

## Proposed Research Conference on Disputes and Litigation Over Delivery of Health Care Services

### OVERVIEW

Litigation appears to play an increasingly important role in the delivery of health care services. The courts know little about the nature of litigation over health care delivery, and even less about the conflicts that form the source of such litigation. Such knowledge is required to plan for the effects of litigation on the courts and the health care system in general. This proposal seeks funding for a conference, hosted by the Federal Judicial Center and co-sponsored by other interested organizations, that will identify opportunities for research on the relationship between litigation and the delivery of health care services. The product of this conference will be a list of questions and issues that will benefit from empirical study. These research topics will then be developed into specific research proposals through the work of smaller groups.

### INTRODUCTION

The health care delivery system seems poised to undergo profound changes in the delivery of services, many of which are likely to generate new litigation. The cover article of the current issue of the American Bar Association Journal (October, 1996) summarizes these trends. Movement away from private providers of health care is likely to attenuate the bonds of loyalty between patient and provider, thereby increasing the opportunity for conflicts to become transformed into litigation.

Moreover, many proposals for reform of the health care system include entitlements that will increase the opportunity for litigation. Proposed federal legislation in 1994 led the Subcommittee on Health-Care Reform of the Judicial Conference Committee on Federal-State Jurisdiction to warn against proposed legislation that made the federal courts the primary forum for review of denial of health care benefits. Future proposals also are likely to present new burdens to the federal and state courts, both in terms of the numbers and complexity of the disputes.

The courts know little about litigation involving the delivery of health care services. Reported decisions represent only a small portion of the disputes that are presented to the courts. Court records do not permit easy identification of litigation related to health care. The federal and state courts require a clearer understanding of the nature of health care disputes to assess the effects on changes in health care delivery on litigation.

While the focus of concern by the Center is on litigation in federal courts, such a topic can best be examined in the context of litigation in other forums and, more generally, as the result of grievances that become transformed into litigation. Health care litigation in federal courts is dwarfed by such litigation in state courts. A better understanding of the nature of such litigation in the federal and state court systems will permit an informed assessment of the consequences of establishing a federal cause of action for a variety of emerging conflicts. Similarly, learning how conflicts are transformed from disputes into litigation will offer insights into the consequences of changed relationships between patients and health care providers and the extent to which alternative dispute resolution offers an attractive alternative to traditional litigation.

## GENERAL RESEARCH STRATEGY

The proposed conference will develop an agenda for a coordinated series of research studies on the relationship between litigation and health care delivery. While the methodology of the studies will be framed around the issues that are raised at the conference, a number of research questions may be addressed in the context of a general research strategy that the Center anticipates using to identify the evolution of conflicts over delivery of health care services into federal litigation. A brief description of that general strategy will provide a context for discussion of the research conference.

Using a model initially developed for the Civil Litigation Research Project,<sup>1</sup> we will attempt to examine the role of litigation in the broader context of conflicts over the delivery of health care services. This model recognizes that litigation occurs near the end of a process that involves (1) perception of a grievance, (2) statement of a claim, (3) bilateral negotiation to resolve the dispute, and possibly, (4) use of alternative dispute resolution devices. Of course, many grievances do not result in litigation, either being resolved at a preliminary stage or abandoned. The extent to which grievances progress to litigation can then be visualized through the metaphor of a pyramid. The number of grievances form the base of the pyramid, with each successive stage of the evolution of the disputes yielding smaller subsets of the original pool of grievances. The top of the pyramid is defined by the relatively few cases that result in litigation. The shape of this pyramid can be compared with earlier findings on other types of disputes to determine if litigation involving health care progresses in a distinctive way. Each stage of the evolution of disputes can be the focus of specific research inquiries.

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<sup>1</sup> This approach is described in Herbert M. Kritzer, *Studying Disputes: Learning from the CLRP Experience*, 15 *Law & Society Review* 503 (1980-81) and Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *Law & Society Review* 525 (1980-81).

*Assessing Grievances and Claims.* Previous surveys have identified a number of common complaints arising in the delivery of health care services that are likely to result in grievances. The research conference will review these findings and identify types of grievances and claims that are likely to increase as the health care system is transformed. Public and private organizations that are knowledgeable about the health care delivery will be invited to participate in the conference and encouraged to pursue these issues through a coordinated research project that focuses on surveys of patients and health care professionals.

*Assessing Dispute Resolution Outside the Courts.* Resolution or abandonment of claims prior to filing a lawsuit is a common alternative to litigation. In recent years great emphasis has been placed on the opportunities for settlement of such claims through negotiation, mediation, arbitration, or other forms of alternative dispute resolution. Many managed care programs have extensive administrative procedures to permit review of claims. The surveys of patients and health care providers mentioned above will be one source of information on the extent and nature of such activities. Local health organizations (e.g., hospitals, clinics, HMOs, medical insurance providers, professional associations) also will be contacted to determine the extent and nature of claims that have arisen and how they were resolved. Particular attention will be devoted to formal mechanisms for mediation or arbitration that are part of health care plans.

*Litigation Regarding Delivery of Health Care Services.* The studies outlined above will provide a context for assessing claims that result in litigation. Federal and state cases arising from the delivery of health care services will be identified by searching electronic databases for the names of litigants that typically indicate a role in health care delivery (e.g., "hospital," "clinic," "M.D." "medical," "physician," etc.) Individual case files will then be examined to assess the nature of the claim and resolution of the litigation. In this way, the litigation "landscape" will be mapped. A sample of federal cases may be examined prior to the proposed conference as a means of assessing the problems and potential of such an approach.

Several benefits arise from such an approach. First, the role of litigation is seen in the context of the larger number of disputes that never result in the filing of a case. Second, examination of litigation in both federal and state courts will permit a better understanding of how disputes are divided between the two jurisdictions and move from one to another. Third, this study will provide baseline data to permit assessment of changes in disputes and litigation that accompanies any future restructuring of the health care delivery system. Finally, this study will sort out what proportion of current litigation is related to health care institutions, and the extent to which such litigation involves delivery of health care services as opposed to more general disputes that arise in large institutions.

## PROPOSED RESEARCH CONFERENCE

The proposed research conference will provide an opportunity for those who are familiar with current and emerging issues in health care delivery to collaborate in the design of a broad-based data collection effort to assess the context of litigation over health care delivery. While the Federal Judicial Center will host the three-day conference, a number of other organizations will serve as co-sponsors and contribute to the development of the conference agenda and research proposals. Potential co-sponsors may include:

- American Association for the Advancement of Science
- American Medical Association
- American Bar Association Health Law Section representative
- National Center for State Courts
- Agency for Health Care Policy and Research
- Rand Corporation Institute for Civil Justice
- Representatives of one or more schools of public health
- Representatives of one or more law school programs on health care
- Representatives of one or more public health care providers

The agenda of the conference will recognize the diversity of health care delivery organizations and will be tailored to reflect the transformation of disputes from claims to litigation. The conference, will focus on what we know about conflicts over the delivery of health care services and what we need to learn to make an informed assessment proposed changes on rates of litigation. The specific agenda will be framed with the assistance of the co-sponsors of the conference. Among the broad topics to be included on the conference agenda are the following:

- Variations in Health Care Delivery Systems and Implications for Selection of Research Sites.
- Past Research Concerning Complaints and Conflicts Arising from the Delivery of Health Care Services.
- Institutional Mechanisms for Recognizing, Assessing, and Resolving Complaints.
- Institutional Mechanisms for Resolving Disputes with Public Providers of Health Care Services (Medicare, Medicaid, VA).
- Patterns of Litigation Involving Health Care Institutions
- [NEED MORE TOPICS]

## BUDGET

The estimated cost of the conference is \$83,000. Travel funds will be provided for approximately forty participants having expertise in: (1) health care policy/delivery and litigation issues relevant to the overall focus of the research conference; and (2) information and data sources on the health care and litigation issues to be addressed by the conference. Funds will also be used to support several small working groups that will develop specific proposals for research in areas conference participants identify as promising.

Travel, lodging, subsistence for participants	\$48,000.00
Presenters and technical/consultant services	15,000.00
Conference-support services, including materials recording of proceedings and limited follow-up support to on-going research groups	<u>20,000.00</u>
	\$83,000.00