Committee of Interns and Residents
SEIU Healthcare

Medical Malpractice and Health Care Reform

In the debate over health care reform, the subject of medical malpractice reform has been hotly contested. CIR identifies two critical – and very much linked – priorities when considering solutions to this complex problem. One is reducing the cost of medical malpractice premiums, particularly for those of us in specialties which carry more risk and incur higher insurance premiums. Second is reducing preventable medical errors, and ensuring that those patients who are harmed by a preventable error receive timely and fair compensation, commensurate with their injury.

While medical malpractice reform is clearly needed, too often the debate is polarized -- filled with misinformation, conflicting studies -- and conflicting interpretations of the same studies! In the 2009 effort to pass health care reform legislation, many physicians are asking why tort reform has not been included in initial drafts of the House and Senate bills. There are several answers to this question:

Malpractice law is normally governed by the states and attempts in the last ten years to pass federal legislation have been unsuccessful. With an unprecedented five congressional committees (three in the house and two in the Senate) already crafting their pieces of the health care reform bill, adding two more (the house and senate judiciary committees) was considered too likely to jeopardize the entire reform effort. There are also numerous aspects of the proposed legislation that *do* provide funding to encourage the practice of evidence-based medicine and address the prevention of medical errors – clearly an important part of any malpractice reform.[1]

Finally, it may be that specific medical malpractice reforms *will* end up in the final legislation via amendment during floor debate.

However, even if medical malpractice reform is not addressed in the final legislation, the current system will continue to be dysfunctional for doctors and patients alike. We will need to keep up the pressure on our legislators to develop and implement a real solution to the problem, and not presume that health care reform is sufficient in and of itself to address the high cost of premiums.

When medical malpractice reform ideas are debated, the CIR Executive Committee urges members to evaluate these ideas with the following in mind:

1. Our current malpractice system stands in direct contradiction to what we know is necessary to improve health care quality by a) discouraging openness[2] when a medical error is committed, and b) encouraging the practice of defensive medicine, which not only adds to the cost of our health care, but also can expose patients to additional risks. [3]

[1] The Institute of Medicine in its report, “To Err is Human: Building a Better Health Care System,” found that 90% of the estimated 40,000-98,000 deaths each year due to preventable medical error were the result of failed systems and procedures. National Academy Press, 2000.

[2] Studdert D. Testimony before the Senate Committee on Health, Education, Labor and Pensions At The Hearing Entitled “Medical Liability: New Ideas For Making The System Work Better For Patients.” June 22, 2006. (Accessed September 16, 2009 at www.help.senate.gov/Hearings/2006_06_22/Studdert.pdf) Studdert writes: “Tort law’s punitive, individualist, adversarial approach is antithetical to the non-punitive, systems-oriented, cooperative strategies espoused by patient safety leaders. Litigation entails secrecy and blame, whereas modern quality improvement strategies demand transparency and focus on systems of care, not individuals.”

[3] Gawande A. The Cost Conundrum: What a Texas Town Can Teach Us About Health Care. New Yorker. 2009; June 1, 2009. (Accessed September 16, 2009 at http://www.newyorker.com/reporting/2009/06/01/090601fa_fact_gawande)

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2. While almost all malpractice claims are filed for significant injuries, some of those injuries are not the result of medical errors. Ironically, because doctors and hospitals routinely withhold information from the injured patient for fear of legal consequences, filing a lawsuit may be the only way that a patient can get information to determine whether an error has occurred. After a lawsuit is filed and information is obtained through discovery, the vast majority of medical malpractice claims - 55,000 of the 60,000 cases filed a year[4] - are settled before they go to trial.

3. Our contentious tort system is expensive -- One NEJM study found that 54 cents of every dollar paid to a plaintiff went to pay for lawyers, experts, and other administrative costs incurred by both sides. [5]

4. A more efficient system for determining liability would free up considerable funding to compensate the vast majority of patients who have been the victim of a preventable medical error but either do not know it or, for whatever other reason, do not file a claim.

5. Non-economic caps are not the "silver bullet" answer to the complex medical liability problem and they are very controversial. Some reports say that non-economic caps may modestly constrain the growth of insurance premiums, but do not reduce them in absolute terms.[6] Other reports conclude that it is not possible to show a direct link between caps and premiums because there are other factors that distinguish states with and without caps. Moreover some states without caps had the lowest premiums.[7] But there is little disagreement that caps have a disproportionate impact on the most severely injured patients and do nothing to address the fundamental pathologies of the medical liability system.

6. There *are* models of efficient malpractice compensation systems, such as health courts[8] or other alternative dispute resolution approaches[9] that will reduce the time and cost of sorting out error and compensation. Bipartisan federal legislation has been proposed in recent years to fund 10 state pilot projects and President Obama is directing HHS to pursue this course irrespective of health care reform legislation.[10] President Obama's approach is in line with a commendable evidence-based approach to medical malpractice reform.

The CIR Executive Committee supports changes to our medical malpractice system that will reduce medical malpractice premiums as well as preventable injuries. If a preventable error does occur, the malpractice system should provide timely and fair compensation to those patients who are injured.

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Committee of Interns and Residents/SEIU Healthcare
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[4] Studdert Testimony before the Senate Committee on Health, Education, Labor and Pensions, *supra* note 2, at 5.
[5] Studdert D, Mello M, Gawande A, et al. Claims, Errors and Compensation Payments in Medical Malpractice Litigation. N Engl J Med 2006;354:19:2024-33.
[6] Mello M. Medical Malpractice: Impact of the Crisis and Effect of State Tort Reforms. Research Synthesis Report No. 10. Princeton, NJ: The Robert Wood Johnson Foundation. 2006.
[7] U.S. General Accounting Office. Medical Malpractice: Implications of Rising Premiums on Access to Health Care. GAO-03-836. August 2003.
[8] A health care court would focus solely on malpractice cases, with specialized judges, independent expert witnesses, predictable damage awards and strong linkages to patient safety programs to reduce errors. Howard PK. Just Medicine. New York Times. April 1, 2009. (Accessed September 16, 2009 at http://www.nytimes.com/2009/04/02/opinion/02howard.html?scp=1&sq=%22Just%20Medicine%22%20%20Howard&st=cse)
[9] An alternative dispute resolution (ADR) model stresses timely, open communication between physician and patient when an error occurs, and quick and fair compensation, but allows for cases without merit to be aggressively litigated. Since 2002, at the University of Michigan, the ADR model reduced lawsuits and the time it took to resolve claims by more than half and reduced annual litigation costs by two thirds. Clinton HR, Obama B. Making Patient Safety the Centerpiece of Medical Liability Reform. N Engl J Med 2006;354:21:2205-8. See also Gallagher T, Studdert D, Levinson W. Disclosing Harmful Medical Errors to Patients. N Engl J Med 2007;356:2713-9.
[10] President Barack Obama. Televised Health Care Speech Before Joint Session Of Congress. September 8, 2009.