


# TWENTY QUESTIONS (AND ANSWERS) ABOUT ISSUE 1 AND TORT REFORM



*By Marc Kilmer*  
9/10/18

## Questions and Answers on Issue 1

This November, Arkansas voters will consider Issue 1, a proposed constitutional amendment to establish tort reform. This ballot measure has attracted significant attention this election season from both friends and foes of tort reform. In their attempts to defeat Issue 1, opponents of tort reform have been spreading deceptive and false information about what it would do. To help clear up any confusion, here are some frequently asked questions about tort reform along with short, accurate answers.

# 1 What is tort reform, and how will it change Arkansas?

Lawsuit reform, also known as tort reform or legal reform, is the label that people use to describe changes in the American system of civil justice. Civil justice is not the same as criminal justice: civil justice is the part of the justice system that people use when they have been wronged and want financial compensation. The civil justice system provides financial compensation (often called “damages”) by requiring wrongdoers to pay those whom they have harmed.

Issue 1, which was written by the Arkansas state legislature in 2017, will be voted up or down by the state’s voters in the 2018 general election. Issue 1 consists of several different legal reforms: regulation of lawyers’ contingency fee contracts, regulation of different kinds of damages, and measures to preserve the constitutional separation of powers. All of these measures are aspects of legal reform, and they can properly be combined into one constitutional amendment<sup>1</sup>. Each reform is described below.

Lawsuit reform deserves support because everyone in the U.S. pays a “lawsuit tax” of hundreds or thousands of dollars every year, and the average cost of U.S. civil liability is more than twice the average cost in other industrialized countries<sup>2</sup>. Lawsuit abuse is a drag on the economy and hurts efforts to create jobs and to expand access to health care.

# 2 How does lawsuit reform affect health care?

Lawsuit reform has great potential to improve Arkansans’ access to health care.

Consider the case of Texas. Prior to passage of lawsuit reform in Texas in 2003, the state had a variety of problems with its health care system that were related to lawsuit abuse. For instance, only four medical malpractice insurers operated in the state at the time. Ten years after the enactment of lawsuit reform, the Heritage Foundation studied its effects and found:<sup>3</sup>

- The number of licensed physicians in the state nearly doubled.
- The number of physicians in the state was increasing at a rate that was twice the rate of population growth.
- Doctors’ malpractice premiums had decreased by 60%.

Other studies also show how lawsuit reform can improve health care:

- One study concluded that that laws limiting malpractice payments would lead to lower health care spending.<sup>4</sup>
- Another found that states that had non-economic damage caps (such as the ceilings being considered with Issue 1) set at or below \$500,000 had insurance premiums that were lower than states that did not have such caps.<sup>5</sup>
- A RAND Corporation study found that the most likely outcome of one kind of lawsuit reform – ceilings on non-economic damages – was an increase in the supply of physicians in high-risk specialties.<sup>6</sup>
- Yet another study concluded that increasing non-economic damage ceilings led to increases in insurance premiums. Higher ceilings led to substantially higher premiums.<sup>7</sup>

It is reasonable to predict that changes in the lawsuit system like that of Texas will attract medical personnel to Arkansas, improve access to health care, and make patients better off.

1 See generally *Forrester v. Martin*, 2011 Ark. 277.

2 See “Get the Facts: Lawsuit Abuse Is Having A Devastating Impact on Our Society,” Institute for Legal Reform, U.S. Chamber of Commerce.

3 Nixon, Joseph et al., “Ten Years of Tort Reform in Texas: A Review,” The Heritage Foundation, July 26, 2013.

4 Hellinger, Fred et al., “The Impact of State Laws Limiting Malpractice Damage Awards on Health Care Expenditures,” *American Journal of Public Health*, 2006 August; 96(8): 1375–1381.

5 Nelson, Leonard et al., “Damages Caps in Medical Malpractice Cases,” *Milbank Quarterly*, 2007 Jun; 85(2): 259–286.

6 Helland and Seabury, “Tort Reform and Physician Labor Supply: A Review of the Evidence,” RAND Institute for Civil Justice,” September 2014.

7 Nelson, Leonard et al.

### 3 How does lawsuit reform affect attorney fees?

Issue 1 does not regulate attorney fees; instead, it regulates contingency-fee contracts. These are contracts where a lawyer takes a case with an agreement that if the client is awarded money, the lawyer will receive a portion of that money. These contracts would still be legal if voters approve Issue 1, but lawyers would be prohibited from receiving (after expenses) more than 1/3 of the client's recovery.

Contingency fee contracts can be useful in some situations, but they also can introduce anti-client incentives for lawyers. Clients have an inequality of bargaining power when it comes to negotiating contingency fee contracts with lawyers, in that clients will regularly disclose their financial circumstances to their own lawyers. Many states have a ceiling of one-third on contingency fees, which is the rule that Issue 1 proposes. These arrangements still allow for low-income clients to use lawyers on a contingency-fee basis, but prevent unscrupulous lawyers from taking an excessive amount of money from these clients.

Some opponents of regulating contingency fees argue that they are already appropriately regulated, in that the law already requires that contingency fees must be "reasonable." Other opponents of regulating contingency fees argue that the possibility of a conflict of interest is an insufficient justification to regulate a complex financial instrument. These arguments are so weak that they almost refute themselves (notably, anyone who reads the rule on what constitutes a reasonable contingency fee will find that, as a practical matter, it provides no real guidance as to how to determine whether any particular fee is reasonable).

Arkansas already recognizes the unacceptability of some contingency fee contracts. Lobbyists, for instance, cannot be paid using such arrangements. Neither can lawyers who are handling criminal or child custody cases. Doctors also cannot be paid using this method. That is because we recognize that paying these professionals based on results could, in some cases, result in actions that are detrimental to the client or the public. Lawyers are supposed to be agents of their clients, rather than facing a conflict of interest which such contingency-fee agreements can create. When a lawyer puts his or her financial interest above the interests of the client, then this could cause serious problems. Placing a reasonable ceiling on contingency fees is one way to eliminate possible conflicts of interest.

### 4 What are punitive damages, and how does lawsuit reform affect them?

Punitive damages are awarded by juries or judges in order to punish actions that are especially wrongful. These damages are a multiplier of other damages. So under Issue 1, someone who receives damages to compensate them for the wrong they suffered could, in addition, receive punitive damages up to three times the amount of the compensatory damages – but not more. (Note that compensatory damages are the sum of economic and non-economic damages.)

It should be noted that the U.S. Supreme Court has already placed limits on how much punitive damages may be multiplied. Issue 1 would limit punitive damages to three times compensatory damages; it isn't going to significantly affect possibilities for recovery, because the ceiling that the U.S. Supreme Court has already imposed isn't much higher. Furthermore, Issue 1's ceiling will not apply very often, because in the set of cases where punitive damages is requested, there is an exception – there is no ceiling for intentionally harmful actions (the actions that the law typically labels "intentional torts.") So in many, perhaps most, cases where punitive damages are called for, this amendment will have no effect.

## 5 What are non-economic damages, and how does lawsuit reform affect them?

Under our legal system, you can recover damages from someone who has harmed you. Economic damages are damages for your economic losses. These could include things such as lost wages, medical bills, or the cost of hiring a caregiver. They are relatively easy to calculate. Non-economic damages, on the other hand, are awarded for things that are hard to measure in dollars, such as mental anguish or pain and suffering. To state the obvious, it is not always clear how a justice system can arrive at a dollar value for pain and suffering in a fair or principled way.

Issue 1 would limit non-economic damages to \$500,000. It would not affect economic damages. It bears repeating that this ceiling only affects one aspect of one kind of damages – it does not affect economic damages or punitive damages. In the unlikely event that the public decides that this \$500,000 ceiling is too low, legislators can raise the ceiling.

## 6 Does lawsuit reform affect the 7th Amendment or the right to trial by jury?

No. Juries, whether civil or criminal, do not have absolute freedom to do whatever they want. They must follow the law. Currently, there are numerous laws that govern what juries can do. Lawsuit reform opponents sometimes argue that juries should be able to ignore the law and exercise unlimited powers. In reality, juries are only supposed to exercise the limited powers that are set forth in the law. They must apply the law, not make the law. The Arkansas Model Jury Instructions stretch out over 39 chapters and hundreds of pages. If we take the strange logic of Issue 1 opponents seriously, we might as well say that every rule of evidence which affects what the jury can hear or act on affects the right to trial by jury -- it's almost as if the logic of the opponents of Issue 1 commits them to opposing rules of evidence.

Issue 1 opponents also appear to have a basic misunderstanding of federal versus state jurisdiction. Issue 1 is a state issue. Sometimes opponents of lawsuit reform bring up the 7th Amendment to the U.S. Constitution, which deals with the right to a jury trial. But the U.S. Constitution cannot and does not control state decisions in this area. Furthermore, the right to trial by jury in Arkansas courts is expressly preserved by and unaffected by this amendment.

## 7 How does lawsuit reform affect the separation of powers and the balance of powers?

In the U.S., we have separation of powers between the three branches of government: executive, legislative, and judicial. Each has its own power, but each checks the power of the others. No branch is supreme. The legislative branch is supposed to set general rules (for example, statutes) that are applicable to all, while the judicial branch makes decision about how to apply these laws to concrete cases.

At times, the Arkansas court system has attempted to use its exclusive control over judicial rules to stray into the areas of public policy. This aggressive interpretation of judicial authority prevents the legislature from enacting laws in certain areas, thus subverting the balance of powers. Issue 1 would restore that balance by putting a check on the unilateral authority of the judicial branch to set rules. It is fair to say that Issue 1 comes close to repairing the state Constitution's balance of powers between the legislative and executive branch in the 19th and 20th century, which was regrettably thrown out of balance by the passage of Amendment 80 early in the 21st century.

Those who argue that the legislature cannot properly have any voice in procedural rules display a remarkable ignorance of the federal system (in which Congress writes the rules for the federal courts), the system in many states (in which roughly half the states write the rules for their state courts), and the system in our state (in which, for the first 165 years of Arkansas history, the legislature held the power of judicial rulemaking).

## 8 What was the view of the Founders on the proper separation of powers and balance of powers between the three branches of government?

Those who wish to answer that question might begin by reading one of the most famous passages of the Federalist Papers. Federalist 78 explains the proper roles of the legislative, executive, and judicial branch, and the paragraph reproduced below should be of interest to anyone with an interest in the proper site of rulemaking power. Those who are curious about whether the legislature or the courts should prescribe general rules should pay particular attention to the passage I have italicized below.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. *The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.* The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

## 9 Does lawsuit reform put a price tag on human life?

No. Although this charge has been frequently brought up in the debate over Issue 1, it is flatly inaccurate to say that Issue 1 places a price tag on human life. The civil justice system we have provides monetary damages to someone who has been harmed; Issue 1 would preserve this part of the system. (Indeed, it is difficult to imagine a viable civil justice system that does not assign money damages.) In the American system of justice, and in most others, when wrongdoers harm others, they must pay damages – money – to their victims. Those who are arguing that it is wrong to “put a price tag on human life” must necessarily reject our current system of civil justice, which arguably places a price tag on human life every day. The charge that Issue 1 places a price tag on human life is not a serious argument: it is much more like an air horn or an ear-splitting noise that is designed to stop serious argument.

Issue 1 does change one aspect of the current system, which gives trial lawyers a disproportionate amount of power to determine a price tag on human life. The notion that the trial bar should be able to make decisions about the appropriate range of compensation and damages, but that the people of Arkansas who under the Constitution are allowed to amend it should be prevented from making such decisions, is an immoral and anti-constitutional political vision.

## 10 What is the pro-life perspective on lawsuit reform?

Some pro-life activists in Arkansas have arrived at the confused position that there is a conflict between lawsuit reform and pro-life values. This posture is nonsensical, since lawsuit reform has nothing to do with abortion issues. In fact, expanding access to health care seems far more related to the pro-life cause; those who do not understand that health care protects life cannot be said to have given life issues very much thought. Lawsuit reform will help improve access to health care in Arkansas. People who oppose providing increased access to health care can with some justice be accused of working against pro-life values. It is a twisted version of pro-life politics that ignores the lives of the people that are saved and improved by health care.

## 11 How does Amendment 80 affect lawsuit reform?

Throughout much of Arkansas's history, the legislature set the rules for the state's court system. In 1973, it delegated some of this authority to the Supreme Court, but as a formal matter, the legislature still held ultimate rulemaking authority. In 2000, voters passed Amendment 80, which the courts have aggressively interpreted to give them exclusive authority in judicial rulemaking. This interpretation has prevented legislators from enacting lawsuit reform under the rationale that this policy reform is not fundamentally a legislative power, but really just a change in judicial rules. Such interpretations have also led courts to strike down democratically enacted policies pertaining to "stand-your-ground" laws and the rights of witnesses to be accompanied by service dogs in court. The current interpretation of judicial powers under Amendment 80 makes it impossible for legislators to enact the will of Arkansans on lawsuit reform and related issues unless the state Constitution is amended.

Notably, Amendment 80's reshuffling of constitutional powers pushed Arkansas out of sync with the balance of powers in many states and in the federal system. In the federal system, the Rules Enabling Act ensures that Congress makes judicial rules, not the courts. There is no serious argument that the federal arrangement is inconsistent with the separation of powers or the balance of powers.

## 12 Why does lawsuit reform require a constitutional amendment?

Returning power to legislators to amend or annul judicial rules (power that legislators had for most of the state's history) is necessary for lawsuit reform. Without that ability, the judiciary will continue to thwart efforts to make reasonable reforms in the civil justice system. Because of how the judicial branch interprets the state Constitution, it has taken upon itself broad authority to strike down a variety of lawsuit reform measures, such as medical malpractice reforms. Currently the court's interpretation of its powers would forbid legislators from passing policy changes like a "loser-pays" system, where the losing parties in lawsuits would be responsible for some or all of the winners' legal fees, or preventing the use of harassing lawsuits designed to shut down participation in the political process. When the judiciary has a monopoly on rule-making, it has demonstrated that it will use that power to stop the will of the people when it comes to lawsuit reform. Only by amending the state Constitution can this situation be fixed.

## 13 How does lawsuit reform affect the economy?

Lawsuit reform helps the economy by reducing the wasteful spending caused by abuse in the legal system. As mentioned above, Texas enacted lawsuit reform in 2003. Not only did those reforms help lead to a significant improvement in Texans' access to health care, they also contributed to economic growth.

A 2008 study concluded that the Texas medical malpractice reforms led "to increases of \$55.3 billion in spending per year and more than 223,000 jobs."<sup>8</sup> It is reasonable to predict that, just as in Texas, the enactment of lawsuit reform could lead to more job creation and economic opportunity in Arkansas. A 2009 study from the Institute for Legal Reform backs this up: it estimates that legal reform would reduce the state's lawsuit costs by approximately \$316 million and reduce unemployment somewhere between .65% and 1.77%.<sup>9</sup>

<sup>8</sup> Perryman Group, *A Texas Turnaround: The Impact of Lawsuit Reform on Business Activity in the Lone Star State*, April 2008.

<sup>9</sup> Hinton and McKnight, "Creating Conditions for Economic Growth: The Role of Legal Environment," U.S. Chamber Institute for Legal Reform, October 26, 2011.

## 14 Do lawsuits make people's lives better?

Lawsuits are a necessary part of life. They are a way for those who have been wronged by another to seek damages. However, lawsuits can be abused. Unscrupulous lawyers can game the process to benefit themselves at the expense of their clients and the public. Placing common-sense rules in place to make this sort of abuse more difficult will help Arkansans. Lawsuit reform can grow the economy, expand access to health care, and protect clients from exploitation.

Those opposing Issue 1 have fixated on the idea that lawsuits are necessary to address problems at nursing homes. Their case is undercut by the fact that (for instance) both low-quality and high-quality nursing homes are sued at roughly the same rate.<sup>10</sup> If lawsuits played a key role in improving nursing home quality, then it would make sense for low-quality nursing homes to face significantly more lawsuits. But these nursing home suits are faced by the good and bad alike, which would lead a reasonable person to conclude that the undifferentiated rain of lawsuits that such businesses face play little to no role in improving nursing home quality. More generally, it is uncontroversial that lawsuits succeed in transferring money from one party to another, but real-world evidence does not really support the theory that lawsuits in the current civil justice system provide a helpful set of incentives to encourage good behavior.

## 15 Does limiting damages under lawsuit reform harm people?

Issue 1 would not limit economic damages suffered by Arkansans. If anyone is harmed economically by the wrongdoing of others, they would still be able to recover the full amount of damages. If a wrongdoer intentionally commits a bad act that harms someone, judges and juries would still be able to impose punitive damages. Issue 1 would only impose a ceiling on non-economic damages, which are hard to measure and can be prone to abuse. This will curb the "tort tax" that exists in Arkansas. As it did in Texas, it will likely also lead to greater health care access. Lawsuit reform certainly will not harm the people of Arkansas; instead, it is a way to help them.

## 16 Is lawsuit reform conservative?

Yes. The "tort tax" of hundreds or thousands of dollars per person per year under the current system hurts job growth. It is a drag on our economy that can be smoothed away with lawsuit reform. In addition, lawsuit reform can expand health care access without new government spending or regulations. Lawsuit reform also places limits on the power of government to award excessive damages in cases. In addition, lawsuit reform strengthens the separation of powers between the judicial branch and legislative branch by ensuring that judges are not able to make policy, but are instead confined to their traditional role of interpreting the law.

## 17 Does lawsuit reform limit government?

Yes. One of the most important limits on government is the separation of powers. Each branch of government checks and balances the other. Currently, the Arkansas judiciary has exclusive power to set its rules of practice and procedure. This is a dangerous situation that, as described above, has led to the judicial branch straying into making decisions on public policy. Separation of powers should prevent any branch of state government from both issuing rules and deciding case. Allowing a supermajority of legislators to play a role in setting judicial rules will restore the balance of power between the two branches. It will check the currently unchecked power of the Arkansas judiciary and return policymaking power to legislators. It will also ensure that juries must obey the law.

<sup>10</sup> Studdert, David M. et al., "Relationship Between Quality of Care and Negligence Litigation in Nursing Homes," *New England Journal of Medicine*, 364: 1243-1250, March 31, 2011.

## 18 Several Arkansas legislators have recently been indicted or found guilty of serious crimes. Does this demonstrate that the legislature should not be given its traditional constitutional role?

No. Fraudulent conduct by some legislators can justify such measures as resignation or expulsion, disbarment, prison time, and restitution; it does not justify abandonment of constitutional values like separation of powers and balance of powers. It would certainly be a mistake to assume that members of the Arkansas judicial branch have universally done a good job of respecting constitutional norms. Witness, for instance, Justice Courtney Goodson's success in barring a hostile campaign commercial from the airwaves by engineering a flagrantly unconstitutional court order by means of an ex parte hearing; Goodson also argued in her pleading that she had a judicial privilege not to reveal whether she had voted for or against a judicial pay raise, which is a theory of judicial privilege that is utterly groundless. Those who do not see such actions as corrupt have not thought very seriously about what corruption is.

Members of the judiciary, like anyone else who runs for office, will often attempt to advance their political goals; this underscores the importance of preserving the constitutional norms of checks and balances. The proper method of answering questions about constitutional divisions of authority has little to do with the identities of those who temporarily hold offices; instead, we should attempt to answer such questions in a principled manner, primarily by determining which branch of government is institutionally best suited to exercise such powers.

## 19 Although the advocates of Issue 1 argue that it would create jobs, improve health care, and advance the prospects for lawsuit reforms for punishing frivolous litigation or encouraging loser-pays, these important matters are not mentioned in Issue 1. Why not?

A constitutional amendment is different from legislation. Although legislation typically specifies concrete policy goals, a constitutional amendment often does something different: namely, it changes or clarifies the responsibilities of various parts of government.

It is very difficult to anticipate all of the effects of a constitutional amendment; that is why many proposed constitutional amendments – like Issue 1 – allow the legislature to clarify unanticipated issues, but do not go into detail about specific policies. That is because it is much easier to pass legislation to solve a newly identified problem than it is to pass a constitutional amendment; a good constitutional amendment, within certain boundaries, allows some opportunities for addressing problems that cannot be immediately anticipated.

It isn't much of an exaggeration to say that a good constitutional amendment is short and general, and that a bad constitutional amendment is long and concrete. Despite its extensive detail, the ambiguities of the 22-page-long "ethics" constitutional amendment voters narrowly passed in 2014 are still creating uncertainty on the part of public officials. The relative brevity of Issue 1 is a feature, not a bug.



## 20 There's big money behind the debate over lawsuit reform. Shouldn't that affect how we vote on Issue 1?

It is certainly true that many donors have contributed lots of money to advertising campaigns that discuss the pros and cons of Issue 1. For instance, trial lawyers will have made and engineered donations of millions of dollars that attempt to scuttle lawsuit reform by the time Election Day rolls around in November. It is fair to say that many large financial interests have made significant contributions so as to publicize their preferred perspective on the debate over Issue 1.

What this should underscore is that voters should focus on the actual consequences of Issue 1, rather than looking at Issue 1's advocates and opponents. Sadly, some voters likely will not learn this, and instead will fall victim to an unwholesome and regrettable fact of politics: namely, the political demonization of people we disagree with. Obviously, demonization is much easier than thinking about issues of lawsuit reform, but it is also counterproductive and socially dangerous.

Our duties of civic participation would be much easier if we could simply look at financial contribution reports and then, like an adding machine, determine what measures we should vote for based on those contributions – sadly, civic duties cannot be fulfilled in that way.

## CONCLUSION

When making decisions on ballot initiatives, every voter's civic duty is to look at the facts and the merits of the issues. Voters who study this issue and are able to cut through the fog of clichés and sloganeering created by liberals and trial lawyers can reasonably predict that:

Issue 1 will create jobs, bolster the economy, and improve access to health care in Arkansas;

Issue 1 will regulate contingency-fee contracts so that clients will not be taken advantage of by unscrupulous attorneys;

Issue 1 will not diminish 7th Amendment rights or the right to a jury trial;

Issue 1 will restore separation of powers and the balance of powers to Arkansas's constitutional system by ensuring that the legislature has a role in policy decisions;

Issue 1 will not create a legal system that places a price on life;

Issue 1 will respect life by creating conditions that will lead to more access to health care in Arkansas; and

Issue 1 will lead to a reduction in lawsuit abuse.

In short, Issue 1 is conservative lawsuit reform that will benefit the people of Arkansas.

Marc Kilmer is an analyst for the Advance Arkansas Institute.