VIEWPOINT

Medical Liability Reform in a New Political Environment

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Many physicians, patients, and other interested parties do not consider the current medical malpractice system to be optimal. For example, it has been estimated that only 2% to 3% of patients who experience a medical error file a malpractice claim (although it is unclear how serious those medical errors were and if they would result in an adjudicated malpractice claim), the mean time from claim initiation to closure is more than 5 years, and nearly 50% of all compensation awarded to patients is consumed by attorney fees and administrative charges.[1] With respect to clinicians, the annual risk of having an open malpractice claim has been reported to be 7.4%, and, by age 65 years, most physicians will have been involved in a malpractice claim.[1] In addition, the adversarial nature of the current system makes it difficult to improve patient safety and also creates stress for clinicians.

Although medical malpractice reform is often seen as a state issue, a reason previous attempts by the federal government to address the inadequacies of the current system have been unsuccessful is because stakeholders see reform as a path to different goals. The various goals of malpractice reform are to (1) ensure patient compensation, (2) reduce physician burden, (3) improve patient safety, (4) reduce defensive medicine, and (5) reduce health care costs. Although many of these goals are related, others are in conflict with one another, and thus policy solutions that are offered are often controversial.

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Republican Congress and Administration

The election of President Donald Trump and a Republican-controlled US Congress may once again thrust medical liability reform into the health care debate. One likely policy solution to be advocated for is to place a cap on noneconomic damages that plaintiffs can recover through lawsuits. This policy proposal is part of the GOP's A Better Way health care platform and has been part of previous Republican proposals to limit medical malpractice torts despite concerns that federal medical liability reform, by preempting state laws, may potentially weaken successful state regulation in some cases.

This proposal, in conjunction with additional features, could reduce the number and amount of claims, reduce malpractice insurance premiums, and reduce federal mandatory health care spending by $55 billion from 2017 through 2026 according to the Congressional Budget Office, but would not address the other goals of malpractice reform.[2] Specifically, limiting torts could make it more difficult for people to obtain full compensation for injuries caused by medical negligence and also may have an adverse effect on health outcomes, although the evidence for this possibility is mixed.[2] Thus, it is likely that this proposal will be debated, but broad consensus may not be possible.

Potential Bipartisan Approaches

Several additional federal policy options may offer a more bipartisan and comprehensive approach to medical liability reform. The new administration could support state experimentation beyond the traditional tort system to be both more responsive to patients and less adversarial for clinicians. Several nontraditional approaches to medical liability reform have been advanced including safe harbors for adhering to practice guidelines, communication-and-resolution programs, and administrative compensation systems wherein medical injury claims are routed into an alternate adjudication process.[3] The Affordable Care Act (ACA) had authorized $50 million in demonstration grant money to states for the development, implementation, and evaluation of alternatives to current tort litigation; however, no funding was ever appropriated. Both the GOP's A Better Way platform and recently confirmed HHS Secretary Tom Price's 2015 ACA repeal bill (HR 2300, Empowering Patients First Act) favor state support for nontraditional approaches to medical liability reform.

The administration also could champion specific nontraditional approaches such as safe harbors. In general, safe harbor provisions are meant to provide liability protections to clinicians who follow recommended best practices and adhere to clinical practice guidelines. In past demonstrations of this provision, states selected or approved guidelines from national medical associations to help determine standard of care when adverse events occurred.[4] In addition to promoting high-quality care and patient safety, one of the comparative strengths of this approach may be its ability to curb the practice of defensive medicine by physicians and other health care practitioners. Although a recent retrospective claims-based study funded by the Agency for Healthcare Research and Quality hinted only at limited reductions in liability claims through safe harbors,[4] the effect on more broadly reducing costs

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from unnecessary tests, procedures, and referrals by changing physician practice behavior is intuitively much greater. Reducing defensive medicine, which is practiced by many clinicians and is estimated to cost the health care system billions of dollars,[5] will be even more important as value-based health care transformation advances. Although more study of the feasibility and effect of safe harbors is required, it has been referenced in the GOP A Better Way platform, is a central plank of Tom Price's ACA repeal bill, is supported by experts at the Center for American Progress,[6] and was the focus of a bipartisan bill by Congressmen Andy Barr (R-KY) and Ami Bera (D-CA) (HR 4106, Saving Lives, Saving Costs Act) in a previous congressional session. Thus, the potential of bipartisan support for such an approach certainly exists.

Another specific nontraditional approach that could be supported at the federal level involves communication-and-resolution programs. These programs encourage physicians and hospitals to take a proactive approach in disclosing adverse outcomes, apologizing, and in the event of substandard care, offering compensation to individuals harmed by the care. Evidence suggests that such an approach lowers malpractice claims, accelerates settlements, and enhances patient safety.[7] However, potential legal barriers stand in the way of widespread dissemination and implementation of this approach. One barrier involves the lack of robust apology laws across all 50 states that would protect physician apologies during the disclosure process from being introduced as evidence in a possible future malpractice suit. Another barrier involves the reluctance of the federal National Practitioner Data Bank to adjust its reporting requirements in cases involving communication-and-resolution programs as a way of promoting patient safety.[7] Despite a promise by the Health Resources and Services Administration to provide guidance on this issue given new medical liability laws in Oregon and Massachusetts, no federal action has taken place to date.[8]

Conclusions

Given the recent election results, medical liability reform will most likely resurface on the federal health care policy radar. Bipartisan progress will require addressing federalism concerns to ensure state reform efforts are not impeded and also necessitate proposals that address most, if not all, of the goals that key stakeholders seek in reform. Although politically arduous, the task of improving on the current health care system, including the aspects related to medical liability, is an objective everyone should share.

ARTICLE INFORMATION

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