



Medical Malpractice Legislation in Limbo Until Next Year

According to Senate Republican leadership, medical malpractice legislation will have to wait until at least 2007 before getting any help from Congress. The Senate will not debate medical malpractice reform before the end of the year, in part because of the chamber's focus on helping victims of Hurricane Katrina. While medical malpractice legislation will be debated in the Senate in 2006, the votes to pass it likely will not materialize.

Currently, S.354 is the leading medical malpractice bill in the Senate. The bill was introduced February 10, 2005 by Senate Budget Committee Chairman Judd Gregg (R-NH) and Senator John Ensign (R-NV). Among other provisions, the bill would impose a \$250,000 cap on noneconomic damages. Political positions have hardened in the Senate over the medical liability issue, reducing chances that a compromise bill could be crafted or that those opposed to S.354 could be convinced to support it.

The House passed its medical malpractice legislation – H.R.5 – in July 2005 by a 230 to 194-vote. HR.5 limits noneconomic damages to \$250,000 in malpractice lawsuits, makes each party in malpractice lawsuits liable

only for the amount of damages directly proportional to such party's percentage of responsibility, and allows courts to restrict the payment of attorney contingency fees.

Earlier in March, Senate Majority Leader Bill Frist (R-TN) said he was "absolutely committed" to bringing medical malpractice legislation to the Senate floor this year, signaling his willingness to discuss issues such as insurance industry reforms and raising the cap on noneconomic damages to broker a compromise with Democrats that would help to achieve his objective. But a bipartisan solution has not gotten any momentum in the Senate.

Many Democrats claim insurance industry practices are responsible in part for rising medical malpractice premiums, and have said lawmakers should focus more scrutiny on insurers perhaps considering amending insurers' longstanding exemption from antitrust laws. Democrats remain equally convinced that limiting patients' recoveries in medical lawsuits would not cause malpractice insurers to cut their rates.

Panelist Urges EMTALA Reconsideration

At a House Energy and Commerce Committee hearing entitled, "Medicaid: Empowering Beneficiaries on the Road to Reform," Jim Gardner, President and CEO of Northeast Georgia Medical Center and Health System, made a case for reconsideration of EMTALA. Health Subcommittee Chair Nathan Deal (R-GA) had invited Gardner to testify at the hearing and, along with the other panel members appearing before the Committee, explore Medicaid reform proposals and how these proposals could create incentives for beneficiaries to be engaged and more responsible consumers of healthcare services. (Cont'd page 3)

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Proposed Legislation Encourages Disclosure of Medical Errors

Senators Hillary Rodham Clinton (D-NY) and Barack Obama (D-IL) have introduced legislation that they hope will move Congress out of its stalemate on medical liability overhaul. Their bill takes a novel approach to improving patient safety and the quality of health care while protecting patients' rights, reducing medical errors, and lowering malpractice costs. The [National Medical Error Disclosure and Compensation \(MEDiC\) Act, S.1784](#), is designed to propel the medical community to universally adopt a policy of disclosure of medical errors, apologies for these errors, and early compensation for patient injury. Further, the MEDiC program – to be administered by the Department of Health and Human Services – will provide liability protections for physicians who disclose medical errors to patients and offer to enter into negotiations for fair compensation, and it will grant money and technical assistance to help doctors, hospitals, and health systems implement its policies.

In a statement introducing the legislation, Clinton spoke of the relationship between full disclosure of medical errors and improved patient safety. "Patients and physicians are paying the price for a health care system that discourages the kind of communication needed to find and correct the conditions that lead to medical errors," she said. "We need to do everything we can to put patient safety first and bring a fresh idea to the table."

In his statement, Obama said, "Across America, hospitals and medical providers are proving that there's a better way to protect patients and doctors, all while raising the quality of our care and lowering its cost. This legislation will help reduce medical error rates and medical malpractice costs by opening the lines of communication between doctors and patients – encouraging honesty and accountability in the process and most importantly improving care."

In an attempt to reduce deaths and injuries due to medical errors, address the inconsistency of the medical liability system in determining negligence and compensating patients, and reduce soaring medical liability costs, a number of hospital systems and private liability insurance companies have adopted a policy of robust disclosure of medical errors with thorough analysis and intervention, apologies for such errors, and early compensation for patient injury. Overall, these policies have

resulted in greater patient trust and satisfaction, more patients being compensated for injuries, fewer numbers of malpractice suits being filed, and significantly reduced administrative and legal defense costs for providers, insurers, and hospitals where such policies are in place.

MEDiC was modeled after the policy changes that have already been implemented across the country, and – by encouraging adoption of this model – the national program intends to build on these local level initiatives. One such initiative, the Sorry Works! Coalition (SWC), is leading the charge in the promotion of full disclosure. SWC is a group of doctors, lawyers, and insurance industry representatives who have come together to advocate the middle ground solutions: apologies for medical errors and quick, up-front compensation to reduce lawsuits for doctors while providing swift resolutions for attorneys.

The SWC protocol works by practicing full disclosure immediately after a medical error occurs. The patient and/or family is contacted and encouraged to retain counsel and a meeting with the doctor and hospital is scheduled. An apology and explanation are provided and a settlement offered. If it is determined that a medical error was not to blame for a bad outcome, open communication is still practiced through the provision of medical records and answering of questions or concerns from a patient and their family.

In his remarks, Obama particularly pointed to the University of Michigan Hospital System's full disclosure policy. Under the direction of Rick Boothman, chief risk officer, the hospital has implemented numerous changes in the way the staff addresses medical errors and their consequences. Since the implementation of the new policy in 2001, the number of malpractice claims has fallen from roughly 265 per year to 114, levels Boothman said the hospital has not seen since the 1980s. What pleases Boothman further is the change in culture among the doctors and nurses, who had learned through the years to keep quiet about errors.

Obama and Clinton expressed confidence that S.1784 would move through Congress more easily than the current medical liability bills, because lawmakers in both parties will support disclosure.

Panelist Urges EMTALA Reconsideration (Cont'd from page 1)

In his testimony, Gardner noted the increasing number of patients seeking primary health care in the ED and the high costs of providing such non-emergency medical care. "In our community, a typical visit to the doctor's office costs about \$74, but the cost in the ER is more than three and one-half times that amount. Due to federal EMTALA regulations, however, my hospital has no choice but to serve as the community 'safety net,'" Gardner said. He reported that, in 2004, Northeast Georgia Health System treated more than 20,000 uninsured ED patients at a cost of \$6.9 million. Non-emergency illnesses, such as ear infections and flu, were treated in 29% of those patients. "Right now, there just aren't incentives for patients to seek care in the proper setting."

Gardner recounted EMTALA's requirements that hospital EDs examine any patient who presents for care, and he urged Committee members to reconsider the law. "At present, hospitals are precluded from redirecting patients to other more appropriate sources of care, assuming they exist, prior to a screening exam. This exam must include any and all diagnostic tests to complete the screening, so by the time we're done with the evaluation phase, all that remains is the writing of any prescriptions which might be indicated." Gardner ended his testimony saying, "We all share a common interest in affordable healthcare for those in our communities. Medicaid reform is complex, and calls for systemic change that doesn't make an already tenuous situation any worse."

In concluding the hearing, Deal told the Committee that he would have Medicaid reform legislation available for mark-up within the next few weeks.

Legislation Could Protect Hurricane Relief Workers from Lawsuits

If a bill introduced on September 21 by Senators Trent Lott (R-MS) and John Cornyn (R-TX) becomes law, nurses and other hurricane relief workers will not have to worry about lawsuits being filed against them. S.1747, the [*Good Samaritan Liability Improvement and Volunteer Encouragement Act of 2005*](#), or the *Give Act*, is designed to protect hurricane recovery volunteers and relief workers from unreasonable liability.

Specifically, the *Give Act* ensures that:

- Disaster relief volunteers generally are not liable for harm caused in carrying out their volunteer activities in connection with disaster relief, unless their act of omission constitutes willful, knowing, or reckless misconduct;
- Medical and other professionals can volunteer their services for disaster relief based on being licensed in their home state regardless of where the declared disaster occurred;
- A disaster relief volunteer is protected from liability even if the volunteer is not working for a specific non-profit organization;

"The United States is a generous nation, and we've seen ample evidence of that selfless giving since Katrina's deadly impact as people from throughout our nation are giving of their time and talents to help Katrina's victims," Lott said. "Yet, these men and women who work to protect life and property need protection, too." —Senator Trent Lott

- Disaster relief volunteers can offer their services without subjecting their business partners or employers to liability;
- Disaster relief volunteers are protected from punitive damages, and non-economic damages are apportioned according to percentage of fault,
- Non-profit organizations are not liable for the acts or omissions of their volunteers unless the organization has willfully disregarded or is recklessly indifferent to the safety of the individual harmed;
- All donors of goods or equipment, whether businesses, non-profits, or individuals, are not liable for harm caused by donating those items unless they acted with willful, knowing, or reckless misconduct; and
- All litigation that proceeds despite any protections under this act or under the *Volunteer Protection Act* requires a high level of specificity and documentation in the claim and a review by a judge that the claim raises, as a matter of law, a genuine issue of material fact.

AHRQ Publication Focusing on Emergency Preparedness Available

In the wake of Hurricanes Katrina and Rita, the Agency for Health Research and Quality recently released a report titled *Development of Models for Emergency Preparedness* to help field- and facility-based health care professionals plan for and respond to bioterrorism events or public health emergencies. The evidence-based, best-practice models in this report provide guidance on personal protective equipment, decontamination, isolation/quarantine, and laboratory capacity. AHRQ also has funded a number of emergency preparedness-related tools and resources to help hospitals and health care systems prepare for medical emergencies. More information about these products can be found on the [AHRQ web site](#).

The States: Medical Malpractice Update

T Utah Considering Reforms

At the end of September, health care providers testified before the **Utah** Legislature in support of a bill that would make apologies to patients inadmissible as evidence in malpractice lawsuits. The legislation, sponsored by state Senator Dave Thomas (R), would protect "statements, affirmations, gestures or conduct expressing apology, fault, sympathy, commiseration, condolence, compassion or a general sense of benevolence." The bill is modeled after a similar law in Colorado, one of seventeen states to enact such legislation. "Patients need us to be honest and upfront," Catherine Wheeler, president of the Utah Medical Association, said, adding, "If we make a mistake, we want to be honest with our patients." However, the Utah Trial Lawyers Association criticized the provision. Attorney Charlie Thronson said that the provision would provide physicians with a "free pass" to revise medical records and lie in court to avoid liability.

T Physicians and Trial Lawyers at Odds in WA

Physicians and trial attorneys are mounting aggressive grass-roots campaigns and television advertisements for two measures on the **Washington** November 8 statewide ballots that would offer radically different solutions to rising malpractice insurance costs. Both sides in large part have focused on I-330, which would limit attorney fees in malpractice lawsuits and place a \$350,000 cap on noneconomic damages in such cases. Supporters and opponents have raised a combined \$10 million for campaigns related to I-330. In addition, state voters will consider I-336, which has support from trial attorneys

and would revoke the medical licenses of physicians who have received three malpractice jury verdicts against them over a 10-year period. I-336 also seeks to improve public access to information about medical errors, establish a supplemental state malpractice insurance fund, and require public hearings on proposed malpractice insurance premium rate increases.

Washington physicians and health clinics statewide also have begun to mail thousands of letters in conjunction with absentee ballot mailings for the November election. Some medical ethicists say that the letters are inappropriate. According to Wylie Burke, chair of the Department of Medical History and Ethics at the University of Washington, "Discussion of politics at that level should really not be part of the doctor-patient relationship."

T Wisconsin Assembly Committee Approves Caps

On October 12, the **Wisconsin** state Assembly Committee on Insurance voted to approve a bill that would cap noneconomic damages in malpractice lawsuits at \$450,000 for adults and \$550,000 for children younger than age 18. Under the bill, the state could adjust the caps in the future. Governor Jim Doyle (D) questioned the constitutionality of the bill. He said that proposed caps are similar to those the state Supreme Court ruled unconstitutional in July. Doyle has said that he will not sign legislation that does not meet the standards of the court and has not indicated whether he would veto the bill if it came before him.