

2004 holds promise for progress in medical malpractice crisis

by Richard E. Anderson, MD, Napa, CA

The issue of spiraling medical malpractice insurance rates and its ramifications for patients finally captured the attention of the American public last year. The nature of the crisis has become increasingly clear to the average person. Polls now show that more than 70 percent of Americans want tort reform.

States act

As the situation grew more desperate, several states in which skyrocketing malpractice premiums were front-page news took unprecedented steps to rein in lawsuits. The momentum toward passing vital medical liability reforms will continue in 2004, because state legislatures are beginning to act early rather than wait for a full-blown health crisis to take hold.

Texas demonstrated the power of public support for reforms in 2003. In a landmark vote, Texans decided to change their state constitution to allow the legislature to put a cap on damage awards in lawsuits, particularly the subjective

noneconomic (pain and suffering) damages that are driving up jury awards and insurance premiums.

Other states moved forward as well. To further preclude the possibility of a crisis, the Idaho legislature, in a bold example of leadership, took the preemptive step of lowering the state's noneconomic damages cap. Arkansas and West Virginia, two states where shuttered medical practices and hospital wards had sometimes forced residents to travel into nearby states for health care, also enacted solid tort reform (see related story on page 16).

These legislative actions were based on the realization that the cost of medical malpractice insurance is primarily determined by the insurer's loss experience. Insurers in states that do not limit the amount of money a jury may award a plaintiff for intangibles, such as pain and suffering, face a greater risk of large awards.

Dubious claims

Additionally, the current tort system provides an incentive for patients and lawyers in these states to try to hit the jackpot by filing claims of dubious merit and hoping for a sympathetic jury. Nationally, nearly 80 percent of claims are ultimately determined to be without merit, but the insurer still must spend an average of about \$25,000 each time a claim is filed to vindicate its policyholders. Not surprisingly, in the last several years malpractice insurers paid out about \$1.30 for every premium dollar they collected in

today's lawsuit-happy society.

The cost of dubious lawsuits ignites a financial chain reaction that extends far beyond insurers, physicians, and patients, however. In addition to paying higher insurance premiums because of lawsuit risks, physicians are performing more tests and using expensive defensive medicine techniques to protect themselves. Because most Americans receive their health insurance through their employers, businesses of all kinds are either paying more for health insurance or asking employees to saddle part of the load. This translates into higher costs throughout our economy and family budgets stretched to the breaking point.

Good news/bad news

The good news is that even though the march toward tort reform is sometimes slow, the movement has continued to be positive. No state has passed legislation rescinding advances made in past years, and many have pushed tort reform proposals to the front of their agendas.

The bad news is that some state legislatures and members of Congress have not yet gotten the message and wait until the last moment to enact minimal reforms that provide more political cover for them than long-term relief for surgeons and patients. Effective tort reform legislation failed to pass in Missouri, Nebraska, Oregon, Washington, and Wyoming, while laws with significant loopholes were passed in Florida and Nevada.

Medical liability reform activities of the College and the ACSPA

The American College of Surgeons is extremely concerned about the medical liability crisis and its effects on surgical practice and patient access to care. To help ensure that the surgical community's voice is heard on this issue, the College and the American College of Surgeons Professional Association (ACSPA) are carrying out several important efforts. They are as follows.

1. *Forming Doctors for Medical Liability Reform (DMLR).* The ACSPA has joined with a number of medical and surgical specialty societies to form a coalition of more than 230,000 specialty physicians who support federal medical liability reform. The DMLR effort is focused on bringing the message about the need for medical liability reform to those states that have a U.S. senator who is helping to block passage of national medical liability reform legislation.

2. *Expert witness standards.* The Board of Regents recently revised and strengthened the College's "Statement on the physician acting as an expert witness." An affirmation statement embracing the expert witness qualifications and behavior standards set forth in the statement was also approved for voluntary use by Fellows involved in medical liability litigation.

3. *Disseminating patient information brochures.* The ACSPA recently sent all Fellows a packet of brochures that can be used to enlist the support of surgical patients in asking senators to support medical liability reform.

4. *Distributing buttons.* The ACSPA recently sent all Fellows buttons that read, "Will a surgeon be there?" Surgeons are encouraged to wear these buttons to draw public attention to the medical liability crisis.

5. *Building the Legislative Action Center.* Thousands of surgeons have used the ACS Legislative Action Center (which can be found on the ACS Web page www.facs.org) to write letters to both U.S. senators and representatives and state legislators, urging them to support medical liability reform.

6. *Developing Chapter Leadership Conference programs.* The medical liability reform crisis will be a major focus of the May 2004 ACS Chapter Leadership Conference in Washington, DC. Surgeons from across the country will be going to Capitol Hill and urging representatives and senators to support federal medical liability reform.

7. *Chairing the Health Coalition on Liability and Access (HCLA).* The HCLA, chaired by ACS staff, is the largest coalition specifically dedicated to advancing federal medical liability reform.

Looking ahead

So what does 2004 hold for medical liability reform? First and foremost, the issue probably will receive even more attention at the national level than it did in 2003. Candidates for President, Congress, and state legislatures across the nation will have to address the issue when they run for office this year. Reform will be a key campaign issue, particularly in the nearly two dozen states the American Medical Association says are in a full-fledged health care crisis driven by insurance rates that can be as much as four times more than physicians pay in stable states such as California.

Overall, there will be a continued effort by physicians, patients, and the business community to keep moving forward. More policymakers are realizing that physicians are avoiding risky cases and spending hours upon hours dealing with legal issues, time that would be spent more productively helping patients.

Progress was made in 2003, and 2004 promises to bring further advances. We can be certain that the issue will not go away and that even more states will become involved in the coming year. But until politicians find the resolve to take lawyers out of examining rooms, the struggle ahead will be hard-fought and runaway litigation will continue to impair access to health care. □

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