



THE BATTLE FOR TORT REFORM: *The Maryland experience*

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This article depicts the battle for tort reform waged in Maryland. It demonstrates how escalating liability premiums in the state forced the medical community and our diverse patient population to rally behind the cause and grab the attention of legislators. I anticipate that our rather bittersweet story will provide insights into the political process and into how to build momentum at the grassroots level in the fight for liability reform.

THE SETTING

The state of Maryland is located in the mid-Atlantic region and bordered by two states, West Virginia and Pennsylvania, both experiencing a professional liability crisis due to escalating premiums. So understandably, when Maryland's largest private medical liability carrier, the physician-owned Medical Mutual Liability Company, was granted a substantial increase in rates beginning January 1, 2004, health care professionals throughout the state sounded cries of alarm. The lines were drawn for the next battle for tort reform in Maryland.

Maryland's population of more than 5 million live primarily in its eastern and southern regions. The major centers of Baltimore and Annapolis are situated on the western shores of the Chesapeake Bay. The areas to the east of the bay extend to the Atlantic coast. The population centers of Baltimore and Washington, DC, to its southwest on the Potomac River create a metropolis, which is said to contain the greatest per capita density of lawyers in the nation. Further west, the state becomes more rural in character, with smaller communities and rolling hills leading to the modest mountains that border West Virginia.

In 2003, Rep. Robert Ehrlich, Jr., a Republican, was elected governor. He was chosen to preside over a Maryland General Assembly, which has an unbroken history of Democratic dominance. The president of the senate, Thomas Mike V. Miller, Jr., has held that post longer than anyone and has served as a state senator for 30-plus years. And while the majority of the lawmakers in Maryland return to private businesses when the 90-day legislative session is over, Senator Miller and almost all of the other "movers and shakers" in the gov-

ernment are lawyers—trial lawyers. Only two physicians serve in the General Assembly—a Republican anesthesiologist in the Senate, and a Democrat emergency physician in the House of Delegates.

THE YEAR BEGINS

With malpractice premium rates scheduled to increase for physicians, the state medical society, commonly called the MedChi, organized a rally on the steps of the statehouse for opening day of the legislative session, January 21, 2004. More than 2,000 physicians from across the state came to hear speeches by physicians, AMA president Donald Palmisano, MD, FACS, and patients. The governor made an unscheduled appearance on that cold morning, as well. All spoke passionately about the effects that the increases would have on access to health care for Marylanders. Cries of “tort reform now” and “save our docs” filled the air. In my capacity as President of the Maryland Chapter of the ACS, I had written what turned out to be the lead op/ed story in *The Baltimore Sun* that day. The letter declared it was “time for change” and that “the health care of all of the citizens of Maryland warrants this effort.”

Despite the participants’ enthusiasm, local television news programs only gave the rally 30 seconds or so of airtime, but granted three minutes of coverage to the “victims” of “rampant” medical malpractice shown testifying in a Senate conference room. There was no mention of the 60 buses required to bring in physicians from all over the state, nor of the transportation provided by the opponents of medical liability reform to bring the “victims” to Annapolis that day. It was clear that the money allocated by opponents to fight tort reform in the session would be spent in the next 90 days.

THE SESSION

During the 90-day legislative session, general assembly committees conducted numerous hearings on tort reform. Hospitals, physician groups, the state medical society, and insurers banded together to form an Alliance to Preserve Access to health care. Formal testimony and informal discussions were held with leaders on both sides of the aisle in the statehouse and the governor’s office. Bills were introduced with much public de-

bate. Privately, many insiders pronounced the legislation “dead on arrival.”

In the end, the session closed without a bill even being presented on the floor for a vote. Though some observers thought the effort for tort reform was underfunded or pursued too passively, the most prevalent assessment from lawmakers and physicians alike was that nothing would change until there was “blood in the streets”; that is to say, until the patients felt the pain and demanded reform themselves.

THE GROWING STORM

January’s optimism gave way to despondency when the session closed in April. All members of the Alliance to Preserve Access left Annapolis feeling the same sense of overwhelming frustration. During the summer months following the legislative session, the governor visited all of the hospitals in the state, talking with medical staffs and urging physicians to get involved, to contact their lawmakers, and to explain the repercussions of the problem to their patients.

In July, I met with representatives of Governor Ehrlich’s office to discuss the situation and review the issues relevant to the practice of surgery. Changing requirements for expert witnesses as promoted by the American College of Surgeons were included in the chapter’s list of necessary reforms. “Good Samaritan” reform to better protect surgeons who provide emergency care was also advocated. At this time, the governor clearly indicated his support, and we considered him a positive force for liability reform.

In separate meetings and through the press, lawmakers offered various tort reform proposals, most of which appeared to be self-serving and intended to preserve the status quo. The Maryland Chapter and other medical groups sent letters to the editor of the local newspapers decrying the measures. Both the state senate and the governor appointed special panels to study the problem and make recommendations in the fall.

Throughout 2004, Medical Mutual Liability Company and the three remaining medical liability insurers in the state paid out on record verdicts and settlements. Another round of premium rate increases was imminent. Med Mutual requested an additional increase for January 1, 2005. This hike, on top of the prior year’s increase and

the loss of a premium rebate, amounted to a substantial increase for surgeons in a two-year period. GE Medical Protective, the country's oldest medical liability carrier, requested an even larger increase in rates so that it would be on par with Med Mutual. Clearly, the lack of reform during the 2004 session caused the crisis to escalate.

SURGEONS MOBILIZE

In August, a number of surgeons approached the Maryland Chapter Council Members for advice and help. As a result of these requests, an emergency meeting of surgeons from throughout the state took place September 18, 2004, at a conference center in Ellicott City, MD.

Approximately 100 surgeons of all disciplines from across the state attended. Also present were the only physician in the state senate and two lawyers—one an expert on antitrust law and the other in health care business law. During the four-hour session, we outlined immediate ways to stabilize the situation, as well as the elements of reform needed to address the liability crisis. Importantly, the antitrust lawyer tempered calls for a “strike.”

Although the meeting concluded without plans for a strike, surgeons left with a clear understanding of which reforms were effective, necessary, and achievable. We formed a network for rapid communication across the state and were determined to become much more active. Significantly, two separate groups of surgeons from western Maryland resolved to do much more.

PRESSING THE ISSUE

Because January 1, 2005, was the date the additional rate hikes were due to take effect, time was short for definitive action. Two surgical group practices—one in Hagerstown and the other in Frederick—decided to close their doors. These multispecialty surgical groups provided 65 percent to nearly 100 percent of the surgical care to the patients who live in those western Maryland communities, both with populations of more than 50,000. On November 15, 2004, the Hagerstown group would stop seeing elective patients for at least a week and, perhaps, all patients thereafter if significant reform did not materialize. The group in Frederick said it would stop caring for patients entirely on January 1, 2005.

Each group's intentions quickly became known,

and statewide publicity resulted. The Hagerstown group enlisted media consultants to assist in getting the message out. A very effective Web site was established to keep all informed. The issues causing the imminent loss of access to care were discussed almost daily in the media. The impact of the medical liability crisis upon many of the state's physicians and hospitals became increasingly apparent. A survey commissioned by the Maryland Hospital Association highlighted the economic impact the liability crisis was having on the business community.

A SPECIAL SESSION

In Annapolis, lawmakers were reviewing recommendations from special panels convened during the summer. Lawmakers who felt they had put the issue of tort reform to rest during the previous general session now were compelled to address it again. Editorials began to appear in national newspapers and interviews were shown on national television programs. Because the medical community had pressed the issue and prevented it from being ignored or postponed until the next general session, legislators knew it was time to act. Behind the scenes, the governor and key lawmakers met. Provisions of a compromise bill to address essential reforms were reportedly agreed upon. The governor called for a special session of the general assembly to be held between Christmas and New Year's Day. It was the first special session to be held in Annapolis in 12 years.

The special session convened December 27, 2004. The entire day was devoted to testimony in the house of delegates and the senate. I testified before both bodies on behalf of the College's Maryland Chapter and noted that the impending loss of surgeons due to increased malpractice premiums would put all Marylanders at risk. The crisis in access to care affected not only the 67,000 women who deliver babies each year in Maryland, but all of the more than half-million citizens who undergo operations each year throughout the state. The testimony also emphasized the impact the liability crisis was having on staffing the emergency rooms and wait times to find a surgeon.

Instead of the anticipated single bill to be discussed and voted on, lawmakers found themselves confronted with two additional pieces of legislation. Along with the governor's so-called compro-

mise bill, each legislative branch drafted its own proposal. After more than 20 hours of testimony in both chambers, the bill that ultimately emerged from the joint conference committee contained very few tort reform measures that the governor had advocated.

Editorials in the national press deemed this bill a “gift to the trial lawyers.” It was referred to as “tort reform lite” during debates on the senate floor. The only substantive measures it contained related to the insurance industry. Measures to tighten requirements for expert witnesses similar to those proposed by the American College of Surgeons were included in the bill, as was a measure for an enhanced certificate of merit. “Good Samaritan” provisions did not survive. To stabilize liability premiums, the bill sought to establish a \$40 million fund supported through the elimination of a 2 percent premium tax exemption the health maintenance organizations had enjoyed in Maryland for more than 20 years. The fund’s necessity and adequacy were questioned.

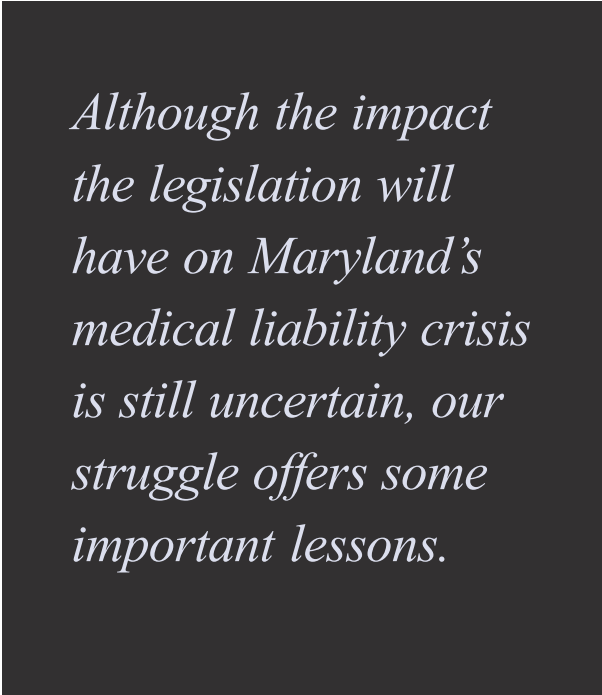
THE BILL’S FATE

Nonetheless, the Maryland Patients’ Access to Quality Health Care Act of 2004 (H.B. 2), passed both houses of the general assembly at 3:00 am Thursday, December 30, 2004. It passed despite the governor’s pledge to veto it because of the “new HMO tax” that would be passed on to working families and much to the overwhelming disappointment of everyone but the trial lawyers. Essentially, all important tort reform measures had been diluted or eliminated. The historic special session adjourned and the bill went onto the governor’s desk, where it languished until January 10, 2005. That day, at a well-publicized press conference, the governor carried out his threatened veto. The following day, the general assembly session overrode his veto as its first order of business, with members voting essentially along party lines. The Maryland Patients’ Access to Quality Health Care Act of 2004 became law.

LESSONS LEARNED

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Undoubtedly, the courageous actions of two surgical group practices in western Maryland were



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pivotal in transforming a politically dead issue at the end of the 2004 legislative session into a topic drawing national attention. By setting dates for ceasing practice and, in the case of the Hagerstown group, *actually doing it*, it became apparent not only to patients and lawmakers, but to the entire state, the media, and the country, that liability abuse was a serious problem in Maryland and tort reform was urgently needed. Because these communities are geographically isolated, their actions did more than just inconvenience a few patients; they brought pressure to bear at the state level to avert a real health care crisis for tens of thousands of patients. This tactic would have been ineffective in Baltimore or in other large metropolitan areas because patients could have obtained care from different physicians or hospitals a few miles—or even a few blocks—away.

It also was apparent that when the debate was revived an important opportunity emerged to reframe the impact of the crisis. Skyrocketing liability premiums affect not just physicians and obstetrical care. By stressing the fact that *everyone* was at risk, lawmakers had to address the prob-

lem. Additionally, it demonstrated that not only physicians, but hospitals, clinics, and nursing homes throughout the state, as well, spend more on liability premiums and defensive care than on staffing, equipment, and maintenance.

By uniting with other stakeholders in the renewed battle for tort reform, such as hospital associations, medical societies, and business organizations, physicians were able to more widely and effectively broadcast their message. Even though what actually ended up in print or on the television was never truly under the control of tort reform advocates, this experience shows that these tools must be used as often and as effectively as possible if the message is ever to reach lawmakers and their constituents—our patients.

Finally, this case proves that physicians are likely to find the political process arduous and frustrating. We are trained to believe that when a problem is identified it should be analyzed and all possible solutions considered. When the solution is chosen, the time for action has arrived. Our only thought is to correct the problem as quickly and safely as possible. Confrontation and manipulation of colleagues or public opinion is outside of our daily modus operandi. When it comes to bringing about change in the political environment, we must keep our eye on our objective, return again to the fray as often as necessary, work hard, and persevere despite the obstacles.

EPILOGUE

Despite the inadequacies of H.B. 2, the Maryland Chapter of the American College of Surgeons, the state medical society, and the Maryland Hospital Association supported the bill's signing. From the pragmatic point of view, its adoption will allow many physicians in Maryland to continue to practice for another year or two, assuming the rate stabilization fund is effective. Unfortunately, within days of H.B. 2 becoming law, it was apparent that additional supporting legislation would have to be enacted to entice private liability insurers into accepting the concept of rate stabilization. Those negotiations are ongoing, and it appears they will be successful.

As for the absent tort reform measures, many have been reintroduced as separate bills in the 2005 general session. Without meaningful tort reform, Maryland's crisis unquestionably will re-

emerge. We are concerned that lawmakers' interest in tackling this subject has been exhausted and that nothing significant will result in the current session. Even so, all participants in last year's actions are being urged to redouble their efforts. Again, all surgeons and other physicians, in concert with patients, hospitals, and so on, must be at the forefront of the tort reform battle. Our profession and our patients require this effort. □

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