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## The Presidential Candidates and Tort Reform

[Divergent views of the candidates provide Pennsylvania litigators with a choice](#)

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With the Pennsylvania primary in the race for President set to take place on April 22, the time has come to review the tort reform positions advocated by the various remaining major presidential candidates.

Although nationally, the issue of tort reform has focused on medical malpractice and health insurance, changes in those areas could obviously have implications in other areas of personal injury litigation. The ripple effect of any changes could affect both the plaintiff's bar and the defense bar.

Another important consideration is each candidate's criteria for the selection of future members of the U.S. Supreme Court and the federal bench.

As noted below, the last remaining major presidential candidates have different platforms on these important issues.

### Legal Backgrounds

Some voters may consider candidates based upon the extent of their legal background.

Sen. Hillary Clinton is a 1973 graduate of Yale Law School but did not go into a career of personal injury civil litigation. According to her biographies on her campaign Web site and on the Washington Post Web site, she instead focused her efforts on advocating children's rights, working to advance her husband's early political career, and even teaching criminal and constitutional law for a time at the University of Arkansas School of Law.

Sen. Barack Obama completed his magna cum laude J.D. degree at Harvard Law School in 1991. According to his biographies as contained in his campaign Web site and the New York Times Web site, following law school, Obama worked as an associate attorney for a Chicago law firm and focused on discrimination claims and voting rights cases. He also worked as a community organizer and a University of Chicago Law School lecturer of constitutional law before leaving the law altogether to focus on his political career.

The Republicans' presumptive nominee, Sen. John McCain, R-Ariz., graduated from the U.S. Naval Academy in 1958 and immediately commenced his military career as a naval pilot. He obviously followed that distinguished career by going into politics.

As such, it does not appear that any of the major presidential candidates has any extensive experience as a civil litigator or otherwise having much courtroom experience.

### McCain: Falling Into Line

Generally speaking, opinions regarding caps on personal injury damages are split along party lines, with Democrats generally voting against arbitrary monetary caps and Republicans being usually in favor of them.

During their primary contest, the leading Republican candidates all bemoaned the nation's litigious climate. Most, including McCain, have supported tort reform measures.

According to Mark Crane, a writer for MedPage Today, during his campaign McCain has made tort reform one of his top priorities. The Arizona senator has supported caps on awards and even expressed some support for a loser-pays rule. McCain has been quoted as saying, "We cannot let the search for high-quality care be derailed by frivolous lawsuits and excessive damage awards. ... Liability reforms should eliminate lawsuits for doctors [who] follow clinical guidelines and adhere to patient safety protocols."

McCain has also publicly lamented increased costs stemming from defensive medicine, where doctors over-cautiously order multiple tests in the hopes of avoiding any mistakes or liability. "In every other industry when technological advances are implemented, costs to the consumer decreases," he told supporters in South Carolina. "This is not the case in health care. ... I can't tell you the number of tests that all of us in this room have taken just so that doctors won't be sued for malpractice."

### **Clinton and Obama: Co-Sponsors and Co-Authors**

In contrast to the Republican position, rather than capping jury awards, the Democrats generally favor efforts to reduce medical errors and steps to increase the reporting of errors as ways to cut the overall number of medical malpractice cases.

Despite their disagreements about the fine details of a universal health insurance plan, Democratic front-runners Clinton and Obama do appear to be in general agreement about the issues of medical malpractice cases and patient safety. Before they officially became Presidential candidates, the Illinois and New York Senators co-authored an article in the May 25, 2006, issue of the New England Journal of Medicine, entitled "Making Patient Safety the Centerpiece of Medical Liability Reform." (See:<http://content.nejm.org/cgi/content/full/354/21/2205>)

In that article, Obama and Clinton sympathized with physicians over escalating insurance costs and criticized the current tort system for creating an "intimidating liability environment." Still, both Democrats advocated that it was more important to focus on how to improve patient safety rather than "areas of intense disagreement," such as caps on financial awards to patients.

In conjunction with the publication of their article, Obama and Clinton introduced and co-sponsored the National Medical Error Disclosure and Compensation (MEDiC) Act of 2005, a bill that, in part, would have required hospitals to disclose errors to patients and would have also created a national patient safety database. The bill further proposed to create a Department of Health and Human Services program that would seek early compensation for patients and offer liability protections to doctors in exchange for their disclosure of errors and apologies. This proposed legislation was never realized and died in 2006.

On her campaign Web site, Clinton vows to continue to promote the premise of this legislation by following up on her previous co-introduction of the National Medical Error Disclosure and Compensation (MEDiC) Act. Through this act, Clinton would continue to encourage the adoption of a model that provides liability protections for doctors who disclose medical errors to patients and who also offer to enter into negotiations for fair compensation. According to the Web site, it is anticipated that such policies would result in greater patient trust and satisfaction, more patients being compensated for injuries, fewer malpractice suits being filed, and, consequently, significantly reduced administrative and legal defense costs.

### **Obama: Sometime-Critic**

It should be noted that, in addition to the similarities noted above, there are some subtle, but important, differences in the tort reform platforms put forth by the Clinton and Obama camps.

Although he has spoken favorably of civil litigators at times, Obama has also been noted in the press to be somewhat more critical of trial lawyers. While campaigning for the U.S. Senate in 2004, he said, "Anyone who denies there's a crisis with medical malpractice is probably a trial lawyer." Furthermore, it has been noted that Obama voted in favor of caps on non-economic damages in medical malpractice cases when he served in the Illinois Senate.

Also, shortly after taking office as U.S. Senator in 2005, Obama voted in favor of the Republican-sponsored Class Action "Unfairness" Act. This Act, signed by President Bush in 2005, limited victims' rights in possible

class-action lawsuits and required many of these types of cases to be heard only in federal court, shutting out state courts as a possible option. Clinton opposed this legislation.

### **Clinton's Signature Issue**

Like Obama, Clinton has also stated her alliance with trial lawyers and victims of malpractice. Moreover, former President Bill Clinton is seen by many as a stalwart in supporting the civil justice system. But Sen. Hillary Clinton has not been always and entirely faithful to her pro-plaintiff platform.

The New Yorker is certainly well-known for having previously pushed a universal health care plan in her first two years as First Lady and has continued that advocacy in her role in the U.S. Senate. Commentators have noted, however, that versions of her failed universal health care plan in the early 1990s did contain caps on damages in medical malpractice cases. It has also been noted that, in recent years, Clinton has been among the leaders in terms of receiving donations from health professionals and lobbyists.

### **A 'Long Shot'**

As predicted by Mark Crane of MedPage Today, regardless of the candidates' respective positions on tort reform, even if a Republican wins the presidency, tort reform is still a long shot. President Bush himself was unable to get his tort reform plan passed even though he was working with, at one time, a Republican Congress. If Democrats obtain control of the White House, major tort reform will likely face an even more uphill battle against the currently Republican controlled House and essentially evenly split Senate.

### **The Candidates and the Court**

Another consideration in this Presidential election campaign is the future makeup of the United States Supreme Court and the rest of the Federal judiciary. It is anticipated that at least two Supreme Court justices will likely leave the bench at some point over the next four years. The two eldest justices — John Paul Stevens, 87, and Ruth Bader Ginsburg, 75 – are seen as liberal stalwarts.

The presidential election could determine whether the court's philosophy – with the recent conservative Republican appointments of Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. – will continue in its present direction with a strict constructionist slant, or whether it will return to a more moderate stance.

It is clear that justices nominated by Obama or Clinton would have a much different idea of the Supreme Court's role than those likely to be nominated by McCain.

According to a posting by Adante Higgins on the CBS News Web site, McCain, in his continuing effort to court conservatives during his campaign, stressed that he would only appoint judges to the Supreme Court who strictly follow the Constitution. McCain has been quoted as saying, "I tell you I will nominate only people who have a clear, complete adherence to the Constitution of the United States and do not legislate from the bench. That's who I'll nominate to the U.S. Supreme Court."

In contrast, as Democrats pursue the White House in 2008, the party is relishing the possibility of its first Supreme Court appointments since 1994. From a Democratic perspective, the list of potential candidates from the lower federal courts may be thin.

For several decades, presidents have drawn their Supreme Court nominees from the ranks of appellate judges appointed by previous presidents of the same party. Now, because the Democrats have been out of the White House for two terms, most of the sitting Democratic appellate judges may be too old to be considered plausible Supreme Court candidates.

For this reason, Clinton or Obama might have to look for candidates in other places, such as from private practice or academia. While it appears that both Clinton and Obama would favor pro-plaintiff and individual rights nominees, Obama has come off as the more liberal of the two in his statements about the potential candidates for the Supreme Court.

In a July 7 speech decrying the current selection process for Supreme Court justices, Obama stated, "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African-American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."

Clearly, with the candidates having such differing views on criteria for the selection of judges, the future makeup of the United States Supreme Court and the Federal bench will be directly impacted by which candidate makes it into the White House in the next election.

Whatever one's politics may be, each vote counts. The Republican and Democratic candidates have strong and divergent views on the issues of tort reform and the makeup of the federal bench. It is therefore imperative that the voice of Pennsylvania litigators be heard on the primary and general election days in order that the bar may have any say on the future of civil litigation practice as we know it. •