

MEDICAL LIABILITY REFORM

Doctors for Medical Liability Reform

DMLR's key objectives include:

- To advance medical liability reform as a key issue in the public debate, through press briefings, policy conferences, Congressional hearings and forums, etc.
- To maintain and expand DMLR's presence as a top resource on medical liability reform to key decision makers and opinion leaders, physicians, patients, concerned citizens and the media, through maintenance and expansion of the website, publication of press releases and op-eds, and periodic radio-tours.
- To preserve and continue to build DMLR's grassroots network by identifying, recruiting, educating, motivating and mobilizing physicians, patients, and concerned citizens to support medical liability reform, through ongoing email messages, newsletters, etc.

Keeping DMLR Alive in 2009 and Beyond

The AANS and CNS, along with the American Association of Orthopaedic Surgeons, are the current funding sources of DMLR. Because we had spent so much – time, effort and financial resources – in building DMLR, and its trademark initiative *Protect Patients Now (PPN)* – and because the medical liability reform issue could once again become a front burner issue at the federal level, organized neurosurgery contributed \$50,000 to DMLR for 2009.

DMLR is also pursuing a relationship with the Health Coalition on Liability and Access (HCLA), which is the other national coalition of which the AANS and CNS are members. Katie Orrico serves as the HCLA Vice-Chair and this group is also struggling to determine how to proceed given the overwhelmingly high odds against passage of any federal medical liability reform legislation.

Energy and Commerce Committee Hearing

On March 24, 2009, AANS President, Jim Bean, testified at a House Energy and Commerce Health Subcommittee hearing on health care reform. Representing DMLR, Dr. Bean focused his testimony on the need for medical liability reform in conjunction with any comprehensive health care reform legislation.

Federal Legislation

While we will continue to push for reform in the 111th Congress, given the fact that the Congress and the White House are now controlled by democrats, it is highly unlikely that any progress on medical liability reform will be made. Indeed, the trial lawyers have been emboldened by the strengthening of their power in Washington, DC and medicine will need to be vigilant to ensure that we do not take steps backwards.

Efforts to introduce bi-partisan, comprehensive medical liability reform legislation (patterned after MICRA or the Texas approach) continue, and Rep. Bart Gordon (D-TX) is one democrat that is interested in pursuing this issue (we have not identified a democrat in the Senate, and will not likely do so). In addition, we are pursuing the introduction of targeted liability reform efforts, such as protections for physicians providing EMTALA mandated emergency care.

Legislation for Medical Liability Protection During a Declared National Emergency

The AANS/CNS is also working with the groups mentioned above (and HCLA) to have legislation introduced in the 111th Congress that would provide liability protections for any voluntary medical

services provided by physicians, nurses and pharmacists during a declared national emergency. The “Emergency Volunteer Health Care Professionals Protection Act of 2009” will be introduced by Rep. Bart Gordon (D-TN) within the next month.

Protections for Following Guidelines

President Obama has signaled support for providing physicians protection from lawsuits if they follow practice guidelines. In addition, Senator Baucus is entering (in conjunction with his comparative effectiveness legislation) the notion that if physicians follow established practice guidelines that they should at least have an affirmative defense against a medical liability lawsuit. The AANS and CNS will pursue federal legislation on this topic.

Baucus White Paper

As reported in December, Senator Baucus’s health care reform White Paper also includes a section entitled “Medical Malpractice Reform,” which states:

Medical malpractice insurance premiums have risen steadily over recent decades, at times increasing an average of 15 percent a year.⁴⁰ Some states have seen even more dramatic increases. Pennsylvania, for example, experienced increases ranging from 26 to 73 percent in 2003. While the Government Accountability Office has found that access to medical care is not “widely affected” by large premium increases, and malpractice costs account for less than two percent of health costs, physicians and other health care providers contend that the current legal environment leads to the practice of defensive medicine. Ordering more tests, procedures, or visits primarily to avoid liability rather than to benefit patients may contribute to unnecessary health care spending.

A serious effort at comprehensive health care reform, then, should address medical malpractice.

Reducing malpractice premiums alone would not have a substantial effect on overall health spending. CBO estimates that a 25 to 30 percent reduction in malpractice costs “would lower health care costs by only about 0.4 to 0.5 percent, and the likely effect on health insurance premiums would be comparably small.” But helping patients and providers to cooperate rather than participate in time-consuming and expensive legal battles may help to shift America’s health care system away from the costly practice of defensive medicine and toward the best quality care and adherence to standards of care.

The current litigation system does not do a good job of compensating victims of malpractice or of reducing the occurrence of medical malpractice. In fact, “research typically shows Americans rarely take their disputes to court. Of every one hundred Americans injured in an accident, only ten make a liability claim, and only two file a lawsuit.” Yet, the large number of malpractice claims filed still overwhelms the legal system, and only 30 percent of claims filed result in payments to victims of medical malpractice. Alternatives to civil litigation need to be utilized so that administrative costs associated with litigation, which account for 60 percent of malpractice premiums, can be reduced, while simultaneously allowing credible claims to be compensated fairly and quickly.

Malpractice reform could address money and time spent on litigation, as well as improve patient and provider satisfaction with the resolution of complaints or grievances. Additionally, changes made as part of reforming the health care system would affect medical malpractice. For example, damages awarded for care necessary as a result of malpractice would be reduced because the cost of care would decrease across the board. Also, improvements in preventive care and care coordination would reduce the likelihood of risky procedures that are a source of malpractice claims.

The Fair and Reliable Medical Justice Act, introduced in the 109th Congress and again in the current Congress, includes ideas for ensuring safe and effective medical care, while working to limit malpractice insurance premiums.⁴⁸ This legislation would provide grants to states to create alternatives to current tort litigation in an effort to increase access to recovery for patients with low-

dollar value claims and improve satisfaction with claims resolution for patients and provides. States would have flexibility in developing alternatives to civil litigation, with three specific models outlined in the bill: (1) the early disclosure and compensation model, (2) the administrative determination of compensation model, and (3) the health court model.

The early disclosure model offers health care providers tort liability immunity after an offer, in good faith, to pay compensation to any patient injured or harmed as a result of care. The compensation would have to include any economic loss to the patient, noneconomic damages (as determined by the state) and reasonable attorney fees. The University of Michigan Health System (UMHS) implemented this system in 2002 with astounding results. Three years after the program was established, UMHS had reduced its annual litigation costs by \$2 million and reduced the number of lawsuits, as well as the time it took to resolve the suits, by more than half. That is one of the goals of the early disclosure model. Fostering communication about medical errors and awarding appropriate compensation in a non-adversarial setting are the hallmarks of this approach.

By increasing communication about medical errors, and doing so in a non-adversarial setting, the collection of medical error data will increase, leading to improved patient safety. Data collection is essential to preventing errors by enabling providers to better understand how errors occur. "Accurate information also provides a baseline measurement for further assessment of the effectiveness of the changes made."⁵⁰ Unfortunately, under the current system, data collection remains limited because of the lack of incentives. Alternatives to litigation, such as early disclosure, provide incentives to disclose medical errors, while continuing to protect the provider and improve patient safety.

The second approach, the administrative determination of compensation model, calls for the establishment of an administrative board to designate classes of avoidable injuries. Based on these classes, the board would determine the level of compensation awarded to the patient. An appeals process would also be established to review decisions made by the board.

Under the third alternative, a specialized health court would be established. The court would be presided over by judges with expertise in health care with the ability to hire outside experts. The judges' decisions regarding compensation would be binding but subject to an appeals process.

The Fair and Reliable Medical Justice Act serves as a foundation for an important element of this health reform plan. Like the legislation, the Baucus plan would call on states to take the opportunity to develop alternatives for resolving conflicts and compensating patients who are the victims of medical errors. In addition to receiving Federal assistance to establish an alternative model, states would also receive assistance to collect data about medical errors, which would help keep patients better informed and create an opportunity for providers to learn from each other. In fact, the systems developed by the Department of Defense and the Veterans Health Administration that successfully track such data could serve as models. Patients and providers should have the chance to cooperate, rather than participate in a time-consuming and expensive legal battle. This plan would help achieve that important objective.

Federal Rules Initiative

As reported in December, the AANS and CNS are working with the AMA and other medical organizations to pursue changes in the Federal Rules of Civil Procedure. The AMA launched this behind-the-scenes initiative as an additional liability reform effort to pursue while the political climate is not favorable for pushing for broader federal legislative reforms. The AMA is hopeful that pursuing targeted changes to the Federal Rules of Civil Procedure and Evidence can create a more balanced litigation environment for physicians.

One project is to attempt to modify Rule 56. Currently a significant amount of time and money is spent during the initial stages of discovery. Amending the current Rule would allow for the disposition of unsupported claims sooner rather than later; i.e., save docs/PLI insurers defense costs. Others are also in the works. We will continue this effort in 2009.