

**TENNESSEE MEDICAL ASSOCIATION  
LEGISLATIVE WRAP-UP  
2004**

The 103<sup>rd</sup> General Assembly adjourned sine die on May 28<sup>th</sup> after a very contentious and busy session that led to broad-based reforms of the TennCare and Worker's Compensation Programs and resulted in a small, but positive movement in the malpractice reform arena.

TMA had a great deal of interest in both the TennCare and Workers' Compensation reform bills and dedicated extensive resources in an attempt to affect positive outcomes. The Governor, wielding tremendous power, pushed the bills through the House and Senate with little-to-no changes or amendments. Fortunately, TMA was able to meet with the Governor and key administration officials prior to the introduction of these bills to discuss the position of physicians on both TennCare and Workers' Compensation reforms.

Broad-based malpractice reform did not move this year despite the efforts of our hard-working sponsors, Senator Mark Norris (R), Collierville and Representative Doug Overbey (R), Maryville. The House and Senate formed a Joint Tort Reform Committee to review the issue during the fall and met quite extensively. Four physicians provided testimony on behalf of TMA and educated the committee on the increasing number of malpractice suits and the rising cost of malpractice insurance. The physicians also warned the committee about a potential access to care problem, especially in the rural areas of the state. Even with weeks of testimony by healthcare groups requesting malpractice reform measures, the committee did not recommend a broad-based solution.

Overall, 3600 bills were filed during the 103<sup>rd</sup> General Assembly. TMA identified 685 that we supported, opposed or watched. Bills on the watch list are of concern because they are drafted broad enough to be amended to address an issue important to medicine. Below is an overview of some of the most important bills to TMA this year.

**INSURANCE**

**Prior Authorized Procedures –SB 3138 by McNally and HB 3158 by Shepard --** This was TMA legislation. The bills would preclude an insurer from rescinding or modifying prior authorization and disallow non-payment for authorized procedures when the physician provided the service in good faith and pursuant to the authorization. The Legislative Fiscal Review Office determined that this legislation would add a cost of over \$1 million dollars to the state and, as a result, the bill did not move this session.

**Reimbursement and Credentialing – SB 3255 by Bryson and HB 3349 by Overbey –** This was also a TMA bill. The legislation would require an insurance company to reimburse physicians for their services from the time a credentialing application is received, rather than from the time the application is approved. Once again, the Legislative Fiscal Review Office determined that the bill would increase costs to the state and the bill did not move.

## **SCOPE OF PRACTICE**

**Podiatrists – SB 2868 by Herron and HB 3346 by Maddox** – As originally drafted, the bill would have allowed any podiatrist to conduct ankle surgery in an ambulatory surgical treatment center or hospital if that entity allows them to. The bill would have taken away the requirement that a podiatrist have local hospital credentials to perform ankle surgery at an ambulatory surgical treatment center and that the podiatrist is certified by the American Board of Podiatric Surgery. TMA successfully amended the bill to allow only the 12-20 podiatrists previously conducting ankle surgery to continue this practice. Additional safeguards were put in place to ensure that the podiatrists obtain continuing medical education in ankle surgery annually. The handful of podiatrists currently performing ankle surgery must be credentialed by a JCAHO accredited hospital or JCAHO accredited ambulatory surgical treatment center in Tennessee and must notify the board as to where he or she is credentialed. As passed, the law will not allow for an increase in the number of podiatrists performing ankle surgery.

**Optometrists – SB 3163 by Cooper and HB 3135 by Shepard** – TMA was opposed to this bill that would specify that an optometrist could not perform any intra-ocular surgical procedures. With the passage of this bill, the statutory language would have stated that only the intra-ocular surgical procedures were not allowed, thereby opening the door for optometrists to perform procedures to remove chalazions on the eyelid and/or ocular adnexa. The bills did not move out of either the Senate or House Committee this year.

**Psychologists – SB 3303 by Cooper and HB 3282 by Odom** – The psychologists fought extremely hard this year to gain prescriptive authority. With TMA's opposition, the bill was defeated in the House Professional Occupations Subcommittee and was not taken up by the Senate General Welfare Committee.

**Radiologists -- SB 2879 by Herron and HB 2515 by Pinion** – This legislation will allow radiologists to use the services of radiologist assistants. The radiologist assistants will work under the supervision of the radiologists. The bill passed and will go into effect on July 1, 2004.

## **TORT REFORM**

The Joint House and Senate Tort Reform Study Committee conducted a series of extensive hearings over the summer and fall. As previously stated, TMA had four physicians testify on our behalf. The findings of the Study Committee were released and recognized that malpractice premiums have risen and that there was some "evidence that specialties in rural areas have been impacted."

The following bills were filed on the issue of malpractice reform:

**Broad-Based Tort Reform – SB 605 by Norris/ HB 1441 by Overbey** – The tort reform legislation established a \$250,000 limit on the amount that may be awarded for non-economic damages in malpractice lawsuits. The bill also establishes a system for periodic payment of awards over \$50,000 and provides that the contingency percentage paid to the attorney will decrease as the amount of the award increases. The bill did not pass this session.

**Vicarious Liability -- SB 601 Kyle/ HB 1454 Overbey** – The Tennessee Supreme Court ruled in May, 2002, in Johnson v. LeBonheur, that a teaching hospital may be vicariously liable for the acts or omissions of a state-employed physician resident. For example, Vanderbilt would be liable for the actions of a University of Tennessee resident physician working in their facilities. Legislation was filed last session to rectify the problem. The bill provided that no medical or health science faculty member or teaching institution would be held liable under any legal theory of vicarious liability, by reason of the supervision of, control over, or relationship with any intern, resident or fellow in a training program of a medical or health science school owned or operated by this state, for any act or omission of any such intern, resident or fellow in the course of such training program. The legislation was extremely contentious and went through hours of debate in Committee. The bill was amended to provide that only teaching hospitals would be immune from negligent acts of an intern or resident, unless their actions were also found to be negligent. **This is a huge victory for the medical training programs in Tennessee and the sponsors of the legislation should be recognized for their extremely hard work in getting this bill passed.**

**Ex-Parte Communications In Malpractice Defense Cases -- SB 1659 by Norris/HB 986 by Overbey** -- Recently the State Supreme Court ruled in the Givens case that a physician breaches an implied covenant of confidentiality with a patient when that physician discusses the patient's medical information with a third party without first obtaining the patient's consent, unless a physician has a duty to warn a third party against foreseeable risks emanating from the patient's illness. The Givens case essentially created a doctor-patient privilege and made it difficult for defense attorneys in malpractice cases to speak with the plaintiff and other treating physicians to gather information to defend the physician. Defense attorneys have now been forced to use depositions or written discovery to gather evidence for the physician in a malpractice case and this greatly increases the cost of defending a malpractice case for physicians. This bill would allow an attorney representing the plaintiff or defendant in a civil action to contact and interview the physician who provides medical care or treatment to the plaintiff when the mental or physical condition of the plaintiff is at issue. The legislation passed in the House, but was defeated in the Senate Judiciary Committee.

**Malpractice Reporting -- SB 3252 by Fowler and HB 3252 by Briley** – This legislation was developed when the findings of the tort reform study committee determined that there was very little data collected on malpractice cases. The bill will require malpractice insurance carriers to report claims and the amount awarded in a judgment or the settlement amount. SVMIC was heavily involved in this legislation and worked to ensure that the parties involved in the malpractice cases would remain confidential and the information would be non-discoverable. The bill also requires reporting by broad categories of physicians, rather than smaller specialty categories. TMA and SVMIC are pleased with the bill and are hopeful the compilation of this data will help physicians prove that malpractice claims and cases are increasing in Tennessee and we do, therefore, need malpractice reform.

## **TENNCARE**

**Reform Bills**– The Governor used two different pieces of legislation to push his plan for TennCare reform. **SB 3392 by Crutchfield and HB 3513 by McMillan** established the broad-based changes and included, among other things, “medical necessity” language and the creation of the TennCare Foundation. **SB 3394 by Crutchfield and HB 3512 by McMillan** sets up the fraud and abuse enforcement efforts within TennCare. Both of these bills are essentially the framework for TennCare reform. The specifics of the bills will be worked out through regulations and TMA is working with the Governor and his Administration to ensure that physicians have input into the development of the final TennCare reforms. TMA has developed an extensive white paper on the reform measures and can be reviewed at [www.medwire.org](http://www.medwire.org).

## **PRACTICE**

**Tuition Reimbursement By Medical Students – SB 3042 By Jackson and HB 2873 by Shepard** – Legislation was filed early in the session that created a great uproar by physicians, medical students and medical schools. The legislation would require any medical student attending a public medical school in Tennessee to agree to stay in Tennessee upon graduation and accept TennCare for 5 years. In the alternative, the student could repay the amount of the subsidy that the state paid for that student to attend medical school. For ETSU, that amount is equal to \$96,000 per year or \$384,000 for the four years of medical school.

TMA was outraged that medical students would be singled out when all other students at Tennessee’s public schools also receive subsidies. In the end, Senator Jackson explained to the Senate General Welfare Committee that he wanted to use this legislation to ignite a debate over the problems with TennCare participation and rural access to care. Senator Jackson charged the medical schools to develop ideas and programs to encourage newly-trained physicians to stay in Tennessee and practice in rural areas. He also warned that if progress was not made, he would bring the bill back again next year.

Many physicians and medical students contacted their legislators on this issue and the bill did not move out of committee.

**Exemption for Volunteer Physician – SB 2100 by Folwer and HB 2528 by Sharp** – TMA supported this legislation which will exempt volunteer physicians, working in a free health clinic, from the \$400.00 professional privilege tax. The volunteer physician will receive a special volunteer license and there will be no application or license fee to obtain this designation.

**Uniform Standard For Prescription Writing (Medical Error Reduction Act)-- SB 2162 by Dixon and HB 2694 by Armstrong** – This legislation requires that a prescription from a health care provider must be comprehensible by the pharmacist and must include the name and strength of the drug, the quantity prescribed in both letters and numerals, instructions for proper use of the drug and the date on which the prescription is written. The prescribing provider must also sign the prescription on the date it is issued. The bill passed and takes effect on July 1, 2004.

**Tennessee Healthcare Decisions Act – SB 2312 By Fowler and HB 2581 by Davis –** TMA supported this bill rewrote the law on advanced directives to ensure that the issue was clear and not as problematic for families during difficult situations. The legislation directs the Tennessee Board for Licensing Health Care Facilities to create living wills and power of attorney forms that are much more user-friendly. The legislation was passed by both the House and the Senate.

**Division Of Fees By Physicians – SB 2518 By Ford and HB 2972 by Odom and SB 2907 by Miller HB 2737 by Bunch --** This legislation would require any physician splitting a fee to notify the patient through a written consent form. Currently, the Federal Stark Laws address this issue and require notification to the patient if a fee is being split. This bill would add an extra burden on a physician's office by requiring them to utilize a written form. TMA opposed this legislation because the issue is already addressed in federal law and there is no valid reason to increase the administrative burden for the physician's office.

**Reproduction Costs For Medical Records – SB 2803 By Beavers and HB 2807 by Rowland –** This bill stated that the physician and/or insurer would be required to absorb the cost of producing and mailing medical records when the records are requested from another provider. TMA opposed this legislation due to the fact that it would greatly increase business costs for a physician's office. The bill did not move out of the House or Senate Committee.

**Client Billing For Pathology -- SB 2846 By Person and HB 3131 by Briley –** This legislation clarifies that any physician or osteopath contracting with an entity to perform anatomical pathology or cytology services must include the name and address of the laboratory and the amount paid for the anatomical pathology or cytology services. The disclosure must be on the bill or in a written statement to the patient. The legislation was signed by the Governor and is currently in effect.

**Prescriptions for Minors -- SB2930 By Ramsey and HB 2602 by Godsey –** This bill would prohibit physicians from prescribing drugs to a minor without the permission of the parent/guardian or an order of the court. A physician's license could be revoked or suspend if he or she violated the law. TMA opposed this legislation and it did not pass out of committee.

## **PUBLIC HEALTH**

**School Nutrition-- SB 2743 By Trail and HB 2873 By Fowlkes –** This legislation was originally drafted to mandate what foods would be included in school vending machines and was heavily opposed by the soft drink association. After much work during the two-year legislative session, the bill was amended to let the Department of Education establish the guidelines for healthy foods in grades K-8 and only specifically bans sodas and foundants (pure sugar candies). The bill was focused on reducing childhood obesity and childhood diabetes and ensuring better nutrition in the schools. The legislation does not eliminate vending machines in the schools. TMA fully supported this legislation and it was passed by the legislature.

**Motorcycle Helmets – SB 861 By Burchett and HB 952 By Tidwell** – This legislation would allow motorcycle riders 25 or older who have proof of insurance, to ride without a helmet. TMA opposed this legislation. The bill passed in the Senate, but died in the House.

**Asthma Medications – SB2286 By Ford and HB 2341 By Armstrong** – This bill would require the local education authorities to allow students to carry asthma inhalers if the parent has given the authorization and the child has a prescription for the inhaler from a physician. TMA supported this bill which passed. The law will become effective on July 1, 2004.

### **WORKERS' COMPENSATION**

**Reform Legislation – SB 3424 By Haynes and HB 3531 By McMillan** – The Governor stated early in the year that he would propose a comprehensive workers' compensation reform bill this session in an attempt to attract more business and encourage growth of existing companies in Tennessee. For physicians, the concern is first, the incorporation of a medical fee schedule and second, the methodology used to set the new fee schedule.

TMA has historically opposed a fee schedule and offered testimony this year before the Senate Commerce Committee and the Joint Committee on Workers Compensation voicing our opposition. The Governor, however, wanted broad-based changes to the program and incorporated a medical fee schedule into his reform legislation. Currently, 41 states utilize a fee schedule.

The bill, as originally drafted, allowed the Commissioner of Labor to unilaterally set the fee schedule. TMA and the Tennessee Hospital Association opposed that language and an amendment was offered to allow the Workers' Compensation Cost Containment Committee to work in consultation with the Commissioner to establish a medical fee schedule. The medical fee schedule will be presented to the legislature next year for approval and will go into effect in July, 2005.

The legislation also changed the multiplier for permanent partial disability payments, lowering the amount from 2.5 to 1.5. This change accounts for the largest savings in the workers' compensation program. The bill also sets fines for employers who are delinquent in making payments to injured workers.

TMA has established a Task Force on Workers Compensation to address the medical fee schedule issue and to try and develop a methodology for establishing the fee schedule which will appropriately compensate physicians for their services and preserve access to care for the injured worker.