

In defense of patients, in defense of doctors

Symposium examines issues surrounding expert witness testimony

Given a lack of national tort reform, is there a fair and just way to protect the rights of harmed patients and improve medical safety within the economy of sustainable medicine? That was the question asked at “Beyond Medical Liability Reform: Keeping Our House in Order,” a symposium held during the AAOS 2010 Annual Meeting.

Moderator **Alexander R. Vaccaro, MD**, assembled a panel of speakers—including two medical liability trial lawyers—to look at the issue from both the plaintiff’s and the defendant’s sides.



Alexander R. Vaccaro, MD; Joseph L. Messa, Esq.; and Daniel F. Ryan III, Esq., participated in the “Beyond Medical Liability Reform: Keeping Our House in Order” symposium.

Expert witness: \$10,000/day

The first speaker, attorney Joseph L. Messa, Esq., brought a unique perspective to a convention of physicians—that of a plaintiff’s trial lawyer. Saying that “some of the things you may think about malpractice claims aren’t necessarily true,” Mr. Messa encouraged audience members to consider the plaintiff’s point of view before declining to offer testimony on his or her behalf.

“There is an epidemic of medical malpractice,” he said, “not malpractice lawsuits. All of the evidence-based studies that have been done with regard to this issue from the 1970s to the 2000s have shown the same thing. The statistics have been fairly consistent: medical errors kill approximately 100,000 Americans every year—more Americans than motor vehicle accidents and workplace injuries combined.”

Further, he said, government statistics show that the number of medical liability claims in the United States has remained stable or fallen over the last 10 years.

Mr. Messa argued that taking the stand in support of patients who have been harmed medically is an ethical duty supported by the Hippocratic Oath and the American Medical Association Code of Medical Ethics.

“One of the issues that I see, as a defense attorney, is that experts are mercenaries,” responded Daniel F. Ryan III, Esq. “From the defense side, we see experts who testify primarily for plaintiffs, but I don’t get the sense that they’re doing it because of their Hippocratic Oath or because of what it says in the Bible. They’re doing it because they’re getting paid \$5,000 for half a day in the courtroom.”

One of the major problems with the present system of medical liability, Mr. Ryan argued, is an inconsistency of standards in court. An action by a physician that is determined to be entirely within the standard of care in one trial may be considered outside the standard of care if presented to a different jury.

“Issues often turn on the persuasiveness of experts,” he explained. Recent tort reforms in many states, however, are having an impact. “In most states, we no longer face the prospect of an anesthesiologist offering standard of care testimony against an orthopaedic surgeon, although that was a very real possibility a couple of years ago.”

If not caps ... then what?

Mr. Ryan took the opportunity to discuss some potential tort reform demonstration projects that have been mentioned in the context of the healthcare reform legislation. Special medical courts are a leading example of what might be considered.

“The idea of a medical court is that you have a specialized judiciary that just hears healthcare cases,” he said. “You have specialized judges who have training; you have no jury; you have a focus in a specialized court.”

Precedent exists for such courts, he said, in bankruptcy and workers’ compensation cases, as well as in unusual situations such as the World Trade Center attacks.

Another approach mentioned in the House healthcare bill is the so-called “early offer.”

“We have to define early offer,” said Mr. Ryan, “because it means different things depending on whom you’re talking to. Two different types of early offer approaches have been discussed.”

The first, he explained, is a “sorry works” model, in which physicians disclose an adverse event immediately, display empathy with the family, apologize without admitting fault or blame, and promise a prompt, outside investigation.

“Does it prevent all lawsuits?” he asked. “No. But does it work against the idea of a patient’s family going forth with a lawsuit? Yes.”

The second version of early offer, which is unrelated to the first, is a totally voluntary model in which the defendant may, within 6 months of the notice of the claim, offer sufficient funds to

cover the medical situation for the rest of the patient's life, along with sufficient funds to cover all lost wages. If the patient accepts, he or she forgoes the right to sue as well as the chance of receiving pain-and-suffering compensation.

If the plaintiff declines the defendant's offer, the plaintiff is subject to a higher burden of proof when the case goes to trial.

An approach to tort reform that may be considered under the healthcare bill, according to Mr. Ryan, is a model that grants physicians immunity from lawsuits if they follow certain safety measures that might be promulgated by the Institute of Medicine, or if they follow clinical guidelines and protocols.

Mr. Ryan also offered a list of existing approaches that have been shown to reduce the burden placed on physicians, including certificates of merit, binding arbitration, and mediation.

“If the binding arbitration is suggested by the court or by statute, unfailingly it doesn't work,” he said. “It just becomes an extra step in the process. If, however, plaintiffs and defendants reach an agreement with respect to parameters of binding arbitration, it does work, and it works well.”

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