Health Reform Maneuvers Begin on Capitol Hill

BY ALICIA AULT
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Democrats and Republicans are so confident about the chances of some type of health reform in the next administration that staff meetings and hearings geared toward crafting legislation have been going on in earnest in both the House and the Senate, with the goal of being ready to go in January, according to advocates and policy watchers.

Many health policy analysts have compared and contrasted this election cycle with that of 1992, which sent Bill Clinton to the White House and launched the Clintons' health care reform efforts.

Both elections—1992 and 2008—feature a high level of public concern about access to health care and its costs, said Len Nichols, an analyst at the New America Foundation, a nonpartisan public policy institute.

For instance, a Harris Interactive survey conducted for the Commonwealth Fund in May found that 82% of Americans think the health care system should be fundamentally changed or completely rebuilt.

But the differences between the two elections are striking in a positive way, Mr. Nichols said in an interview.

First, the two major candidates themselves have acknowledged that cost is an overriding concern, he said. Also, a common theme is the use of private markets, which he called "evidence, I would say, of moderation" and, perhaps, the proposals' better legislative traction.

Both candidates—Sen. Barack Obama (D-Ill.) and Sen. John McCain (R-Ariz.)—have also learned that "no president is going to send [to Congress] a 1,400-page health bill written in a hotel room by 300 wonks," Mr. Nichols said.

Instead, "Congress is going to own this [effort] far earlier and deeper than before," he said, adding, "It's still going to require a lot of presidential leadership. But the Congress has to be an equal, more than it has before."

Several proposals are likely starting points for congressional negotiations with the new administration, he said. First is the Healthy Americans Act, introduced in January 2007 by Sen. Ron Wyden (D-Ore.) and Sen. Bob Bennett (R-Utah). It has 16 cosponsors from both parties, including Sen. Chuck Grassley (R-Iowa), the Finance Committee's ranking minority member.

The bill is being championed in the House by Rep. Debbie Wasserman Schultz (D-Fla.) and Rep. Jo Ann Emerson (R-Mo.). Rep. Wasserman Schultz is important "because she's a rising star and has impeccable liberal credentials," Mr. Nichols said.

In a paper published in the policy journal Health Affairs, Sen. Wyden and Sen. Bennett said they saw "signs of an ideological truce" on the Hill, with agreement that there is a need for the Democratic-backed universal coverage and the Republican-supported desire for market forces to promote competition and innovation. "The Healthy Americans Act strikes a balance between these ideals," they wrote (Health Affairs 2008;27:689-92).

The bill would require individuals to purchase insurance for themselves and their dependent children, and would require insurers to offer a prescribed package of benefits.

It would subsidize coverage for Americans with incomes up to 400% of the federal poverty level. Employers would convert benefit dollars into salary; such compensation would be tax free, with the goal that the money would be used to purchase coverage.

Sen. Wyden is likely to be front and center in crafting a bill, as he is a member of two of the committees of jurisdiction: finance and budget, said Mr. Nichols, adding that those committees, along with the Health, Education, Labor and Pensions (HELP) Committee, "will play very important roles."

Ron Pollack, executive director of the advocacy group Families USA, said that although Sen. Wyden may play a part, "I have little doubt that Sen. Baucus is going to be as instrumental in the process as anyone."

Sen. Max Baucus (D-Mont.), chairman of the Finance Committee, held a health care summit in mid-June. Staff from the Finance Committee and the HELP Com-

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Law & Medicine

Good Samaritan Acts

Question: On a flight from Los Angeles to Newark, a passenger developed acute chest pain and diaphoresis. A flight attendant put out an emergency call, but Dr. Brown, a general internist nearing retirement, failed to respond because he was concerned about potential litigation. Unfortunately, the passenger sustained a massive MI, and died en route.

Regarding a medical malpractice lawsuit in such a scenario, which of the following is correct?

BY S.Y. TAN, M.D., J.D.

A. The Good Samaritan statute imposes upon doctors the legal duty to treat.
B. Good Samaritan statutes immunize doctors against all liability.
C. Dr. Brown need not have hesitated, as his attempts, even if negligent, would have been protected by the Aviation Medical Assistance Act.
D. All doctors have taken the Hippocratic Oath to treat in an emergency situation.
E. But for Dr. Brown's negligent failure to act, the patient might have survived, so the doctor is at least partly liable.

Answer: C. If Dr. Brown had responded, his effort would not have put him in jeopardy even if his intervention had proved ineffective. However, there is no legal duty for anyone, even a doctor, to come to the aid of a stranger. Although doctors are generally thought to have an ethical duty to offer emergency care, the Hippocratic Oath is silent on this matter, and the American Medical Association's Code of Medical Ethics states: "Physicians are free to choose whom they will serve. The physician should, however, respond to the best of his or her ability in cases of emergency where first aid treatment is essential" (AMA Code of Medical Ethics §8.11, 2006-2007 edition).

All 50 states have laws on their books called Good Samaritan statutes, whose intent is to encourage people to help those in acute distress. These statutes do not require doctors to come to the aid of strangers. (Vermont is an exception, imposing an affirmative duty to assist a victim in need.) Rather, they protect against liability arising out of negligent rescue, but typically they cover only ordinary, not gross, negligence. The Aviation Medical Assistance Act, enacted in 1998, is the federal equivalent of the Good Samaritan statute, covering emergency treatment during flights in the United States.

In allegations of medical malpractice, the plaintiff must first show that the doctor owed a duty of due care to the injured victim. This duty arises out of the doctor-patient relationship, i.e., whenever a doctor undertakes to evaluate or treat a patient.

In the absence of such a relationship, a doctor is not legally obligated to treat, even in an emergency.

However, to encourage aiding strangers in distress, states have enacted so-called Good Samaritan laws to protect rescuers who act in good faith. Popularized in the 1960s in response to the perception that doctors were reluctant to treat strangers for fear of a malpractice lawsuit, these laws immunize the aid giver against allegations of negligent care. Their protective scope varies from state to state, usually offering immunity against simple negligence but not gross misconduct.

Hawaii's Good Samaritan statute is typical. It states: "Any person who in good faith renders emergency care, without remuneration or expectation of remuneration … shall not be liable for any civil damages resulting from the person's acts or omissions, except for such damages as may result from the person's gross negligence or wanton acts or omissions" (Hawaii Revised Statutes §663-1.5 [a]).

California, the first state to enact a Good Samaritan statute in 1959, is an exception, as it may excuse even gross negligence as long as the act was done in good faith. In a litigated case, a California court declared: "The goodness of the Samaritan is a description of the quality of his or her intention, not the quality of the aid delivered" (*Perkins v. Howard*, 232 Cal.App.3d 708 [1991]).

There is no universal definition of gross negligence, but the term is frequently equated with willful, wanton, or reckless misconduct.

One can think of gross negligence as aggravated negligence, involving more than mere mistake, inadvertence, or inattention, and representing highly unreasonable conduct, or an extreme departure from ordinary care where a high degree of danger is apparent (Prosser, W.L. et al., eds. "Prosser and Keeton on Torts," 5th ed., St. Paul, Minn.: West Publishing Co., 1984, pp. 211-4).

Statutory protection is generally excluded for Good Samaritan acts performed within a hospital setting under the theory that doctors have an ongoing relationship with the hospital and are already obligated to provide emergency care within its walls. A minority of states such as California and Colorado do provide immunity irrespective of the location of aid.

Commentators have observed that very few lawsuits have involved Good Samaritan doctors and that such laws are both unnecessary and ineffective. Those who are averse to helping will remain on the sidelines even with the protection of the law.

In a 1963 AMA survey, approximately half of responding physicians said they would render emergency help, and this did not depend on whether there was a Good Samaritan statute in place (Sanders GB. First Results: 1963 Professional-Liability Survey. JAMA 1964;189:859-66). ■

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mittee, led by Sen. Edward M. Kennedy (D-Mass.), have been coordinating meetings with those two panels and the Budget Committee, Mr. Pollack said in an interview.

Committee chairs have the greatest influence on the legislative process, he said. Both Mr. Pollack and Mr. Nichols also expect Sen. Kennedy to play a very significant part in creating the legislation, as much as his cancer will allow.

Even so, "to pass anything of significance will require bipartisanship," said Mr. Pollack, noting that Sen. Baucus and Sen. Grassley have worked closely on many bills.

The House is not as far along in preparing for health reform, but staffers on the four relevant committees with jurisdiction over health care have been meeting, Mr. Pollack said.

"I think there's significant movement underway in anticipation of health care reform being a top domestic priority," he said. But, "I don't think any of the proposals that have come out so far are going to be *the* proposals," Mr. Pollack added.

Instead, the expectation is that a health reform bill will be developed during the transition period between November and January, "and that's what we should look at most seriously," he said. ■

Still Concerned About Health Care After All These Years

Harry and Louise, who became infamous in a 1993-1994 television ad lambasting the Clinton administration's health care reform plan, were dragged briefly out of mothballs to appear in a new commercial that urged Congress and the next president to make such reform the top domestic policy priority.

The effort was bankrolled by five groups that by their own admission have "historically divergent views about health care reform": the American Cancer Society's Cancer Action Network, the American Hospital Association (AHA), the Catholic Health Association (CHA), Families USA, and the National Federation of Independent Business (NFIB).

"We intend to transcend ideology and partisan politics," said Families USA Executive Director Ron Pollack at a press conference. The multimillion-dollar campaign aired nationally for 2 weeks during the Republican and Democratic conventions.

The new ad featured Harry and Louise, back at their kitchen table. The characters were portrayed by the same two actors, now 14 years older. Harry noted that health care costs are going up again and that small businesses are being forced to drop their plans. Louise said that a friend just found out he has cancer and can't afford a plan. Harry remarked that "too many people are falling through the cracks." Finally, Louise said that "whoever the next president is," health care should be "at the top of his agenda," and that he should bring everyone to the table and "make it happen."

HEALTH CARE FIRST

Harry and Louise were back at their kitchen table in a new ad promoting health care reform.

The campaign did not advocate any specific solution. The sponsors said their goal was to create momentum for change, and that they believed that, unlike 14 years ago, there is a consensus that reform is inevitable and necessary.

"The status quo is no longer acceptable," said Rich Umbdenstock, AHA president and CEO.

"We simply can't be having this conversation 14 years from now," added Sister Carol Keehan, CHA president and CEO.

The NFIB joined the effort because its membership said that "health care costs are their No. 1 concern," said Todd Stottlemyer, president and CEO.

The five groups were joined at the briefing by Karen Ignani, president and CEO of America's Health Insurance Plans. AHIP (back when it was known as the Health Insurance Association of America) launched Harry and Louise the first time, helping to defeat the Clinton reform plan.

But Ms. Ignani said times are different now: "Our commitment is to make sure no one falls through the cracks," she said.