill Ryan, president and CEO of the CHA, and Dr. William H. Seitz, Jr., president of the AMC/NOMA. Mr. Ryan noted this fall, the Ohio electorate will choose who will sit in three of the seven seats on the Ohio Supreme Court. All the candidates for these seats were participants in our forum. Two were incumbents: Chief Justice Thomas Moyer and Justice Terrence O'Donnell. Joining the justices in the race are Judge Ellen Connally and Judge William O'Neill. The third race is for an open seat and running for that post are Judge Nancy Fuerst and Judge Judith Lanzinger. Mr. Ryan wrapped up his comments by providing background and credentials on each of the forum's participants.

Dr. Seitz set the tone for the forum by outlining the effect of the medical liability crisis in Northeastern Ohio. He noted the high cost of medical liability insurance, decreased reimbursements for patient care, the fear of malpractice suits affecting the way physicians practice, and the number of physicians available to practice medicine in the area have had a negative effect on the bright, young, in-training physicians who should be the future of medical care in our region. He noted the citizens of Northern Ohio have always had access to high quality, state-of-the-art medical care. We have some of the world's best physicians and finest institutions. Medical care in our region has been consistently recognized by many national publications, as among the best our nation has to offer. From an economic standpoint, the concentration of medical services in Northeast Ohio makes the practice of medicine the largest single employer in the region.

Dr. Seitz noted physicians are the first to believe and admit that when quality is not there, when people are injured due to negligence or medical error, patients should be compensated. But when meaningless lawsuits coerce settlements, there is a domino effect for which all of us pay the price. The prime contributor to this situation has been the proliferation of meritless lawsuits, the escalating costs of defending such suits, excessive jury awards and settlements. Dr. Seitz outlined extensive AMC/NOMA survey data to illustrate his point. He also outlined how other states, such as California, have contained this problem through sustained tort reform.

Dr. Seitz concluded his remarks by stating the Ohio Supreme Court has the last word on the resolution of the medical liability crisis in Ohio. The Ohio Legislature has previously passed tort reform laws only to have the Ohio Supreme Court strike down the law. New tort reform legislation has passed in the Ohio Legislature and we need to assure the Ohio Supreme Court upholds this law.

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AMC/NOMA  
6000 Rockside Woods Blvd.  
Ste. 150  
Cleveland, OH 44131-0999

ADDRESS SERVICE REQUESTED



DO NOT DISCARD!

Please be sure to read the enclosed letter from Dr. William H. Seitz, Jr., AMC/NOMA president, included in this issue. We ask that you give immediate attention to the accompanying material, as it will affect your practice in the near future. Help us to help you.



**William H. Seitz, Jr., M.D.,** president of the AMC/NOMA, provides the opening remarks for the forum and outlines the severity of the medical liability crisis in Northeastern Ohio.



The Ohio Supreme Court Candidate Forum participants respond to the questions posed by the moderator (l to r) Chief Justice Thomas Moyer, Judge C. Ellen Connally, Justice Terrence O'Donnell, Judge William O'Neill, Judge Judith Lanzinger, and Judge Nancy Fuerst.

**The AMC/NOMA Co-Sponsors an Ohio Supreme Court Candidate Forum** (*Continued from page 1*)

Monica Robins, the WKYC health anchor, moderated the remainder of the forum. The format alternated the order of each candidate's response and no time was allowed for rebuttals. Candidates were allotted time for opening and closing remarks and asked to respond to prepared questions. (Due to limited space, this article provides an abbreviated version of the candidate responses to questions. For candidate background, their opening and closing remarks and a complete transcript of their responses to the questions and answers; visit the AMC/NOMA Web site at [www.amcnoma.org](http://www.amcnoma.org).)

The first question noted that in the opening comments it was clearly articulated that there is a medical liability crisis in Ohio affecting patients — the electorate. Tort reform has passed in Ohio on three separate occasions only to be overturned by the Ohio Supreme Court. The court determined these reforms were "unconstitutional" because they violated the single subject rule. Other states have been able to enact and sustain meaningful tort reform laws. What is it about Ohio's constitution and rules that suggest that these laws are unconstitutional here?

Judge Connally responded by saying she feels there is not enough information on the tort reform issue. She felt Ohio is working with "sketchy" information. She said, it is important we (the justice system) are fair and base our decisions regarding tort reform on



*Ms. Monica Robins, WKYC health anchor, moderated the forum.*

actual statistical information. At this point, she does not believe we (the justice system) have the statistical information to make these kinds of decisions. Justice O'Donnell stated the analysis of constitutional consideration of a statute begins by examination of the statute and the constitutional provision with which the issue may be in conflict. He stated a proper Supreme Court review on a constitutional issue should be done with a complete record and evidence so the court has the necessary material to engage in this type of constitutional review. Judge O'Neill indicated the Ohio General Assembly is more than capable of passing meaningful legislation, which will give us (the state) meaningful relief to an acknowledged problem. The difficulty is the Ohio General Assembly, without data, continues to put a band-aid on an open wound. Judge O'Neill pointed to the insurance company rates and, in his opinion, caps don't work. He indicated it is the job of the Ohio Supreme Court to see that the General Assembly does its job. He suggested, today, they are not. Judge Lanzinger stated there are different views about what interpreting the law actually means. The court does not know what kind of challenge a particular group might bring. However, it is up to the judge to listen very carefully and to try to absorb those arguments and then make a principled, intellectually conscious decision. Then, the judge needs to write it clearly so people understand why that decision was made the way it was. Judge Fuerst indicated judges are not legislators, but on the other hand, the judiciary is not a rubber stamp for the legislature. If there is a conflict in law or a controversy, which has developed on its way through the system from the trial courts through to the Supreme Court, a judge needs to look to the state's constitution to make that determination when called upon. Chief Justice Moyer felt the question referred to the "one issue rule." The Ohio Constitution does contain a provision that says the General Assembly must confine its legislation to single issues, except when it's adopting budgets for obvious reasons. If the "one issue rule" is violated, it might be brought to the attention of the Court. The U.S. Constitution does not have this provi-

sion, and many state constitutions do not have it as well. But that is one reason, one basis upon which other tort reform acts have been declared unconstitutional. There have been attempts by members of the current General Assembly to confine and breakup the tort reform legislation into pieces so that it does not violate the "one issue rule."

The next question noted that our right to due process is guaranteed by both the federal and state constitutions. In your experience, does this right guarantee a jury trial? Are there other means for resolving medical liability cases that could be more effective than a jury trial, for example, through alternative dispute resolution mechanisms such as mediation, arbitration and medical courts?

Judge O'Donnell felt if legislation were to pass infringing on the right to a jury trial, then the issue would need to be presented to our courts. He said it is difficult to comment on a matter that might come before the court and he indicated the issue of alternative dispute resolution is an important one to review. Judge O'Neill suggested a screening mechanism, for example, bringing doctors, lawyers, the insurance companies and housewives together, to present a case to a panel. If the panel thinks a case is actionable, it would go



*Mr. William Ryan, president and CEO of the CHA provided background information on the candidates.*

forward. If they determine it's not actionable, maybe you go forward at your own peril. Judge Lanzinger stated she has seen the growth of alternative dispute resolution in the civil field, in general. She stated she would not want to say how she would vote if the issue came before her. But she could see, however, if the proper statute were in effect this mechanism could be helpful. She felt alternative dispute resolution could certainly help narrow issues at the very beginning of a case. Judge Fuerst indicated she agreed with many of the aspects of her colleagues here. She indicated in her work on the bench, she has noted that alternative dispute resolution is a tactic that many are using. Parties are either going to a retired judge, or a very experienced lawyer to help sit down and mediate and work things out. Chief Justice Moyer indicated

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## CLEVELAND PHYSICIAN

THE ACADEMY OF MEDICINE OF CLEVELAND/  
NORTHERN OHIO MEDICAL ASSOCIATION  
6000 Rockside Woods Blvd., Suite 150  
Cleveland, Ohio 44131-2352  
Phone: (216) 520-1000  
Fax: (216) 520-0999

### STAFF

**Executive Editor**  
Elayne R. Biddlestone

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## Reduce Workers' Comp Premiums

### Welcoming Lutheran Hospital

The AMC/NOMA is pleased to welcome 21 new members from the medical staff of Lutheran Hospital. We are pleased to have the support of your organization. We hope Lutheran's support inspires other regional hospitals, groups and health professionals in northern Ohio to join the AMC/NOMA and support its efforts to promote the practice of the highest quality of medicine. For more information on individual or group membership, contact Linda Hale, membership and marketing coordinator, at (216) 520-1000 ext. 309. ■

### Vote and Vaccinate Program at Polls

AMC/NOMA will host its fifth annual "Vote and Vaccinate" program on Election Day 2004, Tuesday, November 2, in neighborhoods where influenza and pneumonia vaccination rates among senior citizens are low. Vote and Vaccinate provides the public with the opportunity to receive flu and/or pneumonia shots at area polling sites.

The Vote and Vaccinate program is a parallel program to voting and not connected with the Board of Elections. The goal of the program is to offer senior citizens an opportunity to get vaccinated when they go out to vote on Election Day.

Proud sponsors of Vote and Vaccinate include the AMC/NOMA, Visiting Nurse Association, the Cuyahoga County Board of Health, Consortium for Healthy and Immunized Communities, Parma Community General Hospital and Ohio KePro, Inc.

For more information on the Vote and Vaccinate program, contact Taunya Rock at (216) 520-1000 ext. 314. ■

If you're looking for ways to reduce your premiums, group rating is an alternative rating program designed by the Bureau of Workers' Compensation. Since 1989, group rating has allowed employers in similar industries to join together through a sponsoring association and to be rated as a group. These groups are comprised of employers with low, or no claim losses, which makes it possible for employers to obtain a lower rate than they could individually.

In order for a company to qualify for a group rating, an employer must request a group rating review by submitting a Temporary Letter of Authorization (AC-3) to CompManagement, Inc. (CMI), AMC/NOMA's third party workers' compensation and unemployment administrator of choice.

CMI is the largest and most trusted third party administrator in Ohio, offering higher savings and more group plans. As an advocate for your business, AMC/NOMA understands saving money is just as important as making it. We are urging all of our members to participate in this no-cost, no-obligation group rating review. If you are already participating in our 2004 Workers' Compensation group rating program, your business will automatically be reviewed in the fall.

If not, members or prospective members who are interested in receiving a Workers' Compensation group rating quote for the 2005 rating year, should complete the AC-3 form recently mailed to you and return it by fax to (614) 766-6888 or call Comp Management at 800-825-6755 for more information.

#### The Ohio Bureau of Workers' Compensation (BWC) Group Rating Rules

In order to participate in a Group Rating Program, the BWC requires the following:

- The employer must be in "active status" (meaning premium payments are current) as of the group rating application deadline (Feb. 28, 2005) and remain active/current until the start of the July 1 rating year. To maintain active status, premiums for the July 1, 2004 – Dec. 31, 2004 payroll period *must* be paid by Feb. 28, 2005.
- The employer cannot have lapses in coverage totaling more than 59 days between Sept. 1, 2003 and Feb. 28, 2005. A lapse in coverage will occur whenever a premium payment is not received by the BWC due date.

between Sept. 1, 2003 and Feb. 28, 2005. A lapse in coverage will occur whenever a premium payment is not received by the BWC due date.

- The employer must maintain an account in good standing with the BWC. There can be no undisputed balances with the BWC more than 45 days past due as of Feb. 28, 2005. All partial payment plans must also be current in accordance with the payment schedule established.
- The employer cannot enroll in more than one group plan each policy year.
- All employers within the AMC/NOMA group must be members
- Employers within a group must be similar in nature (same industry group).

*Editor's Note: All physicians should have received a CompManagement mailer with the AC-3 form enclosed in July. If you haven't received it, please contact Linda Hale at (216) 520-1000 ext. 309. ■*

#### 2005 Group Rating Timeline

##### Sept. 2004 – Jan. 2005

Invitations sent and returned for enrollment for 2005 group rating.

##### Jan. 1, 2005

CompManagement claims administrative services begin.

##### Feb. 28, 2005

BWC deadline for CompManagement to fill enrollment application for 2005 group rating.

##### March – June 2005

- BWC reviews applicants for final approval or rejection for 2005 group rating.
- AMC/NOMA reviews applicants relative to member status.

##### July 1, 2005 – Dec. 31, 2005

First period of group discounted premium – payable to the BWC by Feb. 28, 2006.

##### Jan. 1, 2006 – June 30, 2006

Second period of group discounted premium — payable to the BWC by Aug. 31, 2006.

## Farewell to Dr. Fabian



*Dr. Henry Fabian, former medical director of the Ohio Spine Institute, moves his private practice to Colorado in search of medical malpractice insurance relief. Dr. Fabian's new title is medical director of the Spine Center of Steamboat Springs.*

Saying goodbye to trusted colleagues is something, like it or not, that Cleveland area doctors are growing accustom to these days and Dr. Henry Fabian's story is case in point.

In the spring 2004 issue of the *Cleveland Physician* you read about Dr. Fabian's interview with WKYC's Monica Robins regarding the medical liability crisis. During the TV interview, he mentioned losing colleagues who have been forced to leave the state due, in part, to skyrocketing increases in insurance premiums.

Last month the 8-year, private practice spine surgeon informed AMC/NOMA that he, too, will exit the Cleveland market and head to Steamboat Springs, Colorado, where he plans to pay approximately one-fifth of the medical malpractice liability insurance he paid in Cleveland.

*Cleveland Physician* caught up with him before his last day on the job in Ohio to ask him the following questions:

**Q: Why are you leaving?**

**A:** It's a quality of life decision for my family and me. Since I perform spine surgery, which ranks as one of the riskiest specialties to cover in terms of medical malpractice insurance, I saw about a 400 percent increase in insurance rates in the last four years without ever paying a penny out on a claim. With my overhead climbing and insurance reimbursements decreasing, the only way to maintain the bottom line would be to see more patients. I felt that could affect the quality of care I wished to provide my patients and the standard of personalized care I had set. Since I wanted to remain in private practice, I saw no alternative except to relocate.

**Q: Will the orthopedic group you were a part of continue?**

**A:** Yes. My three partners, all general orthopedic surgeons, will remain.

**Q: What do you think organized medicine can do to improve the situation?**

**A:** Get active in the politics of this issue and focus on reform of the judicial system. The recent empha-

sis on insurance company CEOs and legislative reviews on premiums diverts attention away from the real issue: our flawed courts. The Ohio Supreme Court seats open this election will affect the outcome of further tort reform in the state. Caps on damages, a medical review board to screen cases, mandating only the use of expert witnesses in the field that pertain to the case and a sliding scale limit on attorney fees are all ways to help the malpractice crisis in Cuyahoga County.

*Editor's Note: The AMC/NOMA Board of Directors has been working hard helping educate fellow physicians, healthcare consumers and, in general, northeast Ohio voters about the importance of the Ohio Supreme Court race and how the decisions of the court have an impact on tort reform and health care. In this issue the AMC/NOMA has included materials that physicians may use to educate your patients and office staff regarding the medical liability crisis as well as the impact of the Ohio Supreme Court race. In addition, the AMC/NOMA recently sponsored, in conjunction with The Center for Health Affairs (CHA), a candidate forum to help the medical community make informed choices at the polls this November. ■*

## LEGISLATIVE REPORT

### State House News

by Towner Policy Group

#### The Ohio Commission to Reform Medicaid Continues to Hold Hearings

Throughout the summer the three subcommittees of the Ohio Commission to Reform Medicaid have continued to hold meetings and hear testimony from Ohio Departments and the public. The Commission's final report is scheduled to be adopted and sent to the Governor in December 2004.

The subcommittees have narrowed their focus as the summer has progressed. The Subcommittee on Eligibility and Covered Families and Children has

defined its focuses as providing incentives to work by creating Buy-Ins based on percent of poverty level. The subcommittee is exploring the option of switching from a 209(b) state to a 1634 state; this would change how Ohio determines eligibility. This subcommittee has also been discussing shifting disability eligibility determination from the Ohio Department of Job and Family Services to Ohio Rehabilitation Services Commission. Finally, the main focus of the subcommittee's discussions has been expanding managed care. The subcom-

mittee believes this would assist in controlling patient behavior and save money in the long run.

The Subcommittee on Aged, Blind, and Disabled has also stressed managed care would be a great vehicle for change in the flawed Medicaid system. The Chairman of the Subcommittee, Richard Browdie, has pointed out that other states are having a lot of success with these programs. The cost of aged, blind and disabled services are very high and this type of system could enable Ohio to  
*(Continued on page 5)*

reimburse based on the intensity of care needed.

The Subcommittee on Medical Implementation and Reimbursement has heard testimony from the University of Massachusetts. They are looking at the possibility of contracting with an Ohio university. The subcommittee believes this could save Ohio money and resources and also provide opportunity for growth. Also, if Ohio is working with a university, Ohio would be able to maximize federal waivers and state investments. The subcommittee's other focuses include system abuse, pharmaceutical cost, nursing home costs and assessing technology.

#### **Election 2004**

November 2004 is an election year for the State House. All seats in the Ohio House of Representatives are up for re-election and Ohio Senators in even-numbered districts are up for re-election. In the Ohio Senate, the most competitive race will be in Southeastern Ohio in the 20th Senate Seat currently held by Senator Joy Padgett, a Republican.

According to State Representative Chris Redfern, Minority Leader of the Ohio House of Representatives, and State Representative Jon Husted, the frontrunner to be the next Speaker of the Ohio House of Representatives for the Republicans, there are two Democrat controlled seats. One in Belmont County and one in Columbus that will be very competitive in the November election. Of the seats currently controlled by the Republicans, competitive seats will be in the 41st House District in Akron/Northern Summit County currently occupied by State Representative Marilyn Slaby, who will be opposed by newcomer Brian Williams (this is not former State Representative Bryan Williams); a Toledo/Maumee seat currently held by State Representative Lynn Olman, who is term-limited; State Representative Earl Martin's 57th District House seat in Lorain County; Representative Kathleen Walcher's House District 58 in Norwalk; House District 62 in Willowick, where the incumbent is term-limited; and State Representative Jeff Wagner's House District 81 in Sandusky and Seneca Counties.

In addition, Redfern believes Democrats will also be competitive for the following seats currently held by Republicans: House District 88 in

Clermont and Brown Counties; District 91 in Perry County; and District 92 in Athens County. Husted also believed House District 18 in Strongsville, currently held by incumbent State Representative Tom Patton, and House District 43 in Summit and Portage County, currently held by incumbent State Representative Mary Taylor, could be competitive.

#### **Senator Bill Harris Frontrunner for Senate President**

Senator Bill Harris (R – Ashland) is now the new frontrunner to be the next President of the Ohio Senate, as long as the Republicans maintain their majority in the November election. Senator Harris formerly served in the Ohio House of Representatives and has served in the Ohio Senate since 2000. Harris, a former owner of a car dealership in Ashland, graduated from the University of Arizona, and served in the Marines. Harris currently Chairs the Finance and Financial Institutions Committee and serves on the Education Committee, the Public Utilities Committee, as well as the Reference Committee and Rules Committee.

In response to newspaper articles linking Senator Jeff Jacobson (R – Dayton) to two Republican fundraisers, who are under investigation by federal agencies for potential violations of campaign finance laws, Senator Jacobson announced he would no longer seek the Ohio Senate Presidency for 2005. Jacobson had been the frontrunner for the President of the Senate in the 126th General Assembly until his announcement. The current Senate President Doug White is term-limited.

State Representative Jon Husted (R – Dayton) is expected to be named the next Speaker of the Ohio House of Representatives for the 2005 – 2006 legislative session. Speaker Larry Householder is term-limited and cannot run for re-election this November.

#### **Ohio Has Long Legislative Sessions**

Ohio is one of nine states that have full-time legislatures. According to Hannah News Service and information from StateNet.com, a Washington, D.C. organization gathering information on the 50 states and Congress, Ohio and Wisconsin, beginning in 2005, will have the longest legislative sessions among their peer group. Other states in the full-time category include: Illinois, Massachusetts,

Michigan, New Jersey, New York and Pennsylvania, all of which have a shorter session than Ohio.

Although Ohio's legislative session is tied with Wisconsin as the longest in duration, Ohio appears to have fewer bills introduced than other states. Leading in the category of estimated bill introductions is New York with 15,000, and Illinois and Massachusetts tying for a distant second with 6,500. Pennsylvania is expected to produce 3,850; Michigan 3,100; New Jersey 1,750 and Wisconsin 1,250 bills. Ohio's is estimated to have 1,300 by the end of the session. Length of a legislative session is not an absolute factor in determining the number of bills that a legislature will have introduced, as is demonstrated by short-term legislatures like Florida (2,700), New Mexico (2,400) or Virginia (2,850).

#### **Legislation to Disclose Drug Companies' Influence of Physicians and Other Health Care Providers**

State Representative Michael Skindell (D-Lakewood) has introduced House Bill 538, which requires the disclosure of free perks worth over \$25 that drug companies give to physicians and other health care providers.

House Bill 538 will require manufacturers and labelers of dangerous drugs to disclose to the Director of Health the value, nature, and purpose of certain gifts, fees, payments, subsidies, and other economic benefits they provide in connection with pharmaceutical detailing, marketing or promotion. The bill would apply to any healthcare professional, healthcare facility, hospital, nursing home, or health plan administrator. Exempt from disclosure would be items under \$25, sample drugs distributed to patients; the payment of reasonable compensation and reimbursement of expenses in connection with a bona fide clinical trial conducted in connection with a research study; certain scholarships or other support for medical students, residents, and fellows to attend bona fide educational, scientific, or policy-making conferences of an established professional association.

As yet, the bill has not been referred to a Committee in the Ohio House of Representatives. ■

## AMC/NOMA Leadership Meets with the Ohio Department of Insurance

The AMC/NOMA Vice President of Legislative Affairs, **Dr. John Bastulli**, met with Ann Womer Benjamin, Director of the Ohio Department of Insurance (ODI), in Columbus on July 29, 2004. Also in attendance were Ms. Carolyn Towner, AMC/NOMA lobbyist and Elayne Biddlestone, EVP/CEO of the AMC/NOMA. Agenda items included: tail insurance coverage for retired physicians, mediation legislation, patient compensation fund (PCF), HB 215, ODI's survey and prompt pay issues.

On the issue of "tail" insurance coverage or (free tail) the Director was informed that the AMC/NOMA Physician Advocacy Committee has been reviewing the issue that is impacting physicians in Northeastern Ohio — namely their ability to engage in medically related activities following retirement. The key issue under review by the committee relates to the eligibility of a physician for free "tail" coverage upon retirement. Professional liability insurance carriers

provide free "tail" coverage for those physicians who are covered under claims made type liability policy provided that the physician has a certain number of years with the carrier and retires from medical practice. Issues have come up concerning what constitutes "retirement." In one instance, an OB/GYN was retiring and he wanted to participate in clinical trials and be involved in the delivery of volunteer medical services for a free clinic. The insurance company viewed physicians engaging in either of these services to be inconsistent with retirement and therefore would disqualify the doctor from the free "tail" coverage provision. Many of these physicians have "retired" only because working less than full time results in income insufficient to pay their premium and they'd like to be reasonably compensated for their effort.

The chairman of the Physician Advocacy Committee, **Dr. Richard Ludgin** sent a detailed letter to ODI outlining the

issues involved with the free tail coverage and indicating that as a matter of pure public policy, the activities in which these physicians sought to participate are exactly what we want to encourage. They would have been a boon to the care of the indigent and underserved. The letter to ODI offered some talking points that should leave the carriers whole and accomplish the goals that the AMC/NOMA wishes to achieve for our membership. The AMC/NOMA urged resolution on these issues so some of its retired members interested in volunteering and working in free clinics or other settings could do so soon.

Ms. Womer Benjamin informed the AMC/NOMA that the ODI has hired a consulting group to look at the tail coverage issue and that a report should be available by the end of August. She also deferred AMC/NOMA to an ODI survey examining the tail coverage issue conducted by a consulting group hired by

*(Continued on page 7)*



Kathy Stahl, CHPN, RN  
Certified Hospice Nurse

## THE NEW NAME IN HOSPICE CARE

Hospice and Palliative Care Partners of Ohio is a new name that blends 100 years of Visiting Nurse Association knowledge and expertise with a brand new vision and direction for Hospice care in Ohio.

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the agency. She indicated the survey results should be available in late August as well, and in the meantime, she will ask the department's property and casualty staff to look at a variety of issues pertaining to tail coverage and determine exactly how it is calculated and report back. In addition, the free tail issue is one of the topics under discussion at the August Ohio Medical Malpractice Commission meeting and Dr. Ludgin has been asked to testify to the committee on this issue. (See related story on page 11.)

Dr. Bastulli then gave the Director a brief overview of the mediation legislation reported in the July/August issue of *Cleveland Physician*. The Director requested Mahoning County to be added to the pilot program and asked to be kept apprised on the progress of this legislation.

The conversation then led to talk about the Patient Compensation Fund (PCF). The Pinnacle Report on PCFs indicated a PCF works best when the state also has hard caps on non-economic damages, caps on attorney contingency fees and periodic payments. The AMC/NOMA believes these items should be closely reviewed prior to moving forward with the PCF. Specifically AMC/NOMA leadership pushed to have a hard cap of \$250,000 on non-economic damages, a cap on attorney contingency fees and an established mechanism for periodic payments. In addition, AMC/NOMA believes the funding mechanism for the PCF should be reviewed to ascertain whether there are other sources of funding available. Benjamin indicated the agency hired a consultant who is preparing a model with different variables and investigating the various aspects that might be included in a PCF and how these would impact the PCF.

Benjamin also mentioned rates would be evaluated based on the variables chosen in the model. She reiterated ODI wants to ensure a PCF will work, prior to implementation, and her two goals for a PCF are two-fold: to reduce overall premiums and maintain a solvent fund. AMC/NOMA requested a copy of the consultant's PCF findings for review and will share with membership upon receipt.

On the topic of HB 215, AMC/NOMA representative inquired about the type of data being collected by the department. Currently, the bill does not include collecting data on attorneys. During the

meeting, Benjamin informed the AMC/NOMA representatives that ODI has the ability to create rules and, in the draft rule, the department is including collecting payment to plaintiffs and defense attorneys for fees as well expenses. Other items under the rule can be added. AMC/NOMA leadership suggests including in the rule an item that insurers would be required to provide data on whether or not their insureds have been dropped from a case or not (i.e.: affidavit of non-involvement issues). The Director indicated that she thought that this was a good idea and would consider adding it to the rule. She also indicated that she plans to add the AMC/NOMA to the ODI list of interested parties to assure that AMC/NOMA receives a copy of the draft

rule for comment.

On the topic of a survey commissioned by ODI, the AMC/NOMA has requested a copy, in aggregate, when available in late Aug.

The last item on the meeting agenda pertained to payment problems some physicians in Northeastern Ohio have been experiencing with certain insurance companies. The Director mentioned she recently met with some Cleveland physicians regarding coverage denials not based on contract but on medical necessity issues. The Director deferred to SB4 and asked that the AMC/NOMA continue to apprise our members of their many appeals rights established under the bill. (See Prompt Pay Becomes Law sidebar story.) ■

## SB4 Prompt Pay Law

Senate Bill 4, the prompt pay law, passed in 2001 and became effective July 24, 2002. SB 4 establishes a 30-day timeframe for the processing and paying of claims submitted by physicians. The law also requires insurers to pay 18 percent interest to healthcare providers for claims not paid in a timely manner and gives the Ohio Department of Insurance authority to assess fines against insurers who pay claims late. The AMC/NOMA was actively involved in the passage of this law that now gives the Ohio Department of Insurance additional authority to ensure compliance by insurance companies with the processing of claims.

Physicians experiencing issues with patient's insurers are encouraged to keep a written record of any problems encountered with health insurance claims on or after July 24, 2002 and to report them to the Ohio Department of Insurance (ODI). A provider complaint form is available on the ODI's Web site at [www.ins.state.oh.us](http://www.ins.state.oh.us).

### Section 3901.3810 – Written Complaints

Section 3901.3810 (A) establishes that a provider or beneficiary aggrieved with respect to any act of a third-party payor that the provider or beneficiary believes to be a violation of sections 3901.381 to 3901.388 of the Ohio Revised Code may file a written complaint with the Superintendent of the Ohio Department of Insurance regarding the violation.

Division (B) prohibits a third-party payor from retaliating against a provider or beneficiary who files a complaint under this section. If a provider or beneficiary is aggrieved with respect to any act of the third-party payor that the provider or beneficiary believes to be retaliation for filing a complaint under this section, the provider or beneficiary may file a written complaint with the Superintendent of the Ohio Department of Insurance regarding the alleged retaliation.

Physician members of the AMC/NOMA may request a complete "Prompt Pay Primer" by contacting the AMC/NOMA offices at (216) 520-1000. The Primer includes a complete overview of the provisions of SB4, information from the Ohio Department of Insurance on how to file a complaint and a copy of form INS 0505 "Provider Complaint Form." ■

# Court Invalidates Regulation Limiting Practice of Anesthesiologist Assistants

by Jennifer Turk and Marc Blubaugh with Benesch, Friedlander, Coplan & Aronoff LLP

On July 26, 2004, the Ohio Court of Common Pleas invalidated a regulation prohibiting anesthesiologist assistants ("AAs") from performing epidural and spinal anesthetic procedures and implementing medically accepted monitoring techniques. In his decision, Judge David Fais held that such regulation was in clear conflict with the permissible practices granted to AAs by the Ohio Legislature.

AAs have been performing all aspects of anesthetic care in the perioperative period for approximately thirty years. No specific training or certification was required by statute. However, in April, 2000, the Ohio Attorney General issued an opinion stating the administration of anesthesia was considered to be the practice of medicine and could not be delegated to a person who was not authorized by law to administer anesthesia. AAs then approached the Ohio Legislature to codify their scope of practice and certification. The legislature subsequently did so.

The new law permits AAs to "assist the supervising anesthesiologist with the implementation of medically accepted monitoring techniques" and also permits AAs to "assist the supervising anesthesiologist with the performance of epidural anesthetic procedures and spinal anesthetic procedures."

On May 14, 2003, the Ohio State Medical Board voted to enact an Administrative Code which promulgates administrative rule which stated "[n]othing in this chapter of the Administrative Code shall permit an anesthesiologist assistant to perform any anesthetic procedure not specifically authorized by Chapter 4760 of the Revised Code, including epidural and spinal anesthetic procedures and invasive medically accepted monitoring techniques." In other words, the regulation appeared to prohibit what the state statute provided.

Arguing the rule was in direct conflict with the statute, Joseph Hoffman, an AA practicing in Cleveland, filed suit against the Ohio State Medical Board demanding a declaration that the rule conflicted with the statute and was therefore invalid. On June 11, 2003, Judge Fais granted a temporary restraining order

prohibiting the Medical Board from enforcing the rule until a hearing on the merits could be held. On November 11, 2003, the parties each submitted motions arguing they were entitled to judgment in their favor as a matter of law.

The heart of the controversy centered on the definition of the word "assist." The Medical Board argued that "assist" could not mean "perform" because if the Legislature intended to have AAs actually performing spinal and epidurals and implementing medically accepted monitoring techniques, it would have simply stated that. Instead, the Legislature chose to use the word "assist." Therefore, according to the Medical Board, the Legislature meant to have AAs assist the anesthesiologist in ways other than by actually performing epidurals, spinals, and medically accepted patient monitoring techniques.

Mr. Hoffman argued that the medically accepted definition of the word "assist" is "to carry out procedures as requested by the supervising anesthesiologist." Mr. Hoffman further pointed out that the Medical Board expressly approved this definition, as this is how "assist" is defined in the rules the Medical Board itself issued. Additionally, Mr. Hoffman stated that the Legislature specifically requires AAs to be trained in the performance of these procedures. This specific clinical training is wholly unnecessary if, as the Rule provides, AAs are thereafter prohibited from performing those very procedures.

The Court agreed with Mr. Hoffman. In his eighteen-page decision, Judge Fais held that the Medical Board specifically negated Ohio Revised Code § 4760.09 which permitted AAs to assist with spinal and epidural procedures as well as medically accepted monitoring techniques by enacting a rule prohibiting AAs from performing these procedures. Additionally, Judge Fais held that it would be unreasonable to allow "assist" to mean to carry out procedures as requested by the supervising anesthesiologist everywhere else but in the rule at issue here.

Judge Fais also found it compelling that the Legislature had prohibited certain anesthesia-related practices with regard to certified registered nurse anesthetists

and medical assistants, indicating that the Legislature chose not to limit AAs from performing spinals, epidurals and medically accepted patient monitoring techniques.

By invalidating Ohio Administrative Code § 4731-24-04(A), AAs are permitted, while under the direct supervision of a practicing anesthesiologist, at the anesthesiologist's direction, to perform spinal anesthetic procedures, epidural anesthetic procedures and implement medically accepted patient monitoring techniques.

On Aug. 18, 2004, the Medical Board filed its Notice of Appeal stating that the trial court erroneously ruled that the rule conflicted with the statute. Briefings will proceed over the next several months.

*(Editor's Note: The AMC/NOMA actively supports the supervised practice of anesthesiologist assistants (AA's). We have worked with both AA's and physicians in our area of the state to assure that AA's are licensed and brought under the jurisdiction of the Ohio State Medical Board. The AMC/NOMA leadership provided testimony to both the Ohio Legislature and the State Medical Board referable to this matter.*

*Early this year, the AMC/NOMA, along with Case, University Hospitals and other entities filed an amicus brief in support of the AA's. The amicus stated in part that the AMC/NOMA strongly supports the use of anesthesiologist assistants on the anesthesia care team. AMC/NOMA further stated that the restrictions placed on AA's by the Rule, contradict the intent of the Legislature when it enacted R.C.S 4760.09. AMC/NOMA was involved in and actively supported the decision by the Legislature to allow AA's to perform regional anesthesia techniques and medically accepted monitoring techniques. The language enacted by the Legislature in R.C. S 4760.09 reflects the working relationship between AA's and anesthesiologists, which has existed for over thirty years. For additional information on this issue, contact Elayne R. Biddlestone at the AMC/NOMA offices at 216-520-1000.) ■*

# Re-evaluating America's Legal System to Remedy the Healthcare Crisis

## Specialized health courts set a precedent

Op-Ed by Philip K. Howard

Some of the root causes of America's current healthcare crisis are unavoidable. No one, for instance, can change the fact that the baby boom population needs more healthcare as it ages. But there is one underlying problem that has to be addressed if the crisis is to be treated and eventually cured: our broken liability system.

### **Current System Yields Inconsistent Verdicts**

Headlines have focused on the rise in liability verdicts and the sharp spike in malpractice premiums — causing doctors to retire early or leave certain states altogether — but those are only the beginning of the real issue. Widespread distrust of justice has fundamentally altered the practice of medicine. Because of it, billions of dollars are squandered annually as doctors order tests and procedures of little or no utility. And doctors and nurses are reluctant to be candid about errors that might lead to better care.

The distrust that pervades American healthcare is an inevitable result of a system of justice that tolerates, indeed encourages, wildly inconsistent verdicts. According to a Harvard Medical Practice Study, most people don't sue when there's a medical mistake; but 80 percent of claims are made against doctors who made no medical error at all. Juries often let a doctor who made a mistake "off the hook" but one out of four cases in which experts believe the doctor did nothing wrong results in payments.

The legal process is not only unpredictable and emotionally wrenching, but also staggeringly inefficient, with legal expenses (for plaintiffs and defendants) consuming 50 percent of the total liability costs. Lawsuits go on for years.

Doctors and patients, of course, aren't natural enemies. Both need what justice today is not providing — reliability. Patients need a system reliable to hold doctors accountable when there's a mistake and doctors need a system reliable to protect them when unfairly charged.

### **Rethinking the Jury's Role**

Restoring reliability to healthcare justice requires questioning the one assumption that, until recently, no one dared even discuss: the role of the jury.

The core flaw with justice today is that no one's in charge — all-important decisions made by juries who come and go with each case is the crux of the problem. Juries can't set precedent; every jury is different and decisions are often inconsistent. One jury might make a huge award in a particular case, and another, in a similar case, might make no award at all.

Under U.S. law, the role of juries in civil cases is to decide disputed issues of fact, and the role of judges is to rule on the law. Decisions on proper standards of care should fall with the judges as matters of the law, not with juries.

### **Defensive Medicine**

Today, partly as a result of the increasing complexity of medical science, no one working on behalf of society is making binding rulings about what is good care and what is not. No one is deciding when a test is needed and when it is not. Established standards of care are missing. Juries, deciding facts in individual cases, don't have the authority to establish such standards. Unlike judges' written decision, their verdicts do not form a body of case law.

### **Specializing to Set a Precedent**

The way to create reliability, and also to make the deliberate choices needed to improve care, is to create specialized health courts. It's impossible to fix the current when no one has the authority to make the choices needed to bring healthcare under control.

Since the 1960s, the rise both in medical liability cases and in the complexities of medical science has been dramatic. But there's virtually no body of law that any judge could look to in making rulings. Shifting responsibility back to judges in current courts would begin to instill a measure of consistency, but not necessarily the wisdom needed to restore trust in healthcare justice. Healthcare has become highly scientific. Judges in courts of general jurisdiction have no medical training.

The outlines of a health court could vary, but the basic components seem clear: judges with medical training would staff health courts. The judges would have the authority to hire neutral experts, instead of experts-for-hire who

now confuse and prolong malpractice cases. To reduce legal fees and the emotional toll, proceedings would be expedited, so that injured patients would keep more of an award.

The primary goal of a specialized court should be patient safety. This requires reviving or inducing a culture of open communication. With an expert health court, doctors could have the confidence that they would not be penalized for admitting uncertainty or error in the candid back-and-forth in hospital corridors and examining rooms.

Reliable accountability is critical to overcoming the distrust that infects daily choices and the doctor-patient relationship. Patients injured by medical mistakes should be compensated fairly. Doctors who are unjustly charged should be protected. Doctors who are not competent should lose their licenses. An expert court could make these types of decisions reliably and consistently.

Creating a new health court may seem like a radical proposal. But health care in the United States is in a meltdown. Specialized courts are common in such areas as taxes, workers compensation, labor issues and vaccine liability. An expert court or tribunal has long been recognized as the sensible solution in situations where there is a crisis of distrust. Sen. Michael Enzi (R., Wyo.) has introduced a bill to fund pilot programs for a health court, and several of America's most prominent hospitals, including New York-Presbyterian Hospital, have indicated an interest in offering themselves for the experiment. Creating a special medical court is an ambitious undertaking and presumably will be opposed by the trial lawyers, for whom the unreliability of the current system is an advantage. Creating such a court, however, will help to strengthen one of the oldest and most basic principles of the U.S. system of justice: that like cases be decided alike.

We don't really have a choice: the distrust that is eating away like a cancer at U.S. healthcare cannot be cured until justice is healthcare is made reliable.

*Philip K. Howard, a lawyer, is Chair of Common Good ([www.cgood.org](http://www.cgood.org)), the bipartisan legal reform coalition, and the author of The Death of Common Sense and The Collapse of the Common Good. ■*

## New Surveys Report Most Americans Support Legal Reform

Most Americans support reforms to the civil justice system according to the Common Good, a coalition dedicated to restoring the ability to make common sense choices and promoting legal reform. According to several surveys released in April 2004, a substantial majority recognizes that excessive litigation and unreasonable jury awards are making healthcare more expensive and less readily available. The recent surveys, commissioned by liability-reform advocates and by the Insurance Research Council find: 82% of Americans are concerned that their access to health care could be impacted as doctors and health care providers leave due to increasing liability cost; 73% of Americans favor a law limiting the percentage of a client's award that a personal injury trial lawyer can receive in fees; 72% of Americans believe healthcare costs are rising because of medical liability lawsuits; 72% of Americans favor a law that guarantees full payment of lost wages and medical

expenses but reasonably limits the amount that can be awarded for 'pain and suffering' in medical liability cases; and 55% of Americans feel that the number of liability lawsuits is higher than is justified.

*According to a recent Insurance Research Council study: 8 in 10 Americans say that people today are more likely to sue for personal injury than in the past; 77% say the size of damages awarded in personal injury lawsuits is larger than in the past; more than half say the number and size of class action lawsuits have increased in the past few years; half say that pain and suffering award in personal injury lawsuits have become 'too large'. A high percentage of Americans support civil justice reform measures, in to include: making it easier for class action members to understand their rights (86%); imposing limits on attorneys' fees (82%); requiring sanctions against attorneys who file frivolous lawsuits (73%); and requiring that large, nation-*

*wide class action cases are tried in federal courts rather than in state courts (53%).*

A *Wall Street Journal/Harris Interactive Poll* from March 2003 also found:

- 59% feel that malpractice suits against doctors and their fear of being sued harms the quality of care to patients.
- Half (48%) favor a cap on malpractice liability damages while a quarter (26%) opposes it, and 25% said they don't know.
- 62% favor having medical malpractice cases tried in special courts presided over by medical professionals and other experts to review and decide injury cases while only 17% oppose, and 21% don't know.

*(Editor's Note: This survey information has been supplied by Common Good, the bipartisan legal reform coalition. See page 9 for the Chair of Common Good's editorial on specialized medical courts.) ■*

## Member Survey Results Provide Ammunition for Legislation

In keeping true to the AMC/NOMA's mission of working as an advocate for patients and physicians by promoting the practice of the highest quality of medicine, the AMC/NOMA recently issued a press release revealing valuable survey data that directly impacts northeast Ohio healthcare consumers.

Survey results from AMC/NOMA member respondents found rising regulatory compliance costs, reduced insurance payouts, low patient volume and a growing under-insured patient base are all contributing factors leading to an increasing number of Northeast Ohio physicians having to make cost related decisions regarding the future of their medical practices in the state.

The survey was conducted by NextMed Systems, Inc., an information technology and medical billing outsourcer. The respondents of the survey represented physicians in practice in a wide variety of settings ranging from small to large practice groups. Previous physician surveys focused on the medical liability crisis but did not broadly represent the declining economics of medical practice here in Northeast Ohio.

"With the advent of HIPAA, electronic medical records (EMR) and other clinical management initiatives being considered by employers, payors and policy makers alike; physicians are trapped in an ongoing squeeze between increasing practice costs, reduced insurance company payments and a continuous medical liability crisis putting our basic livelihoods at risk," said **William H. Seitz, Jr., M.D.**, president of the AMC/NOMA.

Rex Mason, president and chief executive officer of NextMED Systems, Inc. added, "The survey results show the trends in Northeast Ohio are consistent with those across the country."

Survey results show "practice economics", or the cost of doctors conducting business in the Northeast Ohio area, continues to deteriorate with 65 percent reporting a slight or a significant decrease in revenues. A much larger percentage (94) report a slight or significant increase in expenses.

Perhaps most alarming, according to the survey, physician respondents don't expect the trend to change within the next two years. The majority (68 percent) anticipates a slight or significant decrease in revenue.

"Our data shows the primary factor leading to expense increases at physicians' practices is skyrocketing malpractice premiums," said Dr. Seitz. "Unfortunately, the respondents clearly believe that the economic pressures are already impacting the quality of patient care and in response to the economic pressures, many expect to limit their practice, reduce procedures, or retire — further impacting the quality of patient care here in Northeast Ohio."

Other escalating expenses included: increased wages for support staff, rising employee benefit costs and growing rent/occupancy rates. HIPAA compliance costs varied among respondents, with a weighted compliance at approximately \$3,000.

Stories on the issue ran in the July 19 issue of *Crain's Cleveland Business* where Dr. William H. Seitz was quoted.

The AMC/NOMA will utilize survey data in our discussions with legislators regarding implementation of emergency medical records and on the medical liability crisis. For additional survey results, contact the AMC/NOMA at (216) 520-1000. ■

## Tort Reform a Key Issue in Presidential Race

Calling "the lawsuit industry" one of the "biggest obstacles to growth," President Bush has long called for changes so "that if there ever is a verdict, the people who benefit are those who go injured, not the lawyers." As governor of Texas, he made it tougher for plaintiffs' lawyers to win big verdicts and as president, he says he wants to do the same, as reported in the *Wall Street Journal*.

As huge verdicts drive up healthcare costs and force physicians in some states to close their practices, healthcare providers must be vocal players in the political process. And a major way is by educating patients on the meaning of loss of access to care.

A recent Associated Press poll asking Americans what they believed to be the most important problems facing them today found that 19 percent named healthcare, second to 20 percent concerned about terrorism.

With the entry of trial lawyer Sen. John Edwards as John Kerry's running mate, tort reform is emerging as a hot button issue in the presidential campaign. Before becoming a senator, Mr. Edwards's specialty was medical malpractice, particularly cases involving infants who suffered trauma during delivery.

Both Mr. Edwards and Mr. Kerry have accepted millions from trial lawyers and both have repeatedly voted against limiting malpractice lawsuits. The Kerry campaign Web site states that, "The Kerry plan will hold down malpractice premiums by requiring an impartial review of

a claim before an individual could file suit and by eliminating punitive damages except in egregious cases. Kerry's plan will not put a cap on legitimate damage awards."

While some states have passed tort reform at the state level, the Association of Trial Lawyers of America (ATLA) has blocked it on a national basis. Over the past 14 months, the House has passed overhaul bills, but tort reform efforts have been defeated in the Senate, including attempts to limit attorney's fees and three to overhaul medical malpractice laws.

### Financial Loss to Attorneys?

A recent *Wall Street Journal* article reports on the findings of a study conducted by Rand Corp.'s Institute of Civil Justice in Santa Monica, Calif., studying the effects of caps on lawyers and plaintiffs. The article reports that California's 29-year-old MICRA law has "cut by 30 percent the payouts from doctors and their insurers who lose at trial." More significantly, "the reduction in payouts was felt far more by lawyers than by injured patients. Injured patients' recoveries dropped 15 percent while the law resulted in a 60 percent decrease in fees for plaintiff attorneys."

According to the article, "Under California law, contingency fees for attorneys are limited according to a sliding scale, ranging from 40 percent of the first \$40,000 of any recovery to 15 percent of the amount above \$600,000...The cases reviewed by Rand would have produced

an estimated \$140 million in fees for the lawyers, assuming a contingency-fee rate of one-third of the recovery and using the jury's original verdict for calculating the fee. But the fees were reduced by 60 percent of \$56 million because of the caps. Further analysis showed that the sliding scale had a greater depressive effect on lawyer fees than the damage cap."

The group looked only at how California's 1975 law affected payments in cases that went to trial. It did not look at whether the lower awards reduced malpractice insurance premiums for doctors or medical bills for consumers. The 1975 law limits to \$250,000 the amount a plaintiff can recover for non-economic damages such as pain, suffering, distress or disfigurement. Damages for economic losses, such as medical expenses or lost wages, are not capped. This type of legislation passed the House, but Republicans repeatedly failed to get it through the Senate, most recently in April. The study examined 257 plaintiff verdicts in California medical malpractice trials from 1995 to 1999. For more specifics on the study, visit [www.rand.org/news/press/04/07/12.html](http://www.rand.org/news/press/04/07/12.html)

*(Editor's note: The AMC/NOMA currently supports legislation under review in the Ohio legislative — SB 80 — comprehensive civil justice reform that caps jury awards for pain and suffering — of key importance to physicians — this bill would place reasonable limits on attorney contingency fees similar to MICRA.) ■*

## PHYSICIAN ADVOCACY

## Richard Ludgin, M.D., J.D., Testifies Before the Ohio Medical Malpractice Commission

On August 24, 2004, **J. Richard Ludgin, M.D., J.D.**, testified before the Ohio Medical Malpractice Commission. Dr. Ludgin is an AMC/NOMA Board Member and Chair of the group's Physician Advocacy Committee. Prior to Dr. Ludgin's testimony, Joel Whitcraft from the Actuarial Department of GE Medical Protective Company presented testimony on medical malpractice "tail" coverage. Then, Dr. Ludgin gave the physician's perspective on "tail coverage."

First, Joel Whitcraft explained the history and difference between "occurrence

coverage" and "claims-made coverage." He also clarified "tail coverage" is the provision for the extended reporting of claims after the latest "claims-made" policy has expired. He said "tail coverage" was originally intended to eliminate the potential for gaps in coverage that could arise when claims are reported after the latest "claims-made" policy has expired.

Whitcraft told the Commission "claims-made coverage" will be discontinued due to the following: retirement, death or disability or interruption in "claims-made coverage" such as a sabbatical or addi-

tional training as well as when there are changes in carriers. He said carriers address changes in medical practice differently. Carriers may require a "tail" when the practice changes substantially such as a relocation or change in specialty practice.

Mr. Whitcraft also tried to explain to the Commission how the rates are determined. In response to a question from Commission member Ann Womer-Benjamin, director of the Ohio Department of Insurance (ODI), Whitcraft

*(Continued on page 12)*

## **Richard Ludgin, M.D., J.D., Testifies**

*(Continued from page 11)*

explained medical malpractice insurance companies are required to supply data to ODI based on their predictions. Then, ODI determines what they believe the range of rates should be. ODI does not just accept a medical malpractice insurance company's prediction, but makes a separate determination.

Richard Ludgin explained to the Commission that medical staff by-laws require physicians to be covered with at least \$1 million/\$3 million in malpractice coverage and, generally, physicians do not put large sums of money aside for making bad decisions. He explained the difference between "occurrence policies" and "claims-made policies." He then discussed and compared how certain medical malpractice carriers treat "tail coverage" in their policies and how this applies to retired physicians. He said the value of the "tail" is only equal to the value of the company that issued the "tail" to the physician. Dr. Ludgin discussed various factors contributing to why physicians are leaving practice and retiring early: patient demands, reim-

bursement problems, the loss of physicians independence due to health system consolidations, exclusive insurer contracting, and economic credentialing by hospitals.

Dr. Ludgin then presented to the Commission four case examples of physicians receiving their "free tail coverage" from their insurer and what happened when the physician later tried to go back to work. Needless to say, the conclusion of each example was that the physician would lose the "free tail coverage" or would have to buy a "tail" from the prior insurer.

Dr. Ludgin offered the Commission some suggestions for relief for these physicians. He felt exceptions should be provided for physicians working in free clinics and for physicians training other physicians. He suggested a definition of retirement could be limited to a finite period of time. He also felt the "free tail coverage" should be portable. Finally, Dr. Ludgin suggested a physician trust fund or some type of fund could be created for handling claims made more than a certain number of years after retirement of the physicians.

Richard Ludgin concluded his testimony by stating he felt there should be a review of "tail" costs to the insureds. There was a need to review actuarial pricing for evidence that the premium envisions the issuing of a certain number of "free tails." There is also a need to calculate premiums collected where the "tail" is issued at cost and at no cost. He said, data needs to be gathered regarding the tail cost to the insurer. For purchased tails, the data collected should be: the total premium received, the total loss by category, specialty, and care as well as segregated by the time the claim asserted past the date on which the endorsement is issued. For free tails, the data collected should be: the reason the tail is issued, the total loss by category, specialty and care as well as segregated by the time the claim was asserted past the date on which endorsement is issued.

*(Editor's note: The AMC/NOMA will continue to monitor how this issue is handled by the Ohio Department of Insurance and keep our members apprised whether any changes are made due to our efforts.) ■*

## **The AMC/NOMA Co-Sponsors an Ohio Supreme Court Candidate Forum**

*(Continued from page 2)*

cated he is a strong believer in mediation. He indicated he was a leader in the country in offering mediation to parties who come to the adversary system. He said mediation provides another way for these issues to be resolved. Judge Connally indicated she did not believe, at this point, we could make a determination regarding the question of the right to a jury trial. She indicated the key to this issue is good case management and getting cases resolved quickly.

Another question related to judicial philosophy — specifically that we have all heard the term "judicial philosophy" used in Ohio Supreme Court campaigns, discussed in terms of judicial restraint or judicial activism. What is your philosophy? How do you balance the role of the court with the roles of the other branches of government?

Judge Lanzinger indicated the idea of "philosophy," or what judges are supposed to do, or the role of a judge is a very important one. In her view, it is important to be just and ensure the right result is reached in a case as well as to focus on an outcome. If you are a judge who believes in the more traditional views, you do believe in the separation of power — judges do not legislate, they interpret — and they do not write the law. This balance of power is so important, otherwise,

you have an imbalance and you can have chaotic decisions causing problems for everyone. Judge Fuerst noted in the last 22 months as she has toured the state, she has noted the No. 1 thing people are concerned about with government is fair treatment and a level playing field. She indicated no court or judge, at any level in this state, should have any agenda except for the word of law. Chief Justice Moyer noted it is important judges do not take it upon themselves, the authority, or the opportunity to write the law the way we think the other branch of government should have it written. This is a strong principle. He said there are judges who believe otherwise. There are judges who believe a court of last resort is the last place someone can go to get justice, and you can see it in their votes. It is a minority view in the country. Judge Connally stated when you determine a person's "judicial philosophy" you look at the person, you look at the judge and their reputation and the decisions they have rendered. She indicated that she believes it is people who are not satisfied with the decision made by the court who accuse Supreme Court judges of being judicial activists. Justice O'Donnell stated the idea of advancing a philosophy for case decision-making could be summed up best in the concept and term, judicial integrity. Judicial integrity encompasses fairness, a willingness to look impartially at all of the facts in a case and apply the law to those facts. Judges don't

have the liberty to change the law, or to apply their own conception of what they think it is, or what they would like it to be. Rather, judges are obligated, and it is their duty, to follow the law as is written by the General Assembly. Judge O'Neill indicated that he agrees with everything Justice O'Donnell said, that is the law of Ohio. However, if you review the three independent branches of government, there are checks and balances. In 1999 our Supreme Court, which he admires, said that it is wrong to try and balance a statewide crisis on the shoulders of our most seriously injured citizens. They said caps are unconstitutional. The Ohio General Assembly then passed so called "tort reform" and implemented caps in direct defiance of the Ohio Supreme Court — he believes that we have an out of control General Assembly.

The forum concluded with closing remarks from all of the candidates and a wrap-up by Ms. Robins.

This article is just a brief overview of the forum and does not include opening and closing comments or full answers to all of the questions. For a complete overview of the forum, visit the AMC/NOMA Web site at [www.amcnoma.org](http://www.amcnoma.org).

*(Editors' note: This issue of the Cleveland Physician contains important information regarding the medical liability crisis and the importance of the November vote. Please be sure to review these materials and visit our Web site for more information.) ■*

## Additional HIPAA Instructions Announced

Effective July 1, 2004, Medicare systems began enforcing additional HIPAA edit instructions related to X12N 837 Institutional Claims. The HIPAA Implementation Guide for the 837 transactions requires these changes. It is important for providers to become familiar with the changes. Failure to comply will result in claim rejects and accompanying payment delays. Providers need to be sure billing processes comply with the changes to continue correct and timely payments.

Once the inbound claim process was in order, CMS began to work on the coordination of benefits (COB) transaction. Many new issues have arisen since the trading partners treat these COB records, also known as crossover claims, as inbound claims. Medicare's business rules were different from other payors. The changes that take effect in July fall into three primary categories: Medicare now requires certain data elements not needed for Medicare but required by

HIPAA; data previously allowed by Medicare, but not permitted by HIPAA, will result in claims rejections; certain data Medicare now edits only for syntax will be edited for content and will cause claim rejections if the data is not valid.

Providers and their submitters should carefully review the requirements in *Medlearn Matters* Article #3031 to ensure that claims are not unnecessarily rejected after July 6, 2004. ■

## Elimination of Grace Period for Billing Discontinued Codes

Effective for dates of service on and after October 1, 2004, no further 90-day grace periods will apply for the annual ICD-9-CM updates. Physicians, practitioners and suppliers must bill using the diagnosis code that is valid for that date of service. Carriers and DMERCs will no longer be able to accept discontinued codes for dates of service after the date

on which the code is discontinued. Adopt the new codes in your billing processes effective Oct. 1 of each year and begin using them for services rendered on or after that time to assure prompt and accurate payment of your claim.

Providers can view new, revised and discontinued ICD-9-CM diagnosis codes

at <http://www.cms.hhs.gov/medlearn/icd9code.asp>. CMS updates this site annually after the updated diagnosis codes are published in the *Federal Register*, which usually occurs by October 1 of each year.

To view the actual instruction issued by CMS to your Medicare carrier, please go to: [http://www.cms.hhs.gov/manual/pm\\_trans/R95CP.pdf](http://www.cms.hhs.gov/manual/pm_trans/R95CP.pdf) ■

## CIGNA Physician Settlement – Learn How to Get Reimbursed

If you've treated CIGNA subscribers during the past decade, look through your recent mail closely. CIGNA will be settling claims resulting from a class-action lawsuit filed by physicians that alleges the company routinely shorted payments to physicians for services performed.

Any physician group or physician organization that filed a claim between Aug. 4, 1990 and Sept. 5, 2003 and did not choose to opt out of the settlement is eligible for a share of the settlement money.

First, eligible physicians will need to choose to participate in one of two funds.

Doctors who do not want to find and submit documentation of claims they filed with CIGNA can opt to be part of a \$30 million fund to be divided among physicians. They will need to fill out the "Category A Proof of Claim Form" with signed certification.

The other option is the Claim Distribution Fund. In this fund, physicians have three ways to claim money

and can make claims under all three areas. The AMC/NOMA urges all physicians wishing to participate in the CIGNA settlement to carefully read the CIGNA settlement documents, which the company is sending to physicians by mail. Whether you choose Category I or Category II compensation, could affect your amount of recovery.

For more information, visit the HMO Settlements Web site: (<http://www.hmosettlements.com/>). ■

## CLASSIFIEDS

**PYTHON OPPORTUNITIES** - Full- or Part-Time in medicine, general surgery, cardiothoracic surgery, pediatrics and OB/GYN. \$110-250K, never on call, paid malpractice. Physician Staffing, Inc., 30680 Bainbridge Rd., Cleveland, OH 44139. (440) 542-5000, Fax: (440) 542-5005, E-mail: [medicine@physicianstaffing.com](mailto:medicine@physicianstaffing.com)

Cleveland-based, insured, B.C. Anesthesiologist available for vacation coverage and other staffing needs. Cleveland Anesthesia Services (216) 321-1847. Fax (216) 321-1860. [www.MediMigrant.com](http://www.MediMigrant.com).

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Medical Office Space located across from Southwest General Hospital, 1000-2000 square feet. (440) 243-1555.

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## Discounted Tri-C Class List for AMC/NOMA Members and Staff

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Oct. 26, Nov. 2, 9, 16 8:30a-3:30p Westlake 308 \$540.00  
*Prepare for and receive your Medical Office Management Certification*

- **PRINCIPLES OF MEDICAL OFFICE MANAGEMENT (3 CEU)**

Oct. 7 9:00a-12:00p East 2-246  
Oct. 27 9:00a-12:00p Westlake 308 \$96.75  
*Directs managers in maintaining cash flow, efficient staff, positive practice image*

- **FRONT DESK SPECIALIST (3 CEU)**

Oct. 7 1:00p-4:00p East 2-246  
Oct. 27 1:00p-4:00p Westlake 312 \$119.25  
*Enhance productivity/gain new skills in managing the medical front office*

- **ADVANCED CODING CHALLENGE (4 CEU)**

Nov. 4 8:00a-12:00p East 2-229  
Nov. 4 1:00p-5:00p Cleveland Clinic Independence \$119.25  
*Updates administration in coding accuracy/improves physician's bottom line*

- **CHART AUDITING WORKSHOP (6 CEU)**

Oct. 8 9:30a-4:30p Cleveland Clinic Main Campus TTI-104 \$149.00  
*Provides information needed to implement/enhance your internal audit program*

- **ICD-9-CM CODING WORKSHOP (4 CEU)**

Oct. 28 1:00p-5:00p Cleveland Clinic Independence \$119.25  
*Update coding knowledge, learn how to secure accurate reimbursement*

- **CPT CODING WORKSHOP (4 CEU)**

Oct. 28 8:00a-12:00p Cleveland Clinic Independence \$119.25  
*Provides essential skills for properly coding CPT and ICD-9-CM*

**EVENING COURSES (6:00 to 9:00 p.m.)** Receive Certificates of Completion for accelerated medical practice courses taught by local instructors

- **MEDICAL TERMINOLOGY/ANATOMY & PHYSIOLOGY \$216.00**

**Westlake:** Sep 7 – Oct 7 (Tuesday and Thursday)  
**East:** Sep 13 – Oct 13 (Monday and Wednesday) and Nov 3-Dec 8 (Mon and Wednesday)

- **MEDICAL CODING AND ANCILLARY SERVICES \$432.00**

**West:** Oct 11 – Dec 6 (Monday and Wednesday)  
**Westlake:** Oct 13 – Feb 16 (Wednesdays)

- **SURGICAL CODING/MODIFIERS/HCPCS CODING \$432.00**

**East:** Oct 19 – Dec 16 (Tuesday and Thursday)  
**West:** Dec 13 – Feb 14 (Monday and Wednesday)

- **CUSTOMER SERVICE WORKSHOP FOR HEALTH CARE \$74.25**

**East:** Nov 2 (Tuesday)

Members and/or their staff will need an exclusive AMC/NOMA course number to register and obtain the discount. For course numbers, call Linda Hale of AMC/NOMA at (216) 520-1000, ext. 309, or e-mail [lhale@amcnoma.org](mailto:lhale@amcnoma.org). ■

### COLLEAGUES CORNER

*Recognizing outstanding AMC/NOMA members for their honors, awards and achievements, in addition to their work to spread health and wellness messages to the community.*

#### AMC/NOMA Member Named President of Ohio Osteopathic Association

AMC/NOMA member and legislative committee member, **Dr. Jeffrey A. Stanley**, a Solon surgeon was recently named president of the Ohio Osteopathic Association for 2005-2005. The announcement came in conjunction with the association's 106th Annual Meeting held in July at The Lodge at Sawmill Creek.

Dr. Stanley is a 1982 graduate of Ohio University College of Osteopathic Medicine, serves as director of Vascular Surgery at both UHHS Richmond Heights Medical Center and South Pointe Hospital in Warrensville Heights. The association represents about 3,800 osteopathic physicians in Ohio.

The American Society of Interventional Pain Physicians recently awarded AMC/NOMA member and communications committee chairman, **Dr. Mark Boswell**, with the Outstanding Educational Achievement Award. Dr. Boswell is a 1984 graduate of CWRU and is on staff at University Hospitals of Cleveland and Case Western Reserve University School of Medicine. ■

#### Third-Party Payor Seminar

The AMC/NOMA is pleased to offer once again the "Solving the Third-Party Payor Puzzle" seminar on Wednesday, Nov. 10 from 9 a.m. to 4 p.m. at the AMC/NOMA's offices in Independence. Registration begins at 9 a.m. with box lunches included in the attendance cost (\$50 per participant and \$100 for nonmembers).

The seminar's goal is to educate physicians and their office staffs about the many third-party payor claims and managed care issues. Featured speakers include Palmetto GBA Medicare, Medical Mutual of Ohio, Ohio Department of Jobs and Family Services and Anthem Blue Cross and Blue Shield. For further assistance please contact Taunya Rock at 216/520-1000 ext. 314 or via e-mail: [trock@amcnoma.org](mailto:trock@amcnoma.org). Watch your mail for more information regarding this important seminar. ■

## First AMEF Golf Outing a Huge Success

More than 80 golfers turned out at Canterbury Country Club on Monday, Aug. 9 for the Academy of Medicine Education Foundation's first Marissa Rose Biddlestone Memorial Golf Outing. Twenty-one foursomes competed in a shot-gun start tournament to raise more than \$30,000 for expanding the AMC/NOMA's educational programs including medical school scholarships and implementing new initiatives to assist physicians and patients.

First, second and third place foursomes were:

### 1st Place Team

Cleveland Anesthesia Group: **John Bastulli MD, Irving Hirsch MD, Richard Garcia, Marc Mingione**

### 2nd Place Team

Clear Choice Laser Centers: Bill Schneider, Bill Kiessel, Bill Hamilton, Mark Kissinger

### 3rd Place Team

Sagemark Consulting: Phil Moshier, Jim Doan, Bill Hogsett, Loran Uthoff

Prizes were also awarded for longest drive, closest to the pin and longest putt holed.

A special thank you goes to all event and hole sponsors who made the day possible.

### 2004 Event Sponsors:

Clear Choice Laser Centers  
Cleveland Anesthesia Group  
Clinical Technology, Inc.

The Collis Group

Joyce A. Graham, CPA, Inc.

Greenleaf Capital Management

Kellison & Company

Medical Mutual of Ohio

Sagemark Consulting

Sky Insurance

Todd Associates

Walter & Haverfield

### 2004 Hole Sponsors:

Anthem Blue Cross & Blue Shield

Howmedica/Three Rivers

Kapp Surgical Instruments Inc.

McDonald, Hopkins, Burke & Haber LLC

McDonald Investments, Inc.

The Premium Group

Towner Policy Group

United Agencies ■



*The foursome from Sky Insurance, an event sponsor, pose on the tee. From left: Dick Griffin, Dr. Michael Koehler, Mr. Jim Lang and Mr. Rick Schneider.*



*AMC/NOMA President Dr. William H. Seitz, Jr. (second from left) and his foursome (from l to r) Bob Heck, Vinnie Riley and Steve Ruwoldt.*



*Past president of the AMC/NOMA Dr. Kevin Geraci and Dr. Victor Bello pose with their foursome. From l to r - Dr. Kevin T. Geraci, Paul S. Biddlestone, Dr. Victor Bello and Dennis Schwartz.*



*Members of an event sponsor foursome from Walter and Haverfield pause for a Kodak moment. From l to r - Mr. Robert Crump, Ms. Deanna Weber, Ms. Karyn Pistone and Dr. John Dobrowski.*



*First place foursome: Dr. John Bastulli, Dr. Irving Hirsch, Mark Mingione and Richard Garcia.*



*Third place foursome and also an event sponsor was from Sagemark Consulting: l to r - Messrs. Jim Doan, Bill Hogsett, Phil Moshier and Loren Uthoff.*



*Hole sponsor representatives from the Premium Group were part of a foursome with two past presidents of the AMC/NOMA: l to r - Rudy Lakosh, David Martin, Dr. Richard Fratianne and Dr. George Leicht.*



## CWRU Med School Picnic

Medical students at Case Western Reserve School of Medicine attended a late summer picnic on Sunday, Aug. 22. Each year, the AMC/NOMA attends the event to provide information and enlighten students about the various activities and services offered by our organization. We offer free membership to all medical students and residents and welcome input and involvement from these up-and-coming physicians. Apply online at [www.amcnom.org](http://www.amcnom.org) or contact Membership and Marketing Coordinator Linda Hale at (216) 520-1000. ■



*New AMC/NOMA members attending Case Medical School pose for a photograph with current AMC/NOMA member Dr. Ali Askari during the school's annual picnic held Sunday, Aug. 22.*

# Q: What is the driving force behind doctors leaving their practice in Northeastern Ohio?



## A: Medical Liability

### DID YOU KNOW?

- In Northeastern Ohio, medical liability insurance rates are among the highest in the nation.
- Doctors in Northeastern Ohio are forced to pay outrageously expensive liability premiums due to lawsuit abuse and the high cost of defending against claims.
- Personal injury lawyers have a 70% error rate as 7 out of 10 medical liability cases are dropped, dismissed or found in favor of the doctor.
- Only 1.3% of all claims result in a jury award.
- The cost of practicing medicine has escalated dramatically in recent years due to higher premiums for medical liability insurance, soaring jury awards, and lower reimbursements from insurance companies.
- This crisis is forcing your doctor to cut back on staff and services, causing certain specialists to limit their care in emergency room settings, and driving physicians out of the area.

The medical liability crisis is leading to fewer doctors, a reduction in quality of care and damage to the doctor/patient relationship.

### WHAT CAN YOU DO?

- Discuss this issue with your doctor – ask questions.
- Support changes to Ohio's liability laws to make them more fair and reasonable.
- The Ohio Supreme Court has the last word on laws that could resolve this crisis. Please remember that when you go to the polls and vote in November.
- Contact the Academy of Medicine of Cleveland/Northern Ohio Medical Association (AMC/NOMA) at (216) 520-1000 or visit [www.amcnoma.org](http://www.amcnoma.org) for more details.