

# THE LANGUAGE OF LAWSUIT ABUSE REFORM

## OVERVIEW

*'No amount of money can make someone whole again.'*

As a pollster, I can tell you that the most fulfilling projects are those in which the findings are truly conclusive. Divergence of opinion – although frequent and expected in politics – can be vastly frustrating.

No such divergence exists in this issue. I can say – unequivocally – that you have a winner. **The American people are fed up with abusive personal injury attorneys, aggravating frivolous lawsuits, and a healthcare system that is getting more expensive and less accessible as a result.**

It is my firm belief that all societal issues can be directly related to a Seinfeld episode. In this case, I am reminded of Jackie Chiles – the sordid personal injury lawyer – who assures Kramer that *'your face is my case'* against the tobacco companies. Sadly, such cases are all too common in America today. Too many Jackie Chiles personal injury lawyers. Too many frivolous lottery lawsuits.

Until now.

First, we talked to voters in Florida ... the surefire epicenter of the '04 campaign. We then talked to Inside-the-Beltway opinion influencers ... a crowd that - for any political issue - you must be able to sway. They were all college-educated, upper-middle class, news-consuming swing-voters. Evenly split among men and women, Republican and Democrat. In short, we talked to Americans at the center of the political spectrum and electoral world... *everyone's target voter.*

And in each city – after hearing the facts, figures, and arguments on both sides of the issue – they voted *overwhelmingly* in favor of lawsuit abuse reform. From the language to the advertising, we know *exactly* what works. Americans no longer point fingers only at the lawyers and the healthcare industry. They recognize the problem as a broader, more complex issue. They see the need *to balance rights for the 'victims' with the creation of 'more security, more affordability, and more access' in the healthcare system.* They agree that society is suffering as a whole, and that we MUST take responsibility for runaway lawsuits.

The time is ripe for change.

## THE SIX PRINCIPLES OF REFORM

Every effective communication strategy begins with outline a set of principles that sets the context and frames the debate. These are the words that should be spoken in speeches and grace the pages of every op-ed written from today forward.

- (1) **Justice.** Medical liability reform is about justice for all. As a matter of principle, *those who have been wrongly injured deserve their day in court.* They deserve just and fair compensation that will ensure them – and their family – a lifetime of financial security. But sadly, this system – *a system that should be about justice* – has become solely about money. *[If you start with this principle, you will generate greater support for the five that follow.]*
- (2) **Access.** The cost of healthcare is important, but the *accessibility* and *availability* of healthcare is essential. The American people do understand what is at risk here. They understand the impact that these runaway settlements and exorbitant legal costs have on their ability to access medical care *when* they need it and *where* they need it. *[Nothing scares a person more than needing emergency care and not being able to get it.]*
- (3) **Fairness.** Fairness is a critical but delicate perception when it comes to medical liability reform. Although doctors, insurance companies, lawyers, and victims are all players in the medical liability system, what angers Americans most is that too many lawyers are taking too much advantage of that system. Not for their clients ... but for themselves. Today's personal injury lawyers are quite literally *victimizing the victims*, and society as a whole is paying the price. *Fairness is getting what you are entitled to – nothing more and nothing less.*
- (4) **Reasonable.** It is hard to define reasonable – everyone has a different answer. However, most Americans consider what the lawyers are getting in some of these cases as obscene. Who can justify a lawyer walking away with a \$10 or \$20 million cut of a settlement – particularly when the victim gets less? Americans see the current verdicts, the length of the trials, the legal fees that end up in the pockets of the personal injury lawyers, and the whole legal morass as being totally unreasonable and in need of change.
- (5) **Common sense.** This is the attribute most wanted in our legal system and most lacking right now. Talking about “*a common sense approach*” will help take the legal-medical problem from the abstract to something they will want to help fix – by voting.
- (6) **A balanced approach.** This phrase is essential to your communication efforts because it strikes at the core of healthcare's perceptual problems. The American people believe that lawyers and insurance companies are too powerful and that the individual is at their mercy. You will need to prove that your legislation will protect victim's rights and will help make the healthcare system more accessible to more people. If you follow the directions that follow, you will.

These are the principles at the core of medical liability. Your communication efforts **MUST** contain *reference* to these principles, but that alone is not enough. You must also prove that your *solution* does in fact address and represent these principles and that the current liability system does not.

## **KEY FINDINGS**

- 1) **The system is broken.** Start here. Americans fundamentally feel the current legal system is broken. No doubts. No exceptions. It isn't fair. It isn't balanced. *It isn't working.* We know from other polling that almost 90% believe major changes are needed ***'to restore***

*common sense and balance*' to the legal system. Those 90% were fully represented at our sessions – and they are still demanding change.

So say it. '*The current system is needlessly confusing, takes too long, costs too much money, makes health care more expensive for others, and ends up truly benefiting only the lawyers involved.*' Then talk about the alternative.

### **WORDS THAT WORK**

**Access to quality healthcare is a right, not a privilege. Unfortunately, America's personal injury lawyers are threatening that right with frivolous lawsuits and courtroom antics that are raising everyone's premiums and pushing doctors out of the profession.**

**YES, lawsuit abuse IS crippling our healthcare system. YES, lawsuit abuse IS a 'crisis' in America. And YES, people ARE paying more and getting less because of the lawsuit epidemic.**

**The fact is, doctors are closing up shop because insurance premiums are skyrocketing. The price of saving lives is just too high so they simply stop practicing in fields where excessive awards are commonplace. And when the life-savers stop saving lives, we know what chilling reality ensues.**

**There is too much fraud. There is too much abuse. Too many doctors are leaving and too many hospitals are closing.**

**Something must be done, and done NOW.**

- 2) **The personal injury lawyers are at the root of the problem.** A good indicator of the depth of emotion Americans have regarding the current legal system is their utter disdain for personal injury lawyers (use that phrase rather than trial lawyers). When asked at the outset of the session what comes to mind when they hear the term '*personal injury lawyers*', a stew of invective poured forth ... '*creeps,*' '*bottom-feeders,*' '*overpaid,*' '*evil,*' and those were the nice comments.

There is universal agreement that navigating the current system cannot be accomplished without the aid of a lawyer or, more likely, a *team* of lawyers. And no one thought this was a good thing, or an accident. All suspected that it was the personal injury lawyers themselves who have designed the current system ... and with their own financial gain in mind.

You must stress that the current system is broken because it has been hijacked by a horde of personal injury lawyers who are lining Capitol Hill pockets with millions of dollars. The result? "*We have become the lawsuit capitol of the world. The lawyers are getting rich, and the rest of us are getting stuck with the bill.*"

### WORDS THAT WORK

**As a matter of principle, damage awards should go to the victim, not the lawyers. They absolutely deserve to be paid, and they deserve fair compensation when they perform well, but lawsuits should not be “*strike it rich*” lotteries or schemes. There has to be some limit to what lawyers can take from their clients.**

**Otherwise, lawyers end up with the lion’s share of the settlement and the victims end up with little more than the scraps.**

**There is no reason – NONE – that a lawyer should walk away with a \$50 million dollar cut of a medical liability settlement. That money belongs to the victim, or the hospital, or to us. And if you don’t agree, be prepared to pay more, a lot more for your healthcare, because someone’s going to pay.**

- 3) **Link lawsuits with access and affordability.** Americans fully grasp the direct link between lawsuits and higher insurance premiums and declining access to quality healthcare. The argument for reform with the most resonance is the one that demonstrates the adverse domino affect these lawsuits have on the entire health care system. In particular, all the legal battles necessitate the spending of huge sums of money in the lengthy defense process, regardless of culpability. In a sentence: ***“Money that should have been spent in the operating room ends up being spent in the courtroom.”***

The result? ***“Doctors and medical facilities are distracted and diverted from their proper health care mission, spending money to defend themselves rather than helping others. In the end, it is the consumer, the patient, and those in need of medical attention who suffer.”*** This is an easy argument to make, so make it.

### WORDS THAT WORK

**Remember that every time you hear about another \$100 million verdict, two things will happen. Number one, the cost of healthcare will go up for you and for the doctors and hospitals you need. And two, whether or not YOU can afford the higher costs, your doctor, your emergency room, and your hospital may be forced out of business. It’s happened in Nevada. It’s happened in West Virginia. It’s happened in a dozen states. And it can happen right here.**

**When one person wins big, we ALL LOSE.**

Another effect of runaway costs and the growing burden of medical malpractice insurance that Americans will relate to is the drain of doctors and medical facilities from states without caps on malpractice awards. While money will always be a concern, ***“accessibility can be a matter of life or death.”*** In an emergency, cost is not a consideration ... *access is:*

- Families of individuals with chronic conditions may be forced to relocate if there is healthcare flight. Give them real life examples.
- The unavailability of OBGYN care for young mothers and families is another issue that moves your audience and should be emphasized. Talk about Nevada.

Access is the key word, and the lack of accessibility is the most direct threat if the current system is not reformed.

- 4) **To win support for the cap, personalize the issue.** Once people see liability reform as an issue of accessibility, it becomes real and personal to them. It is about them. *It is about their family.* And it goes beyond party affiliation. When the issue becomes patient protection, even partisan Democrats want change (only the amount of the cap is holding them back now).

Yes, talk about the abuse; the fraud; the get-rich-quick mentality among personal injury lawyers that is crippling our healthcare system and hurting too many innocent Americans, but personalize it by explaining what it means in dollars and cents and in decreased access.

#### **THE PERFECT PITCH**

**If we don't get this national greed under control the doctors won't be there when we need them.**

**Let's face it. We are making it impossible for doctors and hospitals to stay in business. Nineteen states today are in crisis due to a legal system that's out of control. This is not a lottery. For each multi-million dollar, frivolous settlement, we are forcing doctors and hospitals out of business, and we all pay the price. Curbing lawsuit abuse is not only a matter of the rising cost of our health insurance.**

**If we don't control this situation, our doctors and emergency rooms and trauma centers will not be there when we need them most. We need to wake up. This is a life or death situation, and we need to take action right now.**

We gave participants six arguments in favor of a \$250,000 cap ... the above statement was the strongest. Why? ***'That could be me.'*** It causes them to personalize this issue. It causes them to think in terms of *their* family, not the family across the street. Moreover, this statement paints a vivid picture of the abuse prevalent in the current system. It allowed these voters to envision a person sitting on their couch and being swayed by a personal injury lawyer commercial.

On the other side of the issue ... we gave participants six arguments against a cap. Again, the most personal is the most credible:

**WORDS THAT WORK ... AGAINST YOU**

**When innocent people who are injured seek compensation from those who caused their injuries, it's *anything* but frivolous. When a preventable careless medical error forces a child into a wheelchair for the rest of his life, it's *anything* but frivolous. And when someone close to you suffers due to doctor negligence, their right to a day in court is *anything* but frivolous.**

That's why you need to start with the argument that ***innocent victims deserve their day in court***. Then emphasize that there is NO cap on economic damages under this legislation. Everything from medical bills to lost wages will be covered – which is what scares people the most about a medical accident. Then tell them you are simply trying to end the *fraud* and *abuse* that exists in the current system.

- 5) **Justice and fairness are the two principles that matter MOST to Americans so they need to matter most to you.** Americans are genuinely moved by human suffering. We have a deep desire to help and protect those we see as victims. You must make it clear again and again that the cap is just, fair, and protects those who have been hurt.

**WORDS THAT WORK**

**Let's talk about what lawsuit abuse is doing to the medical community. Doctors are suffering. Their insurance premiums are on the rise, which is forcing many of them out of fields of medicine that are at risk for huge settlements. And while insurance premiums increase for a number of reasons, the single biggest reason are the excessive malpractice lawsuits.**

**Don't try to find an OBGYN in Nevada. They're closing up shop because they can't afford the insurance. Don't expect to see trauma centers fully staffed. Same reason. Doctors are leaving the fields of medicine where they are most needed because their insurance costs are through the roof. If we truly want to protect our access to quality healthcare, we need reform now.**

- 6) **Stress the balance in the legislation.** That is, don't start by telling voters what they can't have (more than \$250,000 in punitive damages). Start by telling them what they CAN have. In communicating this legislation, begin by describing the full gamut of awards still being received by the 'victim.'

You saw with your own eyes: Americans have a very difficult time putting a cap on the value of human life. A cap of \$250,000 on the value of 'pain and suffering' makes even supporters of the legislation somewhat uncomfortable. While any pre-set amount will trigger this dilemma, allow me to once again point out that the group was much less uneasy when we raised the amount to \$1,000,000. In fact, with a cap of \$1,000,000 you had all but ONE participant in the Washington, D.C. group saying they would support the legislation.

So what do you say?

**All medical expenses will be covered, both now and in the future as a result of malpractice. The patient's anticipated earnings will also be awarded for as long as necessary, possibly for life. There will be no out-of-pocket expenses, and the victim will receive medical treatment at no cost to him/her. In addition, the victim will receive additional compensation for pain and suffering, up to \$250,000. It is only the pain and suffering award that will be capped. The patient will be taken care of and supported in full, *for life*.**

#### **WORDS THAT WORK**

**First and foremost, as a matter of principle *those who have been wrongly injured deserve their day in court*. Legitimate mistakes and, tragically, even true negligence, still exist in medicine today. There are times when people go into hospitals seeking care and come out worse off than when they entered. Those victims have every right to a judicial system that is fair and speedy.**

**Patients will receive ongoing compensation for their medical expenses, their rehabilitation costs, their domestic expenses, and any past or future lost wages, if they are harmed by a physician's negligence.**

**So let me be clear. The main goal of any lawsuit abuse legislation must be to put an end to the out-of-control PUNITIVE damage awards in America ... the \$50, \$75 and even \$100 million dollar paydays and legal lotteries that are crippling the healthcare industry, costing all of us more and more, and making healthcare less available and accessible.**

**We all remember the McDonald's lawsuit ... millions paid out to a woman who, at a drive-through window, spilled coffee on her lap that was – go figure – HOT!**

- 7) **Don't attack juries.** To do so is, essentially, to blame Americans for the problem – and they won't like it at all. Instead, focus on the system. As one person put it, it is not the lawyers that decide these outrageous verdicts; they are simply working within the confines of the system. So too are the juries. We need instead to get at the root of the problem ... and that is the very system that facilitates this abuse.

Talk about the broken system. Talk about the politicians (don't be partisan) who are saying 'no' to balance and to change ... who are saying 'no' to patients, doctors and the future of the healthcare system in America. And talk about the trial lawyers who are enriching the democratic coffers to ensure that this initiative never passes.

- 8) **Beware of tangents.** The cost of healthcare is a highly charged issue for most people. Raising the topic of medical liability reform often leads people to another issue close to their hearts – the rising costs of HMO's and health insurance. They easily confuse one with the other. It's important to keep your audience specifically focused on the issue of medical liability reform. That's why the lawyer component is so important. Draw their attention to the personal injury lawyers taking advantage of the system for themselves at the expense of their clients keeps listeners focused on what matters to you.

- 9) **Talk about the EXCESS.** It is the exception that proves the rule. While the system is widely recognized to be in need of reform, there is still lingering concern for the victim. After all, there, but for the grace of God, go each one of us. The way to sway these voters is to emphasize the extremes. Talk about the exceptions, the abuse – the \$80 million settlement in Texas ... the exorbitant legal fees ... the McDonald's 'hot coffee' case. This is a zero sum game. Today, it is a lottery. When a few can win big, we all suffer.

#### **WORDS THAT WORK**

**As a matter of principle, damage awards should go to the victim, not the lawyers. Lawsuits should not be “*strike it rich*” lotteries or schemes for lawyers. There has to be some limit to what lawyers can take from their clients. Otherwise, lawyers end up with the lion's share of the settlement and the victims end up with little more than the scraps.**

And it's not about the additional money in the pockets of the victims, but rather the *message that this would send to bad doctors.*

Again ... this is an absolute winner.

We found overwhelming consensus on one theme throughout our research ... ***a system that is supposed to be about justice has become solely about money. There is too much fraud. There is too much abuse. Our legal system has become, quite literally, a lottery.***

## **APPENDIX I:**

### **THE PERFECT PARAGRAPH**

**No amount of money will make someone whole again. As a matter of principle, if a doctor is found to be responsible for negligence they should be punished to the greatest extent of the law. But let us not destroy the healthcare system in the process. Let us not make healthcare LESS available. Let us not make healthcare LESS affordable. We must enact balanced reforms that will preserve America's access to a superior healthcare system. Our ultimate goal is NOT to limit justice, *but to limit abuse.***

### **THE FIVE MOST ALARMING CONSEQUENCES OF THE CURRENT SYSTEM**

- #1 The trauma center in the state's largest city was forced to shut down, requiring trauma patients to travel up to three hours to seek emergency care.**
- #2 The state has been designated a state 'in crisis,' due to the alarming number of medical professionals who are leaving the state to practice elsewhere.**
- #3 Forty-five percent of doctors have reduced or eliminated high-risk services to avoid unaffordable liability insurance premiums.**
- #4 Several counties in the state no longer have a practicing OBGYN, leaving many pregnant women unable to get proper medical and childbirth care.**
- #5 Physicians in key specialties, including those with NO past claims history, are facing insurance premiums increases of between 50 percent and 100 percent.**

## APPENDIX II: THE BEST/WORST RHETORIC

We have the BEST rhetoric for this issue. We tested extensively testimony from Members on both sides of the aisle. The participants knew exactly what party the speaker was from. *Yet party did not matter.* Consider some of the following excerpts – spoken by good Democratic communicators – that failed.

### ATTACK RHETORIC THAT DOESN'T WORK

**'If we are really serious about controlling rising medical malpractice insurance premiums, we have to limit the broad exemption to Federal antitrust law and promote real competition in the insurance industry, and work at reducing medical errors across the health care system.**

**This partisan bill doesn't do that. This partisan bill is designed to be a talking point for fundraisers. It is not designed to help doctors in rural, underserved areas to be able to pay their medical malpractice insurance. It doesn't help the women and children in this country who need these medical specialties. It may help insurance companies and fundraisers, but it doesn't help anybody. If we are going to pass something, let's pass something real.'**

**Senator Leahy**

**'The bill we are dealing with seeks to limit the legal rights of a specific segment of our society, women and newborns. It is important to remember that this bill is going to affect those who have actually been injured by malpractice. We are not debating whether there has been a judgment. There has been a decision that malpractice has occurred. A jury has already, in these cases, decided the victims are eligible to collect non-economic damages.**

**Furthermore, it will hurt the most seriously injured; those who might receive a non-economic damage award of more than \$250,000 were it not for the arbitrary cap. We are essentially telling women and infants that the injuries and suffering they experience are not worth as much as the injuries and suffering of others.'**

**Senator Dodd**

Republicans, on the other hand, have mastered the lawsuit abuse reform lexicon.

### **REPUBLICAN RHETORIC THAT WORKS**

**‘It is a crisis. It is getting worse. It should be no surprise that this medical malpractice liability crisis is having a negative effect on the way these much needed specialists practice medicine.**

**In fact, a recent survey—a fascinating survey—showed that 70 percent of neurosurgeons responding said they have had to make at least one of five practice changes. So if 100 responded, 70 said they have had to do one of these following things to narrow down or change their practice in response to the medical malpractice crisis: referred complex cases, closed their practice, moved to a different state, stopped providing patient care or retired. Runaway lawsuits are forcing neurosurgeons and other specialists to limit emergency services.**

**Again, it is not the doctor who is being hurt, it is the patients who are being hurt, and it is future patients, and that means potentially everybody listening to me now.’**

**Senator Frist**

**‘Patients and doctors ought to be on the same side, working together; but fear of the legal system puts them in opposite corners and pits them against one another. There has to be a better way.’**

**Senator Enzi**

**‘All of us want access to quality, affordable health care. When the quality is not there, when people die or are truly sick due to negligence or other medical error, they should be compensated. When healthy plaintiffs file meaningless lawsuits to coerce settlements or to shake the money tree to get as much as they can get, there is a snowball effect and all of us pay the price.**

**For the system to work, we must strike a delicate balance between the rights of aggrieved parties to bring lawsuits and the rights of society to be protected against frivolous lawsuits and outrageous judgments that are disproportionate to compensating the injured and made at the expense of society as a whole. I repeat that again. For the system to work, we must strike a delicate balance between the rights of the aggrieved parties to bring lawsuits and the rights of society to be protected against frivolous lawsuits. . . Society as a whole.’**

**Senator Voinovich**

### **MORE RHETORIC THAT WORKS**

**‘This is not just about big hospitals with shiny buildings owned by corporations. This ultimately comes down to the individual who wants what we all want, and that is access to good quality health care, but who simply cannot find it because they either cannot afford the health insurance or their employer has been priced out of the market because of booming health insurance premiums, in large part caused by this liability crisis or, as we have seen, simply the doctors who, rather than live in the crosshairs of this broken system, decide to retire or to move away to some other location.’**

**Senator Cornyn**