MEDICAL LIABILITY REFORM AND STATE LAW:

West Virginia

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Many people believe that the movement toward reform of the medical liability system has stalled somewhat at the state and federal levels. There seems to be an aura of pessimism, which could be the result of the extremely partisan nature of the discussion, the fact that insurance premiums appear to have peaked, or just a feeling of lethargy because of the lack of progress in Washington and certain state capitals.

Despite the frustrations of many surgeons and other health care providers, there are bright spots around the country. The purpose of this article is to provide specifics from the experience of one such state. Perhaps these details may provide strategic guidance to others and create some optimism that medical liability reform is not a hopeless cause.

The need for reform in West Virginia

In 2001, West Virginia, like much of the rest of the country, was in the midst of a medical liability crisis. Rates had risen considerably over the previous two years and affordability was clearly an issue, but as insurers left or considered leaving the state, availability was also becoming a problem. Responding to the previous liability crisis of the mid-1980s, a $1 million cap on noneconomic losses was signed into law, and rates rose only modestly until early 1999. Although these minimal reforms were certainly helpful, far more important to rate control were that the insurance market was soft and that competition was increased by new companies entering the market in West Virginia.

Whether attempts by the insurers to secure market share during this time kept rates artificially low can't be said with certainty, but when premiums started to increase by 30 to 40 percent a year in 1999, physicians became sensitized. Contributing to the woes, a major carrier went out of business, leaving many physicians without adequate protection. Because of the turmoil within the medical community, a special session of the state legislature was convened in the fall of 2001. The constituencies supporting liability reform were poorly organized but still were able to exert enough pressure for some modest reforms in S.B. 601.

The blueprint for reform

The primary objectives of this legislation were the elimination of suits by plaintiffs' lawyers against insurance companies that refuse to settle in medical liability cases, an increase in the size of the jury from six to 12, requirement of a document from the court certifying that a case has a minimum level of merit before it could proceed, and permission granted to physicians who wanted and needed coverage to purchase liability insurance from the state Board of Insurance and Risk Management. Availability of insurance was no longer an issue, but affordability was still a major concern.

Over the next few months, liability rates continued to increase and there remained considerable unrest in the physician community. Moreover, there were rumblings that other private insurers might leave the state. Despite these concerns, Gov. Bob Wise (D) continued to say that before considering additional liability legislation, he wanted to see what effect S.B. 601 would have.

As spring moved into summer in 2002, pressure for further action was building. During the statewide primary election in May, several physicians ran for the state legislature, and many of them were successful. There was also a growing public concern about the loss of physicians practicing in West Virginia and the difficulty of recruiting others. This concern reached a climax in August, when, with the loss of two orthopaedic surgeons (one to relocation and the other to a change in practice situation), the orthopaedic call schedule at the Level I trauma center at Charleston Area Medical Center remained unfilled and the designation was downgraded to Level III. This situation caught the attention of public policymakers as it had in a similar situation in Nevada several months earlier. This series of events provided the final element of the crisis: the threat to access to quality care. Governor Wise, a lawyer who had been heavily supported by plaintiff attorneys in the 2000 election, became much more engaged almost overnight and responded to the widespread public outcry. Members of his administration were immediately called upon to find a solution. Within a few weeks, a formal agreement was reached, whereby those private physicians providing direct trauma care would receive some of their liability coverage from the original state program for

state employees and university physicians. With the governor's quick action, the trauma center's Level I designation was restored.

When the governor realized the true severity of the problem, he concluded that something more dramatic in the way of legislation would be demanded by the public. Added emphasis was given to this realization in November, as two physicians were elected to the House of Delegates, a rare occurrence in West Virginia. Just as importantly, several high-profile trial lawyers were defeated in legislature reelection bids. In the aftermath of the election, the Speaker of the House, a strong supporter of tort reform, reviewed legislative strategy regarding the issue and the governor's inner circle began working on new substantive legislation in preparation for the beginning of the regular session in January 2003.

A sense of optimism about impending tort reform was palpable. This was enhanced by the increasingly aggressive and well-organized activities of a large group of health and business entities that collectively educated the public on the likely risks to the future of health care in West Virginia if there were no action on the issue.

Passage of reform

With positive dynamics clearly falling into place, an additional event occurred just before the beginning of the session in early January: because the liability climate was considered particularly onerous in Wheeling, there was a brief work stoppage by surgeons from that area. There was risk associated with this action, but, in retrospect, it unquestionably had an effect on the governor's "state of the state" address later that week. Somewhat unexpectedly, a tort reform proposal that went far beyond what had been previously considered was included. That night, there was a sense of exhilaration within the medical community and other patient interest groups, but this was just the beginning.

The governor's bill included a variety of measures, including a flexible cap on noneconomic damages of $350,000; allowance of collateral source information in the courtroom; enhancement of the joint and several provision; a total trauma and emergency cap of $500,000; and state government capitalization of a new physicians' mutual insurance company. Seemingly in collaboration with the governor, the Speaker of the House had carefully made several new appointments to the House Judiciary Committee, where such legislation had died in past years. On the first Monday of the regular session, the Speaker's bill, H.B. 2122, was placed on the agenda for the House Judiciary. This bill was similar to that proposed by the governor, but it went further in some respects, most conspicuously by proposing a more rigid cap of $250,000 for noneconomic damages. After a debate of approximately nine hours and with few changes, H.B. 2122 was reported out of committee and three days later it passed the House by a large margin.

The situation in the state senate was a bit more complicated, but with the assistance of the new chairman of the Senate Judiciary Committee, a trial lawyer with a balanced approach, the process was much smoother than anticipated. The only substantive modification was refinement of the concept of the Patient Injury Compensation Fund, which was to be created to deal with situations in which the trauma cap and the joint and several liability changes could leave a victim with uncompensated economic damages. After some additional tweaks to the bill in committee, it was given to the full senate, where the vote was 33-1 in favor.

To pass legislation that was considered by many experts to be the most comprehensive state effort in medical liability reform in more than 25 years since MICRA (Medical Injury Compensation Reform Act) in California was unbelievable, considering the possibilities only a year before. When the governor signed the bill a few weeks later, it was truly a celebration, with a massive turnout of business leaders, health care providers, and grateful patients.

Although premiums did not immediately decrease, the rate of increase certainly slowed in comparison to other states. Within a few months, optimism was prevalent among all interested parties. Fewer physicians were leaving the state and recruiting efforts were much more successful even in the high-risk specialties, enhancing access to quality care in West Virginia. Less than a year after the effective date of the new legislation, there were credible data showing a decreased frequency and intensity of medical liability lawsuits. In fact, the total number of lawsuits and

the dollar amount of judgments and settlements had dropped to less than 50 percent of their previous levels. This dynamic did not change over the subsequent year.

There still remained concern on the part of the liability insurance underwriters that there might be a successful court challenge that could overturn the hard-fought reforms. Since then, two early challenges to these reforms ended in decisions favorable for physicians and their patients. Even more importantly, a new, more conservative Supreme Court justice was elected in November 2004, defeating a sitting judge who was perceived as more accommodating to the trial lawyer lobby. Then two additional bills—"I'm Sorry" and "Innocent Prescriber"—passed during the 2005 regular session. Taken together, these events calmed the insurers, and it became a virtual certainty that there would be a substantial decrease in liability premiums.

What can be learned from West Virginia?

Comprehensive tort reform at the federal level, which most physicians agree is the ideal solution, appears to be out of reach in the short term. With tort reform at the state level currently receiving the most attention, one could ask if there are any lessons to be learned from the tort reform experience in West Virginia. At the risk of overgeneralization, I believe there is much food for thought in the West Virginia story. There is little doubt that persistence is a virtue in these complex political altercations. Losing a battle should not create a culture of despair but rather a commitment to better understand the process and to play the game more cleverly.

Forming a broad-based coalition that includes the medical and public health communities, businesses, senior citizen groups, and even labor organizations can pay great dividends. Brute force and self-righteousness rarely work in these circles and that is why civility and empathy should be among the guiding principles for anyone joining the fight for liability reform. Medical liability reform is not a partisan issue—it is not about Republicans versus Democrats, physicians versus lawyers, or even about who is hurt financially and who isn't. It is about access to high-quality health care for all our citizens, whether they live in cities or rural communities. This idea needs to be emphasized constantly while other, more self-serving, approaches should be downplayed or eliminated.

The leaders of all the West Virginia organizations supporting medical liability reform showed remarkable commitment to the strategy outlined here. It wasn't easy and it wasn't always pretty, but the result was more than satisfactory. Despite health care and civil justice systems that still have imperfections, the state and its people can now move forward to a much more stable playing field than they had just a few years ago. More importantly, for physicians, compared with many other states, West Virginia just may be, as the John Denver song claims, "almost heaven." Ω

This article was generated through the efforts of the ACS Committee on Patient Safety and Professional Liability. Members of the committee believe that this and other articles published in the *Bulletin* should stimulate thought and possible action on a wider spectrum of issues related to patient safety and professional liability.

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