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Health court concept draws critics from trial, defense attorney groups

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Marc D. Ginsberg, a professor at The John Marshall Law School, said there is a reason the author of a 2008 article about health courts included a question mark in the title.

The idea, which was the subject of a scholarly article called "Health Courts?", is the brainchild of the Harvard School of Public Health and Philip K. Howard. Howard is a New York attorney, author and founder of Common Good, a not-for-profit legal reform organization.

Howard spoke about his proposal on Tuesday at the Union League Club of Chicago.

Supported by President Barack Obama and opposed by the nation's trial lawyer groups, Howard's proposal calls for the creation of a separate court to deal with health-care disputes.

It would work similar to the state's workers' compensation system, which requires claims go before a commission instead of through the circuit courts.

There would be no jury, Howard said, explaining that a judge dedicated to health-care cases would make all of the rulings with the help of a neutral panel of experts.

"It would streamline the process where people injured by medical mistakes could get the case resolved much more quickly," Howard said.

Ginsberg, the John Marshall professor, who represented physicians for about 25 years before joining academia, said Howard's idea is interesting, but one he believes won't make it past the proposal phase.

"There are a lot of unknowns," he said. "We could do this system, but I'm not so sure you're going to get better outcomes and I don't think the trial bar is going to be inclined to go along with this at all."

Ginsberg didn't attend Tuesday's event, but was right about the trial bar.

Jerry A. Latherow, president of the Illinois Trial Lawyers Association, told Howard at the Union Club event that he respectfully opposed his health court proposal.

Latherow used the few minutes he was given to stress the importance of the jury system.

Howard's proposal would eliminate the jury system, something Latherow said is "not what this country is about."

"This country is about people from 12 different walks of life coming in to hear evidence on a particular case," he said.

Latherow said the problem isn't necessarily the legal system, but rather the amount of time cases take to make it through the system.

He pointed to a pilot program recently implemented by Cook County Circuit Judge Kathy M. Flanagan as an example of an effort to improve the system without radically changing it.

Under Flanagan's program, plaintiffs and defendants with cases in the Law Division have to disclose their experts at the same time, an approach expected to speed up the discovery process.

Anne M. Oldenburg, president of the Illinois Association Defense Trial Counsel, said in a joking way that it sounds like her group and the trial lawyers "agree for once."

Oldenburg, who focuses her law practice on malpractice matters, said she "is not in favor of abandoning the civil trial system."

"To completely abandon that in favor of going to a system where one judge is making the decision seems untested and not in the benefit of anyone," she said.

Both Oldenburg and Ginsberg, said they have a lot of questions and a few concerns over Howard's proposal.

"Who are these administrative judges going to be?" Ginsberg said. "Are they going to be highly regarded plaintiffs and defense

lawyers who become the judges? Not likely in part because the compensation would probably be poor."

Oldenburg said she also has concerns with how the judges would be selected and the level of their expertise. She said until recent reforms passed, arbitrators in Illinois' workers' comp system didn't even have to be lawyers.

"I feel like there's a lot of danger when you leave decision making to one individual," she said.

Oldenburg, who did not attend Tuesday's event, said she was unfamiliar with the health court proposal until being asked about it.

The idea of health courts is relatively new in the United States, although there's a few other countries that have tested or implemented the speciality courts, Howard said.

Legislation to create health courts similar to what Howard is proposing was introduced to no avail in Illinois about five years ago, said W. Eugene Basanta, a professor at Southern Illinois University School of Law.

He said he heard about Howard's proposal a few years ago, when he gave a presentation at the law school.

Basanta, who teaches courses in health-care law, said he sees the value in both the jury system and a special health court.

Basanta said he thinks Howard's proposal may have been given a breath of life when Obama voiced support for health courts during last year's health-care debates.

The president also included \$250 million in Department of Justice grants in his 2012 proposed budget to be used to create health court pilot programs.

"The idea behind the issue is gaining some traction," he said.

Ginsberg, however, disagreed. He said candidates tend to bring up tort reform during election cycles.

"I think it's unlikely to occur," he said.