Winning the Tort War in Mississippi:

Keys for Success in other States

By Senator Charlie Ross

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In 2004, the Mississippi Legislature passed comprehensive tort reform legislation that many consider a model for the nation.[2] Among other provisions, the legislation reforms Mississippi's venue law, including a provision that venue must be established independently for each plaintiff (thus effectively wiping out the mass tort actions that have plagued Mississippi courts for so long); caps non-economic damages[3] in general business/tort actions at $1 million, and caps non-economic damages in medical/health related actions at $500,000 (thus, providing predictability with regard to pain and suffering damages, the measurement of which is totally subjective); immunizes sellers and distributors of products from liability for latent defects unless the seller/distributor has actual or constructive knowledge of the defect; caps punitive damages according to a sliding net-worth scale; and eliminates joint and several liability, replacing it with a pure several liability standard where a defendant only pays for his share of a fault, regardless if this percentage is 1% or 99%.

That these reforms were accomplished in the Mississippi Legislature in 2004 is truly amazing. Tort reform efforts had failed many times before. The issue seemed to be one that would be there forever with no resolution. In fact, at the beginning of the Mississippi 2004 Legislative Session in January, many (and probably most) inside and outside observers predicted failure again of the tort reform effort. The plaintiff's trial bar, fortified by hundreds of millions of dollars in fees accumulated through mass tort and tobacco litigation, seemed to be in a position to again block comprehensive tort reform.

This was especially the case in the Mississippi House of Representatives. The Speaker of the House was not known to favor tort reform, and his committee appointments seemed to be confirmation on this point. The House of Representatives' Judiciary Committee, to which any tort reform bill would be referred, was chaired by a very successful plaintiff's trial lawyer who said, from the House podium, that it would be a "cold day in hell" before there would be a vote on the floor of the House on any bill coming out of his committee containing any type of non-economic caps. But five months later, the Legislature had passed, and the Governor had signed, the comprehensive bill discussed in the introduction of this article. Figuratively, it had truly become a "cold day in hell" for opponents of tort reform. Considering the foregoing, the questions naturally arise: What were the keys to success in

[2] The legislation was passed in the 2004 First Extraordinary Session as House Bill (HB) 13, a copy of which can be found at www.ls.state.ms.us.

[3] The term "non-economic damages," as used in the 2004 legislation, includes all types of non-pecuniary damages not subject to objective measurement; those damages subject to objective measurement such as loss of wages, medical expenses, and property damage are not capped in the Mississippi legislation.

the Mississippi legislative tort reform battle of 2004? And, were these keys unique to Mississippi or can they be replicated in other states?

In my judgment, there were several overlapping, critical strategic keys, without which success would not have been possible. It is further my judgment that these keys to success are not magic, and they are not necessarily limited to Mississippi. Important lessons can be taken from the Mississippi experience and applied to other states, even though the composition of the legislature in other states may vary considerably from that of the Mississippi Legislature.

With that said, I will attempt to outline the strategic keys to success in the Mississippi tort reform fight.

A Short History

To understand the Mississippi tort reform fight of 2004, it must be viewed in context. The 2004 legislative session in Mississippi was not the beginning of the fight. Instead, 2004 was the culmination of a battle that had been waged for years, and especially the last four years when the intensity had greatly increased.

Because of a very liberal Supreme Court and a few liberal trial judges; a few jurisdictions where there seemed to be no limit on the amount of damages that juries would award, regardless of the facts; the creation of a virtual mass tort industry where hundreds of plaintiffs could sue hundreds of defendants in one lawsuit in a state court, with no procedural safeguards, such as those that are contained in class action rules; and the efforts of some very talented and aggressive trial lawyers on the plaintiff's side of the bar, Mississippi had come to be known as the "jackpot justice capital of America."[4] The American Tort Reform Association has labeled certain Mississippi jurisdictions as "Judicial Hellholes."[5] A survey of more than 1,200 senior in-house counsel by Harris Interactive for the U.S. Chamber of Commerce ranked Mississippi 50th in virtually every category of its ranking of judicial systems nationwide.[6]

Sometimes, like a staggering alcoholic, a state has to hit rock bottom before a majority of legislators become convinced that changes must occur. To a certain extent, this happened in Mississippi. The media attention that developed and the complaints of the business and medical community

[4] Transcript, *Jackpot Justice*, 60 MINUTES, Nov. 25, 2002.

[5] AM. TORT REFORM ASS'N, BRINGING JUSTICE TO JUDICIAL HELLHOLES (2003), *available at* http://www.atra.org/reports/hellholes/. ATRA named Mississippi's 22nd Judicial Circuit, which includes Copiah, Claiborne, and Jefferson Counties, as a Hellhole in both 2002 and 2003. ATRA added Holmes and Hinds Counties to its list in 2003.

[6] U.S. CHAMBER INST. FOR LEGAL REFORM, STATE LIABILITY SYSTEMS RANKING STUDY (Harris Interactive Inc. 2002, 2003, 2004), *available at* http://www.legalreformnow.com/resources/.

began to sink in. As a result, starting approximately in the year 2000, the tort reform effort gathered momentum. In 2001, hearings were held in the Senate Insurance Committee, and then in joint hearings before a special committee appointed from the House of Representatives and Senate. Major comprehensive legislation was introduced in 2000, 2001, and in 2002. In 2002, legislation actually came out of Committee in the Senate during the regular legislative session before it died on the floor calendar. This was the most progress that had ever been made on major comprehensive tort reform legislation in recent memory.

After major comprehensive tort reform died in the 2002 legislative session, the Governor of Mississippi called a Special Session beginning September of 2002. The Governor at the time was not a strong proponent of tort reform, but public pressure had built to such a point, especially with regard to the medical field, that the Governor, over the objection of the plaintiff's trial bar, called the Special Session. After a grueling 83-day Special Session, tort reform legislation was passed and signed by the Governor.[7]

The 2002 legislation made substantial progress in the medical field by capping non-economic damages in medical malpractice cases, but the legislation did not, in any way, complete the job. As an example, the caps on medical malpractice non-economic damages had significant exceptions for disfigurement and cases where the defendant allegedly acted with specific intent. These exceptions gave a pro-plaintiff trial judge flexibility to avoid the caps. Also, the legislation did not cap non-economic damages in non-medical cases. The 2002 legislation made some helpful venue changes, but most significantly, it did not address the out-of-state influx of mass torts. The legislation moved closer to several liability, but did not go all the way. The legislation capped punitive damages based upon a defendant's net worth, but at very high levels. The legislation attempted to immunize sellers from damages due to latent defects in products, but unfortunately, it did so in a way that was procedurally defective and thus largely ineffective. In general, the 2002 legislation pointed Mississippi in the right direction, but left most of the tort reform road yet to be traveled.

In the 2003 legislative session, tort reform legislation was again introduced, but because the legislature was exhausted, and because it was an election year, these attempts were half hearted at best and not fruitful.

The election of 2003 was an election where tort reform was front

[7] Two bills actually passed in the 2002 Special Session. House Bill (HB) 2 only dealt with actions against medical/healthcare providers. House Bill (HB) 19, passed after HB 2, dealt with all types of actions. Because these two separate bills sometimes amended the same statutory provisions, they must both be read and construed together to ascertain what passed in the 2002 Special Session. Both of these bills can be found at www.ls.state.ms.us.

and center. The Republican candidate for Governor, Haley Barbour, and the Republican candidate for Lt. Governor, Amy Tuck, both made tort reform one of the top platform planks of their campaigns. The Democratic nominees for each of these offices, Ronnie Musgrove and Barbara Blackmon, respectively, both took a wait and see position on tort reform, saying that the 2002 legislation should be given more time to determine if further change was necessary. This position by the Democratic candidates was viewed as an anti-tort reform position. Thus, the voters had a clear choice. In the end, both Republicans won handily; and their victory was widely viewed as a mandate that the public wanted tort reform.

On the heels of the 2003 election, comprehensive tort reform became law in Mississippi in 2004 in a two week Special Session called by the new Governor just days after the regular session ended without a successful tort reform bill.

As the Chairman of the Senate Judiciary Committee handling the legislation, and as a practicing attorney myself, I believe the legislation, from a substantive standpoint, is exceptional. It is fair; it is balanced. It restores much needed predictability to the judicial system. It satisfies the public's perception that dramatic change was necessary to fix Mississippi's legal system. It sends the message to the business world that Mississippi is "open for business." But it does not deny access to the courts, and it does not deny recovery to claimants who have been tortuously injured. In short, it accomplished all of the major goals of the reform movement without denying a legitimate claimant a reasonable and adequate remedy.

With this short history in mind, what were the keys to success to achieving such good legislation?

We Fought a War, Not Just a Battle

War is usually a series of battles that build upon each other. The first key is the fact that the tort reform effort in Mississippi was fought as a war, not just a battle. Just as the invasion of Normandy in June 1944 probably would not have been successful without the experience gained earlier in North Africa and Italy, success in the tort reform war in Mississippi would not have occurred without the lessons learned and the foundations laid in the previous three years of the fight. Conversely, the length of the war wore down the opponents and taxed their resources.

Further, as explained below with regard to other factors, the fact that the fight extended over four years also facilitated several other keys to success that probably would not have occurred otherwise. Since all of these factors were important, it was actually good, in hindsight, that the effort lasted long enough for these factors to be fleshed out and developed. Thus, a key to success in going forward in other states is to plan to wage the fight over a length of time that will allow all the necessary conditions and elements to be in place for a final push.

Consensus as to What Needed to Be Done

A second key to success in the 2004 session is that there had developed in the Mississippi Legislature a consensus as to the reforms that were both substantively necessary and politically achievable. This consensus resulted from the fact that the fight extended over four years.

I can well remember serving on the Joint House/Senate Committee that held extensive hearings on tort reform in 2001, early on in the fight. After the completion of the hearings, the Senate members tried to put our heads together to come up with a list of recommendations. The list we compiled contained many of the measures that were eventually enacted in 2004. The list also contained many other measures that various parts of the business or medical community suggested. To a certain extent, the menu of measures at that time was somewhat of a wish list of what seemed to be good ideas. Unfortunately, there was no clear consensus among legislative leaders of the effort at that time on what was wheat and what was chaff, either substantively or politically. By contrast, at the start of the 2004 legislative session, the leadership of the pro-tort reform forces in the legislature had a very clear idea of the key provisions that were a must, those provisions that would be nice, and those provisions that could be sacrificed without any significant loss to the effort. This consensus was only possible because of the gnashing of teeth, the debate and the process of living with the issues for three years prior.

This consensus was invaluable in the 2004 session for several reasons. To start, by 2004, valuable time and effort did not have to be spent on educating a majority of individual legislators. Further, the consensus gave legislative leaders the confidence to say “no” to groups who wanted to add

special interest provisions to help their business or field. Most importantly, "tort reform" came to mean something concrete. You could be for it or against it, but "it" existed. There was something tangible to fight for or against, rather than an undefined, changing concept. This consensus thus became both a rallying tool for tort reform supporters, and a battering ram to be used against the opposition.

Instituting Reforms to Conform the Law to Common Sense

A third key to success is that the legislation contains provisions that conform the law to common sense. This gave the overall legislative package credibility, not only among members of the legislature but also the public at large.

Whenever the law is disconnected from general perceptions of fairness, common sense, and justice, the law and the judicial system suffer. The flip side of this truth is that legislation that reconnects the law with general perceptions of fairness, common sense, and justice is much easier to justify and sell.

As an example, the 2004 law contains a provision that eliminates all vestiges of joint and several liability and implements pure several liability. In simple English, a defendant is responsible for paying only that portion of damages that the jury finds he caused. Conversely, a defendant is not required to pay for any damages for which he did not cause. Moreover, the jury is specifically allowed to consider whether the fault of non-parties, even if they are immune parties, contributed to the damages. This is the way the world operates (at least roughly) outside the courtroom. Further, it is also the way juries operate unless prohibited from doing so by the court through convoluted special interrogatories designed to implement joint and several liability systems that do not allow allocation of fault to immune tortfeasors or non-parties, even though these immune tortfeasors and non-parties obviously caused much of the harm.[8]

A major key to success was being able to point to this provision (i.e., pure several liability) as a reason for why change was necessary. The public, and non-lawyer legislators, could understand and support this change because it seemed fundamentally fair. In fact, I often heard non-lawyers express surprise that the law was not "already that way." Conversely, opponents of tort reform would often find themselves tied in knots when attention was focused on this

[8] I personally have tried several cases where the jury was instructed to allocate fault, by percentage, to only the several defendants and the plaintiff listed on the jury verdict form, and then decide the total amount of damages suffered by the plaintiff, regardless of fault. Immune tortfeasors (to whom fault could not be allocated under the law at the time) were not listed on the verdict form so no fault could be allocated to such a tortfeasor though he had obviously been at fault and largely responsible. In addition, the jury was instructed to return an amount of damages (if it found any defendant at fault) equal to the plaintiff's total damages. The court itself would then use the fault percentages and the total damages to decide the liability to each defendant. This system prevented juries from allocating fault to entities or persons such as immune tortfeasors, even though the evidence presented may have made it obvious that an immune party (e.g., an employer protected by the exclusive remedy provision of worker's compensation law) was a major contributing tortfeasor. Moreover, in my judgment, the fact that the judge applied the allocation rules indicated a fear that the jury might not follow the allocation law, either because of its complexity, its disconnection with common sense, or both.

particular issue because they could not give a convincing answer as to why someone should have to pay for something they did not cause. Yet, the tort reform opponents fought this issue as they did all the other issues. The result was that opponents lost not only on this issue, but they lost credibility in general on other issues because their arguments with regard to allocation of fault was contrary to widespread perceptions of fairness, common sense and justice.

The same situation existed with regard to products liability law. Mississippi law, prior to the 2004 legislation, followed Section 402(A) of the Restatement of Torts (Second), which provides that a non-manufacturer seller of a product containing a latent design or manufacturing defect can be held liable merely because the seller is in the chain of commerce, despite the fact the seller has no knowledge of the defect and no control over the existence or nonexistence of the defect. Thus, under Mississippi's law prior to 2004, a seller could avoid liability for latent product defects only by not selling products (i.e., by not doing business, a non-desirable goal).[9] The 2004 legislation corrected this problem by providing that a seller of a product could not be held liable for a latent defect unless the seller participated in the design or manufacture of the product (which will almost never be the case); had actual or constructive knowledge of the defect (in which case the seller should be held liable); or the seller altered the product in a material way (in which case the seller should be held liable).

To win on this argument, the issue was intentionally simplified and expressed in examples that ordinary people could understand. Also, the term "innocent seller" was coined. Why should a drug store be liable in tort for selling a FDA-approved drug? Why should a car dealership be liable in tort for merely taking and selling a car with a defective gas tank when the manufacturer designed and manufactured the car and the gas tank, and the car dealership had no knowledge of the defect? Why should any "innocent seller" who is merely trying to earn a living by running a business be liable for something he did not create or know about when he is a mere conduit?

The opponents of tort reform could not answer these questions honestly because the real reason they opposed the innocent seller provision had nothing to do with right or wrong. Instead, their opposition was really based on wanting an in-state defendant to destroy diversity jurisdiction in federal court. Because they could not explain why a plaintiff's choice of courts

[9] Mississippi law, prior to 2004, did allow the seller to seek indemnity from the manufacturer. However, the right to assert an indemnity claim is no great comfort to a small business that must have a lawyer to seek the indemnity and who, regardless, will be a party to the litigation to the end. Further, having a claim or lawsuit filed against someone is still a very personal accusation for many. Finally, indemnity is meaningless in cases where the manufacturer is bankrupt or otherwise judgment proof.

justified an innocent seller being sued, they lost the battle of public opinion on this issue. Further, their intransigence on this point greatly weakened their credibility on other issues on which they may have otherwise had much stronger arguments.

I personally saw how convincing and powerful this point could be when I debated the issue of tort reform on public television. I urged passage of tort reform because it contained provisions such as the "innocent seller" provision that protected the local hardware owner, who had worked hard and invested his life savings to buy the store, when he sold a lawnmower with a blade made of a defective alloy. Did we really want him to be responsible when he knows nothing about how the blade was made and the only thing he did was order the lawnmower from his wholesaler's catalog? The tort reform opponent on the panel became so frustrated that he made the argument that existing law should stay as it is because otherwise there would be an empty chair in the courtroom, which would be a disadvantage to the plaintiff's attorney. In essence, he was arguing that trial tactics justified dragging into court a person who had done nothing wrong. You can imagine how poorly this argument came across with the public.

On another occasion, I again used the argument of the innocent seller position to justify the comprehensive bill; my opponent's response was that there is no such thing as an "innocent seller." Again, imagine how unconvincing this argument was to the general public.

In summary, a major key to success in Mississippi in 2004 and the tort reform fight is the fact that the bill contained a few key provisions that were substantively sound, but also could be used as examples of how the current law was out of touch with common sense. These provisions, which could be explained through simple examples that the layperson could understand, in essence became our "poster children" showing why change was needed; they gave credibility to other provisions in the bill. Conversely, the fact that the opponents of tort reform were opposing even these "common sense" provisions reduced their credibility on the issue of the overall need for tort reform.

Do Not Take Anything To The Podium That Cannot Be Justified On The Merits

In a related sense, another key to success in Mississippi in 2004 is that all of the provisions contained in the tort reform measure that were taken to the floor were provisions that were based on solid substantive justifications. As Chairman of the Senate Committee handling the bill, I personally refused to include in the bill provisions that were logically inconsistent, that were obviously designed to curry favor with a particular interest group but that had no other independent justification, or which could not be justified by any argument other than "we need some bargaining chips." To be sure, on this latter point, there were some provisions of the tort reform bill that were ultimately used as bargaining chips, but these provisions were good substantive provisions which, even if not bargained away, could be independently justified. This requirement in turn gave credibility to the entire bill. Unlike the opponents of tort reform who fought for provisions that violated the rule of common sense, we avoided the inclusion of a provision that was likely to become a "poster child" issue that could be used to reduce our credibility on the concept of the need for tort reform in general.

As an example, there were some in the business community in Mississippi that wanted a provision that not only limited the amount of punitive damages to a multiple of a plaintiff's compensatory damages, but at the same time, also provided that a defendant could not be found liable for punitive damages in more than one lawsuit for the same act. Limiting punitive damages to a multiple of a plaintiff's compensatory damages can be justified. Likewise, a law that limits a defendant's exposure for punitive damages to only one lawsuit can also be justified, provided that the jury in that lawsuit is allowed to consider the harm caused by the defendant to all injured persons, not just the plaintiff in the lawsuit. What does not make sense, however, is both limiting punitive damages to a multiple of an individual plaintiff's compensatory damages, and at the same time prohibiting other plaintiffs from recovering punitive damages. Though such a double limitation would obviously be attractive to defendants, it is also logically inconsistent and seems basically unfair. For this reason, it was rejected.

Maintaining this position was not always easy. It often required saying "no" to powerful interests and valuable allies. But, it was the right approach, both on the merits and politically. It avoided fights on issues we could not

wholeheartedly defend. Most importantly, it avoided a general loss of credibility as to the soundness of the bill and our motivation. In the long run, it was a major reason we won.

Communicating in Plain Language

Yet another key to success was crafting a message and communicating the message in plain English so that it could be easily understood. Lawyers, in arguing to judges and in writing briefs, use technical terms, thus often making concepts sound very complex. Before a judge, who is trained in the law, such is fine. But with legislators, most who are not lawyers (at least in Mississippi),[10] such is not a sound tactic. It is much better to say, "where a lawsuit can be brought" than to say, "where venue is proper." Simply saying that a defendant has to pay for the harm that he caused, and that he does not have to pay for the harm caused by somebody else, is much more effective than saying "several liability." Non-lawyers can understand giving a court the power to transfer a case to another court where the witnesses are and where the accident occurred, whereas the term "forum non conveniens" is foreign to their ears.

How important is this point? Are we just talking about choice of words? I would submit it is very important. One of the favorite tactics of tort reform opponents was to confuse the issue in public debate by using legalese to justify the status quo. The best way to set the record straight was to use simple language over and over again. As common sense as this fact seems, it was crucial in winning the minds of non-lawyer legislators and the public.

Elections Matter

As previously mentioned, Mississippi had statewide elections for the Governor and Lt. Governor in 2003. In addition, every member of the Legislature was up for reelection in 2003. Tort reform was a major platform plank of both the successful gubernatorial candidate and the successful candidate for the Lt. Governor position. As such, the election was widely (and in my judgment, properly) interpreted as a mandate for tort reform. The ultimate bottom line for elected officials, high or low, is votes on Election Day. For this reason, the mandate, or at least perceived mandate, that the public gave the Governor and the Lt. Governor in the 2003 election

[10] In the Mississippi Senate, only 8 of the 52 Senators are members of the Bar. In the Mississippi House of Representatives, only 27 of the 122 Representatives are members of the Bar.

got legislators' attention. Legislators sitting the fence could use this mandate as a reason to support the issue.

In a related sense, the election of 2003 made a tremendous difference because the election of a new Governor who supported tort reform dramatically tilted the balance of power in the legislative process. In Mississippi, the Lt. Governor, who presides over the Senate, and the Speaker of the House, who presides over the House, have the power, through the legislative rules and the power to make committee appointments, to control the agenda of their respective bodies. The Governor also has considerable influence on the legislative process due to his bully pulpit, his ability to influence legislators of his party, his ability to call special sessions, and his veto.

Prior to the election, both the Senate leadership and a substantial majority of the Senate supported tort reform. In the Mississippi House, a majority of members supported tort reform, but the House leadership opposed tort reform. The previous Governor was not an ardent supporter of tort reform. Thus, prior to 2004, the leaders of two of the three entities of government directing the legislative process were against tort reform. In 2004, however, with a new Governor in place who supported tort reform, this ratio changed to 2-1 in favor of tort reform. This put tremendous pressure on the House leadership, and ultimately was a major factor in the House leadership having to relent and allow a floor vote on the tort reform issue.

Simply put, elections matter.

Effective Use of the Bully Pulpit

Another key to success is that the newly elected Governor of Mississippi effectively used his bully pulpit to highlight the issue. When the Governor calls a press conference, the press shows up. The same is not true necessarily when a Legislative Committee Chairman calls a press conference. The newly elected Governor, Haley Barbour, used his bully pulpit not only to speak out on the issue himself, but also to provide key members of the legislature and key members of the business and medical community a media audience that they would not have been able to obtain without the Governor's involvement. The result was repeated positive messages in the media from a variety of people setting forth the need for tort reform. Though opponents

of tort reform tried to counter with their own media events, their lack of a bully pulpit was a major limiting factor in their effectiveness in this regard.

The Development of Public Support in General

In a related sense, a key to success was the development and maintenance of general public support in favor of tort reform. This support was built gradually and reached a peak during the 2004 session. As previously mentioned, the Governor effectively used his bully pulpit to create that support. In addition, business groups and medical groups spent considerable money and time conducting a public relations campaign through the media (newspapers, radio, and TV) to convey to the message the importance and relevance of tort reform. Further, the major newspaper in the state adopted a strong editorial position in favor of tort reform, and reported extensively on some of the shockingly large verdicts in some jurisdictions. All of this in turn translated into public awareness and concern, which in turn created real constituent feedback to individual legislators.

A related part of developing and maintaining public support was the crafting of the message. As previously mentioned, the use of plain English and examples to explain complicated (or at least complicated sounding) legal issues were very important. Just as important, however, and probably more so in many aspects, was the transformation of the tort reform issue into an economic development issue. Just as the public can understand the basic unfairness of joint and several as opposed to several liability, when it is explained to them in plain English, the public can also understand how an unpredictable and unfair legal system can hurt the availability of healthcare and jobs and can impact the state's economic future.

As a practical example on this point, the Governor of Mississippi, Haley Barbour, shortly after his election, convened a "job summit" attended by hundreds of people from across the state. A major aspect of the job summit was tort reform, with the message being that tort reform is necessary for attracting more jobs to Mississippi and retaining the jobs we have. By making tort reform a necessary pillar for successful economic development along with other non-controversial issues as workforce development and education, the Governor was able to effectively broaden the issue. It was no longer just "tort reform," but an integral part of the economic development of the State of Mississippi.

Using the Doctors as the Tip of the Spear

In Mississippi as in many other states, health care is considered a critical asset. In Mississippi, rising insurance rates were threatening not only the affordability of health care, but also its availability. Malpractice insurance costs increased exponentially, making it unaffordable for many physicians. Malpractice carriers pulled out of the state making coverage not even available for many others. The state was forced to establish a state-run risk pool for medical insurance. Doctors were leaving the state, and hospitals were shutting down emergency rooms due to lack of doctors. Though hotly denied by the plaintiff's trial bar, doctors themselves said and felt lawsuit abuse was driving their insurance rates up so high they had no choice but to quit medicine or leave Mississippi.

Because healthcare is so important in people's lives, doctors became the "tip of the spear" in the tort reform fight. If there was a press conference, we always tried to have a number of doctors in their "white coats" there. The medical affordability and availability issue also resonated well with the public. People understood the problem when they heard about people having to drive two hours to find a doctor to deliver a baby.

To be sure, the medical community was facing a real crisis. I do not mean to suggest that their plight was exaggerated (it was not) or that their situation did not demand priority on its merits (it did). What is also true, however, is that the medical crisis provided an opportunity to use doctors as a catalyst to jumpstart the broader issue for all Mississippians.

United We Stand

Yet another key to success was keeping the business community, the medical community, and other supporters of tort reform united and on the same page. Maintaining a unified front of the various groups supporting tort reform behind the consensus package was essential to success. Achieving and maintaining such unity, however, was easier said than done. As an example, some business groups were willing to sacrifice damage caps in order to have venue reforms. Others suggested other trade-offs. Then there is also the challenge of a business group that wants more than is politically feasible, and they threaten to "walk away" unless the bill is further strengthened. Whenever this type of horse-trading starts among pro-tort reform advocates,

the result is usually that the opposition can win the war by giving in on some minor points to divide the general tort reform effort. As with a military campaign, dividing your forces always puts you at risk of being defeated piecemeal. Both in the legislature and litigation arenas, the plaintiff lawyers like nothing better than dividing and conquering.

To achieve and maintain unity, the key in Mississippi was strong political leadership in the State Senate. On high profile issues, elected officials have the greatest personal risk if failure results due to either overreaching or not being aggressive enough. The leadership in the State Senate accepted this responsibility and made it clear to both the business and the medical communities that the goal was comprehensive tort reform, that anything short of such comprehensive tort reform would not be satisfactory, and that nothing was worse than a watered down bill that satisfied some groups at the expense of others. Unlike many legislative issues where special interest lobby groups often have an advantage as far as facts, figures, and information, the legislative leadership in favor of tort reform, because it had been dealing with the issue for so long, was generally more knowledgeable about the issues than some lobbyist groups in favor of tort reform. This enabled the legislative leadership to take control of the process by saying what would and could be done, and what could not be done. Legislative leaders were able to justify these decisions in a way that the support groups in favor of tort reform accepted, even if the decision was not exactly what they would have preferred. In short, a major factor to success in Mississippi in 2004 was mature and knowledgeable legislative leaders that could take charge.

The first major test of this unified strategy occurred in the 2002 Special Session. In Mississippi, the Governor has the constitutional power to limit the call of a special session to only those issues he wants considered. In 2002, the Governor initially limited the special session to tort reform in medical/health related actions only, with no promise of expanding it. The very real fear existed that medical tort reform would pass, and then there would not be enough pressure on the Governor to compel him to expand the special session to consider tort reform for general business. In response to the Governor's limited call, the Senate reacted by amending the Governor's bill to include all legal actions, not just medical/healthcare actions. The Senate argued that the amendments were germane, and thus allowed, despite the limited nature of the Governor's call. The House leadership, who opposed

tort reform, asserted that the legislature did not have the authority under the call to consider non-medical actions. The Senate eventually lost on this issue, but not before the disagreement stalled the special session for several days, with the taxpayers picking up the bill for the stalemate. Because of the resulting stalemate and media attention, the Governor, who was trying to avoid saying he did not support general tort reform, was pressured to publicly and unequivocally state he would expand the call to include all legal actions after the legislature addressed the medical liability issues (which the Governor claimed to be the real crisis). At the same time, the Senate leadership obtained a commitment, prior to passage of the medical bill, from the medical community that they would stay in the fight on the general business bill. When all was said and done, the Senate had shown that it meant what it said about the importance of tort reform for all and having a united front of all groups in support of the issue.

On a smaller scale, this strategy was also tested at times by groups that would argue that it was best to take what you can get rather than not get anything by trying to get everything. There is logic to this argument, and in many contexts in the legislative arena, it is the right argument. However, in the tort reform fight in Mississippi in 2004, the argument was wrong, and rightly resisted. A consensus had developed as to what was needed, the public's support was in place, the 2003 election results were viewed as a mandate, and the political leadership in the Governor's office and the Lt. Governor's office was in place. If there was ever a chance of passing comprehensive tort reform, 2004 was the time. All of these factors coming together again probably would be difficult to replicate. Thus, the legislative leadership in the Senate said "no" to those who advocated half a loaf as opposed to the whole loaf. Though it took courage and nerve, this strategy paid off.

To be sure, going for a whole loaf is not always the right answer. As a legislator, I have seen situations where just the opposite is true. How do you choose between fighting for full, comprehensive reform or settling for less? You turn to your experienced elected officials who know the art of the possible and the practical.

Grassroots Activism and Organization

Yet another key to success was effective grassroots activism by business groups and the medical community.

During the most intense times of the 2004 legislative session, the business community and the medical community were very effective in reaching out to individual legislators, and in particular, those legislators in the House of Representatives who were from conservative districts but had voted against tort reform previously or who were sitting on the fence. This outreach did not simply happen through the traditional method of sending a lobbyist to talk to the legislators. The most effective lobbying actually occurred when business and medical organizations coordinated so that individual doctors, business people, and other citizens in the legislator's district called immediately prior to the vote. This type of lobbying effort by both the business and medical community was expensive, time consuming, and difficult to coordinate, but it paid off. Legislators respond when influential constituents from their own district call.

The ability to mount such an effective outreach program did not just happen. A critical component was the creation of an umbrella organization in Mississippi to coordinate the efforts of the business and medical community. This organization, created and funded by the support groups themselves, brought much needed focus to their efforts.[11] Considering the necessity for a sustained outreach effort extending over several months, the umbrella organization made a huge difference.

A Willingness to Really Fight

An essential element that cannot be overlooked is the true political willingness to really fight. In politics, one can support an issue but not really fight for an issue. Fighting for an issue can strain personal relationships and can cause a legislator to lose support for bills important to his district. It is often easier to sit back without creating a ruckus. You can then say to your constituents that you favored the issue without burning any significant political green stamps inside the Capitol.

Fortunately, many in Mississippi, starting first and foremost with the Governor and the Lt. Governor, decided to fight to the finish for tort reform in 2004. The directive was to win, pure and simple, and 2004 was going to be

[11] The umbrella organization also was important because it provided a point of contact with whom the legislative leadership could communicate without having to meet with every single group.

the year. As an example, the Governor publicly said there would be Special Sessions (i.e., plural) until tort reform was enacted.

Likewise, the Lt. Governor made it clear early on that tort reform was her priority, and backed her statements with the formidable powers of her office in the Senate. As the Committee Chairman handling the bill in the Senate, I always knew I had the Lt. Governor's support in pushing the issue as hard and as far as necessary to prevail. As a result, the Senate passed its own tort reform bill, and then amended and sent back to the House every House bill possible with tort reform included so the House leadership would have to deal with the issue again. This put tremendous pressure on the House. The House leadership strategy was to deny a vote on the merits through procedural moves because they were concerned that tort reform would pass if a vote on the merits were allowed. Such procedural moves are a normal, but usually unnoticed, part of the legislative process. By sending bill after bill to the House, this tactic was exposed to the public and the media.

In the House of Representatives, a small number of members also decided to fight, challenging the House leadership's strategy of procedurally denying a vote. These members waged a procedural guerilla war on the floor of the House that effectively focused attention on the refusal of the House leadership to allow a vote on the merits of the numerous bills sent to the House from the Senate (both Senate bills and House bills).[12] Before too long, the issue with the public became one of "let the people vote" and "set the House free." This was a no win position for those not allowing a vote on the merits of such a high profile issue of such importance to the public interest.

A willingness to play brinkmanship also was crucial. During both the 2002 Special Session and the 2004 Special Session, the leadership in the House of Representatives had the power to prevent legislation from coming to a floor vote, no matter how many of the individual members wanted such a vote. What the House leadership could not do on its own, however, was to adjourn the legislative session and go home. The rules required a vote by the legislative body to adjourn. In 2002, the Senate (which favored tort reform) would not vote to go home, and to the consternation of the House leadership, neither would the House members. As a result, the 2002 Special Session lasted a record 83 days. Every day, the newspaper would print the increasing cost of the 2002 Special Session. Politically, it was a nightmare.

In 2004, the specter of another marathon special session hovered over

[12] Those House members displayed true political courage. Only someone who has served in a legislative body knows how difficult and stressful it can be to "buck the leadership." My hat goes off to those in the Mississippi House that did so in 2004.

the Legislature since it was widely known that the same tactic of "not going home" would be used again, if necessary. Quite literally, we who were in favor of tort reform planned to stay at the Capitol, no matter how long it took, even if we were just staring at each other and the tort reform opponents. Based on the 2002 experience, our opponents knew we had the votes, and just as important, the will to do so. Ultimately, this pressure was too much. The House leadership gave in. A vote was allowed. Tort reform passed in large part because the membership would not have it any other way.

Conclusion

After the 2004 tort reform legislation passed, I was visiting with the Lt. Governor and the Senate pro tempore about what had happened. We all were still finding it hard to believe. All the hard work had actually paid off. Just as important, "smart" work had paid off. In Mississippi, both were necessary for success.

People outside the State called it the "Mississippi Miracle." Perhaps in some ways it was, but it was not by mere chance. The elements of the miracle can be detailed, and that is why I wrote this article. If the elements I have described can be marshaled in other states, I believe the Mississippi Miracle can occur elsewhere. If victory is possible in a state like Mississippi, then it surely is possible in other states. When it does occur, the people of those states will ultimately have a fairer, more sound legal system, and the public will be the beneficiary.

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