



Malpractice reform is important to small business.

Excessive or arbitrary malpractice judgments penalize good doctors who are practicing good medicine, simply because their patients happen to experience bad outcomes. At the same time, most patients who suffer actual acts of malpractice are never compensated. This incoherent system raises costs and damages doctor-patient relationships. Medical liability reform should rationalize economic penalties for malpractice, limit non-economic damages, and offer options for arbitration and no-fault malpractice insurance.

Consumers could reap financial savings.

Small businesses are both consumers and producers of healthcare. Today's irrational malpractice laws harm small businesses whose employees consume healthcare services and small businesses that produce healthcare services. Well-crafted reforms could benefit both healthcare consumers and producers.

Small healthcare providers could also benefit.

For decades, small businesses have said their biggest problem is the high cost of health insurance coverage for their employees. Malpractice-induced litigation and defensive medicine contribute to this cost, and reforms can reduce both. Small businesses would see these savings reflected in their insurance premiums.

Malpractice implies negligence and preventability.

Many healthcare providers, such as standalone medical practices, are small businesses. The negative consequences of today's malpractice law may hit these smaller providers harder, since they lack the in-house legal talent to combat frivolous cases. Reforms, then, could benefit smaller providers.

Most adverse events are not malpractice.

What is malpractice? Medical malpractice is an event where (1) an injury or death results from medical treatment; (2) the injury or death was preventable; and (3) the provider's action (or failure to act) was negligent – deviating from accepted standards of medical practice.

Malpractice laws have multiple purposes.

Most medical injuries do not qualify as malpractice. Injuries can be preventable but non-negligent; the provider could have made a less harmful choice but followed accepted procedures. Non-negligent, non-preventable injuries are unfortunate, but not malpractice. These types of injuries are not the object of malpractice laws.

Judgments have economic and non-economic parts.

What are the benefits of malpractice laws? Malpractice laws serve multiple purposes, including: (1) reimbursing wrongfully injured patients for the costs of treating the injuries; (2) compensating patients for pain and emotional suffering resulting from acts of malpractice; (3) giving healthcare providers a strong incentive to avoid acts of malpractice; and (4) punishing providers who have committed such acts.

Our malpractice system has costly side effects.

Malpractice judgments generally have two components. Economic damages reimburse patients for the financial cost of dealing with a malpractice injury – medical expenses, lost income, etc. Non-economic damages compensate patients for the pain and suffering of the medical injury.

Estimating malpractice costs is an inexact science.

What are the costs of malpractice laws? America's malpractice system generates costly side effects. Providers defensively order excessive tests and procedures that cost money and sometimes result in medical side effects. Fear of legal action complicates the relationship between providers and patients.

Unintended consequences may increase healthcare costs by 2%- 10%.

It is difficult to estimate the malpractice system-induced costs of litigation, defensive medicine, patients harmed by defensive medicine, and so forth. In addition, fear of the malpractice system leads some providers to retire or relocate to less-litigious localities, creating shortages in some places.

According to numerous estimates, the cost of litigation and defensive medicine increases national healthcare spending by something in the neighborhood of 2%. A 2006 Price Waterhouse study put that figure at 10%. National health expenditures should total \$2.8 trillion in 2012. Using the 2% and 10% figures would put the cost of malpractice litigation and defensive medicine at between \$56 billion and \$280 billion per year.



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Many defendants are innocent.

How effective are malpractice laws? According to a 2007 [RAND study](#), “There is only about a 37-percent chance that a medical episode leading to a payment actually involved medical malpractice.” Countless providers settle out of court in order to avoid litigation costs.

Few victims are compensated.

One estimate holds that only 2% of malpractice victims file lawsuits. An even smaller number receive any remuneration. However, an unknown number are compensated through out-of-court settlements.

The goals of malpractice reform are twofold.

What are the goals of malpractice reform? The goal of malpractice reform is to reduce the negative side effects of the laws as much as possible while reducing the benefits as little as possible. Unfortunately, there are tradeoffs between these two goals.

Malpractice reform can reduce the federal deficit.

In 2009, Sen. Orrin Hatch (R-UT) asked the Congressional Budget Office (CBO) to estimate the effects of malpractice reform on the federal budget. Assuming changes such as limits on non-economic and punitive damages, a statute of limitations, and a shift from joint-and-several liability to fair-share liability, CBO estimated \$54 billion in budgetary savings over a ten-year period.

Below are several reform proposals.

What are some specific reform proposals? There are many different approaches to malpractice reform, some of which are listed below. Each has its positives and negatives. This document is not ranking the relative desirability of the different approaches.

Non-economic damage caps.

Laws can limit the level of non-economic damages that a court may order. In 2003, Texas limited non-economic damages to \$250,000. Malpractice payouts dropped dramatically, and there was an influx of physicians.

No-fault medical injury insurance.

No-fault insurance could compensate those suffering adverse medical events, regardless of whether the injuries resulted from malpractice. This is similar to no-fault auto insurance, which pays regardless of whose fault and requires no litigation. New Zealand has a system of no-fault medical injury insurance.

Loser pays expenses.

Under the British legal system, the loser in litigation pays the winner’s legal expenses. While discouraging frivolous suits, this system also discourages some patients with legitimate complaints from filing legal actions.

Malpractice courts.

Lay juries, lacking medical expertise, arguably turn malpractice litigation into a game of chance. An alternative is to establish malpractice courts whose judgments are rendered by healthcare experts. Sen. Mike Enzi (R-WY) has introduced legislation creating such courts on a test basis.

Limit on contingency fees.

Plaintiffs’ attorneys typically receive 1/3 of any judgment, but also cover 100% of the expenses associated with the case. Some argue that this high-stakes incentive scheme encourages “fishing expeditions” by attorneys. In some countries, attorneys’ compensation is limited.

Encourage arbitration.

Laws could encourage injured parties and providers to engage in arbitration. One such incentive would limit non-economic damages if the provider alerts the patient to the problem and admits culpability.