



Jean-Jacques Abitbol, MD
The California Spine Group
San Diego, CA

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FROM THE DESK OF THE PRESIDENT

The Medical Professional Liability Insurance Dilemma: Why Is It a System in Crisis?

Skyrocketing professional liability insurance premiums are creating a complex and convoluted crisis in American medicine. Many physicians report double- and triple-digit percentage premium increases in the past one to two years. Some of the hardest hit physicians are those who practice in Florida, Illinois, Ohio and Pennsylvania. Physicians already face the challenge of juggling increased practice costs within a managed care system that pays less and thwarts a rise in future reimbursements. Finding themselves between the proverbial rock and a hard place, some physicians try to cope financially by working more hours, cutting back staff, eliminating services, relocating their practice to another state or stopping their practice altogether.

A particularly disturbing aspect of the professional liability crisis is the detrimental effect on patient care. High liability insurance premiums and performance criteria stipulations may alter the way a physician interacts with patients. Some physicians, who have become dissatisfied with a system that seems to be beyond their control, have reduced their liability exposure by limiting services, treating fewer patients and excluding high-risk patients. In rural communities or areas where there are few physicians or specialists, patients suffer as co-victims of a broken system.

The effects of soaring liability premiums have been well reported. The American Medical Association (AMA) reported 20 states are in the midst of a full-blown crisis with significant loss of physician services and access to care.¹ Another 24 states indicated some problems, while only six provided solutions

to the medical liability crisis.

Most affected are obstetricians-gynecologists, neurosurgeons and orthopedic surgeons. The AMA reported that Pennsylvania lost 145 orthopedic surgeons between 1997 and 2002, and that during the same period, the city of Philadelphia alone lost about 450 physicians.

So where do we go from here? Perhaps we first need to determine why this is happening. Is it physician incompetence, economic downturn or does the legal system play an integral role?

Driven by Physician Incompetence? Some professional liability insurance companies purport that physician negligence is the cause of the increasing number of patient claims that have resulted in large jury awards. However, according to the AMA, "The biggest mythology related to this issue is that it's about incompetent doctors...but the overwhelming majority of medical lawsuits have nothing to do with physician negligence. In fact, 73% of the lawsuits filed against physicians are closed without payment."² Furthermore, Americans for Insurance Reform (AIR) conducted a study that investigated premiums paid and claims paid over the last 30 years. They concluded, "Not only has there been no explosion in medical malpractice payouts at any time during the last 30 years, but payments have been extremely stable and virtually flat since the mid-1980s."³

Are Economic Issues to Blame? The AIR study reported that "premiums rise and fall in concert with the state of the economy... reflecting gains or losses experienced by the in-

insurance industry's market investments and their perception of how much they can bear on the investment float."³ The Foundation for Taxpayer & Consumer Rights (FTCR) stated it more bluntly, "Insurance rates are increasing because insurance companies bet on Enron and WorldCom and they lost. Rather than take responsibility for investment mistakes, insurers are forcing policyholders to make up the difference."⁴

In addition, during a time when many medical professional liability insurance providers were making profitable investments in the stock markets, they kept premiums low to compete for a larger physician market share. When stock market gains fell, premiums began to rise. Some carriers got caught between heavy stock market losses and high jury awards, causing some companies to go bankrupt or exit the medical liability insurance business.

Is the Courtroom "Out of Order"? It is hard to escape legal advertisements featured on television, radio programs and in magazines. Physicians, hospitals and other health care providers use similar means to broaden their exposure and acquire new patients. However, are some ads exploiting medical errors to recruit prospective plaintiffs for huge jury awards or a form of "legal lotto"? Of course, not all lawyers operate in this fashion, just as most physicians are not incompetent or negligent. But in a media-saturated world, it would only take one or two overly publicized cases of medical malpractice to skew the perception of a profession beyond reality.

This begs the question: are medical liability insurance carriers satisfied to perpetuate the illusion that expensive settlements (from a few high profile cases) are driving premiums skyward? If so, study findings show it just wouldn't make sense. According to an analysis by law professors of the University of Texas, "Large medical malpractice verdicts and settlements did not cause the rapid increase in insurance premiums for doctors and hospitals since 1999 in Texas."⁵ And in a similar analysis by a University of Illinois legal expert and law professor, "There is just not much going on that could drive these premium

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increases."⁵

Using Texas as an example, for every 100 practicing physicians during the years 2000-2002, there were 4.6 million claims made, down from 6.4 million claims during the period from 1990-1992.

Or, could it be argued that claims were down but jury verdicts higher? No, not so. In Texas, for example, "median jury verdicts in trials won by patients... were little changed from the 1990s."⁵

The number of claims should continue to decline in Texas with the recent passing of a damage cap that went into effect in September of 2003. Major counties are already seeing fewer suits and significant reductions have occurred in liability insurance rates since passing this cap.

Some medical liability insurance providers have claimed that increases in the population have spurred the need for higher premiums. However, this has been questioned as well. In a comprehensive study of medical liability claims in Florida since 1990, for example, legal and medical experts at Duke University found "no sharp increase" in lawsuits relative to population growth and only "a modest increase in the size of settlements."⁶

Is Tort Reform the Answer? Is there a single solution to the medical liability crisis? Probably not. Unfortunately, it is part of a complex system for which many changes are necessary. However, several states have followed California's lead and taken important steps to start the process by instituting tort reforms. The Medical Injury Compensation Reform Act (MICRA), introduced in California in 1975, remains a gold standard for other states. This Act placed a cap of \$250,000 on noneconomic damages. This has provided

a "friendly environment" to physicians since its enactment. As mentioned above, Texas recently passed similar legislation in September 2003, and since its enactment there, significant reductions in filed claims and premiums have been noted. Other states such as Colorado, Indiana, Louisiana, New Mexico and Wisconsin, in a similar fashion, are capping pain and suffering payouts and attorney fees, proving effective at least to some degree.

The political environment has never been riper to effect change in medical liability problems. The current administration has stated a commitment to medical professional liability reform on a federal level. NASS as well, has made medical liability reform one of its top priorities with our advocacy efforts. As an example, the Alliance of Specialty Medicine, a coalition of 13 medical societies (of which NASS is a member) representing more than 200,000 specialty physicians in the United States, testified before the House Committee on Small Business on the impact of the nation's litigation system on medical practices. At this hearing, the Alliance testified that, because of the medical liability crisis, one in seven obstetricians has stopped delivering babies, leaving thousands of pregnant woman searching for doctors, 55% of orthopedic surgeons avoid certain high risk procedures, 75% of neurosurgeons no longer operate on children and 41% of urologists refer complex cases.

During the testimony, the Alliance urged Congress to pass legislation that incorporates a \$250,000 cap on noneconomic pain and suffering damages. Despite national polls that overwhelmingly support liability reform, including a cap on noneconomic damages, the Senate has not answered this call for reform. Although the House of

Representatives has passed comprehensive medical liability reform legislation twice in the past two years, similar legislation has been obstructed in the Senate.

We must keep reminding our politicians of the importance of medical liability reform. As physicians we must also encourage our patients to write their Representatives and Senators to remind them that the medical liability problem has affected them, and that changes must be enacted in the near future to avoid further and potentially disastrous effects on their health care.

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