



# What Are Health Courts ... and Are They Right for Virginia?

Presentation to  
The SB 601/HJR 794 Study Committee  
August 30, 2005

# The Current Situation: A Physician's Perspective

- Huge spikes in malpractice premiums
- Growing questions about access to care, particularly for high-risk specialties
- Polarized political environment
- Reasonable non-economic caps unlikely

# Health Courts or Healthy Courts?

- Some states are proposing “health courts” which mimic “drug courts and family courts.”
- That is NOT our proposal.
- We propose authorization for regional pilots to test procedural improvements for the trial of medical malpractice cases.

# Principles to Preserve

- Preserve a patient's right to recover if there is a breach of the standard of care which proximately causes an injury.
- Ensure access to specialty health care by rewarding top quality initiatives.
- Minimize defensive medicine which translates into Medicaid savings.

# The Current Situation: A Policy Perspective

- Quality and safety are major policy & business issues
- Many are injured by the current system ... but few are compensated
- Verdicts often come from poor outcomes, even when there is no fault (i.e. the legal system reaches the 'wrong' decision a considerable part of the time)
- Current system does a poor job at promoting quality improvement: "a wall of silence"

Gibson, Wall of Silence: The  
Untold Story of the Medical  
Mistakes that Kill & Injure Millions  
of Americans, May 2003

Of claims brought forward, 80 percent involve situations where independent experts say that the doctor did no wrong. Still, plaintiffs receive compensation in about a quarter of these cases.

Source: Harvard Medical Practice Study III.  
New England Journal of Medicine,  
1991:325:245-251

... like getting a ticket for going through a green light.



**Justice is random.**

# Medical Liability Issues in Virginia

- Crisis situation
  - Loss of access to care
  - Dramatic rate increases: as much as 300% in last 3 years
  - Insurers have exited market
  - Reduced interest in high-risk specialties
- Crises have happened before, as have responses
  - 1970s: all-inclusive cap instituted
  - 1980s: birth-injury fund created



# Where Are We Now?

- SB 601 (2004) – MICRA-type bill; died in committee
- HB 2659 & SB 1173 (2005); passed, effective July 1, 2005
  - Certify expert witness opinion as of service of process
  - “I’m sorry” protection
  - Allow physician to testify about his patient for the defense
  - Expanding the definition of medical malpractice to include contract claims (to prevent the use of breach of contract to circumvent the cap)
  - Competency evaluations of certain practitioners
  - Reporting of closed claims to the Bureau of Insurance
  - SB 601/HJR 704 study group continues for one year

# What Features Should We Have in a Medical Liability System?

- Consistent standards of care at the bedside and in the court room
- Confidence to provide only the care required
- Fair and reasonable compensation
- Deterrence of bad practices
- Facilitation of quality improvement initiatives

# What the Proposal Entails

- Regional pilots to handle medical malpractice cases
- Greater reliance on independent experts
- Goals:
  - More reliable application of consistent standards of care
  - Reasonable compensation for more injured patients
  - Reduced incentives for secrecy; facilitation of quality improvement activities

# Key Elements

- Expertise: regional judges with health care training
- Neutral experts: reliance on neutral experts, compensated by the court
- Consistent decisions: decisions about standard of care made as a matter of law by regional health court judge
- Consistent compensation: similar injuries receive similar compensation across the state

# How Would it Function?

- Enhance procedural rules to achieve consistency
- Consider having an initial review board for clear, uncontestable cases, with referral to health court if not clear case of malpractice
- Current rights of appeal remains the same

# Potential Benefits

- Consistent expert rulings restore trust in reliable justice
  - Patients: greater certainty of recovery, with less variability
  - Providers: recovery correlates with error, rather than outcome
- Foundation for cost-containment choices by lessening legal incentives for defensive medicine – MEDICAID SAVINGS
- Facilitate quality improvement by promoting culture of openness and transparency
- Reduce litigation costs

# Related Issues

- Links with pay-for-performance programs
- Improved oversight and rehabilitative programs for problem physicians
- Quality and safety programs at enterprise level
- Potential for patient safety legislation with reporting obligations

# Who Supports This Concept?

- Bi-Partisan Support: Senator Bill Frist and the Progressive Policy Institute
- Consumer groups and patient safety advocates
- Common Good brochure: endorsed by 80+ leaders, including Bill Brody, Margaret O’Kane, Dennis DeConcini, Newt Gingrich, 11 deans of medical schools or schools of public health, and more
- IOM has called for demonstration projects
- Nearly two in three Americans support concept



# The Media Is Paying Attention ...

- Featured in:
  - *The National Journal*
  - *The Washington Post*
  - *State Health Notes*
  - *National Law Journal*
  - *Congressional Quarterly*
  - Numerous other publications
- The *New York Times* called for demonstration projects in January 2005

# This Can Become Reality

- Special Procedures exist in other areas of the law
  - Examples: tax, workers' compensation, vaccine liability
- Pilot projects possible
  - Legislation introduced 4/12/05 in U.S. House of Representatives; legislation introduced 6/29/05 in U.S. Senate – SB1337
  - Numerous states are interested

## ... Why Not In Virginia?

- Something needs to happen
  - Cost of insurance continues to increase
  - We have our own stories about declining access.
- The need for pilots
  - Successful change is often incremental
  - More evidence is needed
  - Regional pilots in Virginia can help build the base of evidence.

# Conclusion

- Current system failing patients and providers
- Growing consensus that a new, more reliable system of medical justice is needed
- Our proposal is a key part of the solution
- Essential elements of pilots:
  - Trained regional judges
  - Neutral experts
  - Decisions about standard of care made as a matter of law
  - Similar injuries receive similar compensation

# Potential Steps to Advance This Proposal

- Step 1: Coordinate Medical Education for Judges 2005-2006
- Step 2: Evaluate the practicality of having neutral experts – judicial resources 2006 - 2007
- Step 3: Develop guidelines to achieve similar compensation for similar injuries 2006 - 2007
- Step 4: Enhance procedural tools available to judges in med mal cases 2006 - 2007
- Step 5: Revise Virginia model jury instructions to reflect changes above 2006 - 2007

# Thank You For Your Consideration

