

A Stool with Two-and-a-Half Legs Isn't Much of a Stool

By Gene Beckham

"The more you cut down people's rights to go to court, the more you cap their damages, the more you cut them off by statute of limitations, the more money you save. And if you don't allow any of it, you save it all."

"Caps on damages simply require the most grievously injured people to bear the burden of reducing insurance premiums."

When the U.S. House of Representatives conducted hearings about a claimed "medical malpractice crisis," the American Bar Association was invited to testify, and the Association picked a TIPS member to be its representative. The statements quoted above were made by Walter H. Beckham Jr., my late uncle, during testimony supporting ABA policy, and are published in the *Congressional Record*. As a torts professor and plaintiffs trial lawyer who had been chair of TIPS in 1974–1975, Uncle Walter was a good choice. He was from the era when the plaintiffs bar recognized the importance of ABA policy and valued TIPS membership for providing the opportunity to be involved in its development.

The purpose of the Tort Trial & Insurance Practice Section is, in part, to "bring together lawyers of diverse backgrounds and practice," and we often equate our Section to a three-legged stool, supported equally by plaintiffs, defense, and insurance/corporate lawyers. But, TIPS has not been immune to the

changes in the legal landscape over recent years, which has included a degree of estrangement between the plaintiffs and defense bars. Many practitioners from both sides of civil litigation have retreated into separate, and equally homogeneous, organizations where dissent is rare and the objectives can be self-serving. This has occurred during a time of rapid growth in the number of lawyers, and a new generation of the profession has had fewer opportunities than their predecessors to experience and appreciate the benefits of interacting with "the other side" on professional issues. I do not think it is a coincidence that civility and professionalism issues have arisen during the same period of time. The idea that important trust and connections are created by working in good faith with professional adversaries in the search for consensus, and by recognizing the legitimacy of contrary points of view, now seems a little old-fashioned when lawyer advertisements citing "aggressiveness" as a virtue appear on billboards, bus benches, and television sets across the country.

The members of TIPS continue to provide a forum for thoughtful discussion of all civil justice issues where every interested party has a seat. Our support from the defense bar and from insurance/corporate attorneys remains strong. The three-legged stool, however, has developed a wobble that a sugar packet will not fix. Although ABA policy remains the undisputed and impartial voice of the entire American legal profession,



recognition by the plaintiffs bar of its importance has diminished. There is decreased awareness of our Section's steadfast support of issues important to all tort trial lawyers, including plaintiffs practitioners. I believe TIPS has failed to adequately inform lawyers who have a plaintiffs practice about the opportunities TIPS provides, the importance of ABA policy in the nation's ongoing legal debate, and our Section's involvement in policy development. This is a very disappointing communication failure because TIPS warrants better support from the plaintiffs bar than we are receiving.

Football coach Bill Parcells once said, "You are what your record says you are," and the same is true for TIPS. Please join me in a brief examination of the historical record of ABA policy that began with proposals passed by the TIPS Council. TIPS was instrumental in having each adopted by the 561-member ABA House of Delegates. Please remember, this is only a partial list:

- 1974 and 1980: Opposed federalization of workers' compensation systems.
- 1981: Opposed imposition of a model federal products liability law on the states.
- 1983: Opposed federal

preemption of state products liability laws.

- 1987: Opposed ceilings on pain and suffering damages, abolition of punitive damages, confidentiality agreements depriving other claimants of information, agreements requiring a plaintiffs attorney to destroy information, and settlements prohibiting an attorney from representing other claimants in similar actions.
- 1987: Supported fast-track trials of tort cases, and allowing nonunanimous verdicts in tort trials.
- 1990: Supported allowing a less-than-unanimous federal civil jury to render a verdict.
- 1996: Opposed barriers to access of civil justice based on economic status, fee shifting, and rejection of settlement offers.
- 1998: Opposed federalization of automobile liability and no-fault insurance, allowing the named insured to bind third parties such as resident relatives or persons living in the same home, extension of no-fault immunity provisions to corporations, and exclusion of benefits to persons operating a vehicle under the influence of drugs or alcohol.

The TIPS policy voice is not all ancient history, either. Our work

continues into the twenty-first century on issues such as these:

- 2010: Opposed legislation seeking to merge some medical payment components of auto and compensation policies into health insurance.
- 2011: Recognized that there is no statutory or regulatory requirement for determining a Medicare set-aside payment in third-party liability claims, and supported strict time limits for the Centers for Medicare and Medicaid Services to respond to set-aside inquiries and to provide payment details.
- 2013: Pending now is a resolution to declare void and unenforceable pre-dispute waivers of jury trial.

Legislative and special interest initiatives affecting tort claims will never stop. TIPS will continue to advocate for the fair treatment of all parties seeking justice in America's civil courts. TIPS members know that while many defendants have a corporate voice, countless injured people seeking civil justice every year have only their lawyer to speak for them. TIPS, historically, has been—and should remain—an important part of the policy voice of the plaintiffs bar.

Quality representation requires involvement. TIPS remains ready to include more plaintiffs practitioners in meaningful leadership roles. All

of our 31 substantive general committees have a dedicated position reserved for members representing the plaintiffs practice perspective. Our program diversity guidelines require presentation of the plaintiffs point of view. The TIPS Plaintiffs Policy Task Force is the only permanent entity in the ABA created to formulate and advance policies of specific interest to plaintiffs, and several times a year it nominates outstanding plaintiffs lawyers for the Pursuit of Justice award.

There have been many instances of ABA testimony on Capitol Hill since Uncle Walter appeared in 1993. When the ABA needs a representative to discuss damage caps, contingent fees, the right to jury trial, Medicare set-asides, or the many other subjects both sides of a civil case agree are important, TIPS will be involved. Vibrant participation and support from the plaintiffs bar will help us to do it better. So, my open invitation to our colleagues who represent plaintiffs in tort claims and trials is this: If you would like to have a say in developing ABA policy on issues important to you and to the clients who rely on you so much to help them, join TIPS and add your voice to ours. If you would like to discuss this, call me. The ABA, and countless others, look to TIPS for guidance and leadership in civil tort litigation matters, and our voice is stronger when our stool has three equal legs firmly on the ground. ■



TIPS Needs Your E-mail Address

Please submit your current e-mail address so TIPS can stay in touch with you and provide the information you want. You can use the change of address form at: <https://apps.americanbar.org/abanet/common/MyABA/home.cfm>