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Cocktail party talking points

Med mal tort reform

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Let's do something hypothetical but real enough to make a point. Senator Tom Colburn (R-Oklahoma) appears at a friend's home where you are a guest. He's a gentleman, but at a key moment in a lovely evening he can't resist attacking your profession. The party becomes quiet. People are listening. "Counselor," he says, "medical malpractice lawsuits are out of control."

It's your opportunity. You decide to take it, but you need *talking points*, and you need them fast.

• **Accountability**

When people are not accountable for the harm they cause, they cause more harm. Incredibly, 98,000 people die every year due to medical errors. Thousands more survive, and it's certainly true that most medical errors never come to light.

• **Big Business dominates health care**

Managed health-care organizations pay doctors and hospitals based on steeply discounted reimbursement rates. "The difference between the reasonable cost of care and the amount paid to doctors and hospitals by managed care is often as much as 600 percent to 800 percent." The result is not hard to imagine. Some doctors make up the difference by seeing more patients in less time and then proceed to make preventable errors. The bargain is intentional. The result is foreseeable.

This is discussed in the article, "Big Business Dominates Health Care." (Seattle Post Intelligence, January 2008) http://www.seattlepi.com/opinion/347475_healthcare16.html

• **Frivolous lawsuits**

The so-called frivolous lawsuit is myth. It exists in the marketplace, but it's extremely rare in the courthouse. How do we know this?

- Suing doctors is risky business, and lawyers aggressively avoid taking frivolous cases.
- Frivolous lawsuits don't generate income.
- If a lawsuit is frivolous, the lawyer is not reimbursed for the money he invests in it; typically, \$250,000.
- If a lawsuit is frivolous, the lawyer may end up paying the defendant's costs, probably another \$250,000.
- Insurance companies promote the myth of frivolous lawsuits in the "marketplace" because fear sells more malpractice insurance.

• **Look to Wall Street for the truth about frivolous lawsuits**

Insurance companies don't buy office equipment that doesn't exist, and they don't buy worthless lawsuits. The reason is not hard to imagine: neither one has value.

- Typically, stock in insurance companies is owned by large institutional investors (e.g. banks, private pension funds, etc.) who read financial statements and know how company executives spend the investors' money (particularly large amounts).
- Despite the hundreds of billions claimed to have been spent settling worthless claims over the past 20 years, investors have never sued an insurance executive for wasting money on settling worthless lawsuits.
- Insurance companies tell two stories. They tell investors they spend millions to settle the meritorious cases and

they tell the public they're being shaken down by lawsuits that have no value.

• **Defensive medicine**

Senator Colburn, who practiced medicine before he practiced public policy, makes his rejoinder. He says defensive medicine is a common practice and it costs the public billions. He wants FBI agents to pose as patients and arrest doctors for fraud; really. (<http://www.whitehouse.gov/health-care-meeting/bipartisan-meeting>)

The cost is much exaggerated. Insurance companies control health care, and they don't spend money when they don't have to.

- They require pre-authorization; this means that tests and procedures are not done unless a company approves them first.
- They don't reimburse doctors for medical costs unless the costs are "reasonable and necessary."
- They don't retain doctors who over-treat; and they don't renew annual PPO-contracts with clinics that over treat.
- Diagnosing illness by ruling out other possible illnesses is reasonable and necessary. It's good health care. The method is proven, thoughtful and scientifically sound. It saves lives. Insurance companies know this; it's the reason they pay.

Robert G. Eisele, a former Washington State assistant attorney general, holds licenses in Arizona, California and Washington. His law office is in San Francisco. He is interested in hearing from you about strategies that corporations and Wall Street use to promote tort reform; eisele@icehouse.net. Stephanie Eisele will graduate this spring from the University of Puget Sound, double majoring in International Affairs and in French.