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The Problem with Medical Malpractice Litigation Alternatives

Pre-litigation Certificate of Merit/Medical Review Panels. Some states currently have “Certificate of Merit” laws that require patients and their attorneys to certify that a case has merit before filing it in court. Some are not unreasonably burdensome. Other laws are onerous, unfair to patients and prevent legitimate cases from going forward.

- Under some provisions, claims are dismissed “with prejudice” if the certificate is not completed and filed. Such laws have been struck down as unconstitutional. In September 2009, Washington State’s Supreme Court struck down that state’s law, finding that, “Requiring plaintiffs to submit evidence supporting their claims before the discovery process violates the plaintiffs’ right of access to courts.”
- Even more prejudicial are medical review panels that must certify that a case can move forward. These are fundamentally unfair for patients, since the panel members would come from the health care industry, with clear conflicts of interest. Also unfair are the extra burdens, such as undue time and expenses, this process places on patients in their quest just to get into court.

“Sorry Works”/Early Offer proposals. Typically under these provisions, providers or their insurers would explain the malpractice to the patient, offer an apology and enter into compensation negotiations. The apologies would remain confidential, and patients could not use them as an admission of guilt in legal proceedings.” There are several concerns.

- First, the civil justice system is structured to neutralize resource and power imbalances between the parties. Without it, negotiations can become heavily tilted in favor of the doctor or hospital. There is little doubt that an uninformed patient, particularly one who is catastrophically injured, could be pressured by insurers to resolve their case for a fraction of what they need or deserve, particularly when it comes to future medical expenses.
- When there is no requirement that the patient be represented by counsel, negotiations could be extremely perilous for the injured patient.
- Finally, keeping an admission of wrongdoing out of court is not only unfair to patients who have been hurt, but increases transaction costs as patients are forced to build their case from scratch. The real problem is the insurance company that fights patients in these cases, rather than acknowledge the culpability of the health care provider that they insure.

Alternative Dispute Resolution. Mediation or arbitration that is truly voluntary and non-binding can be an appropriate way to resolving disputes. However, there is enormous potential for abuse especially on the issue of consent. For example, patients could be asked to waive their rights to jury trial in order to receive medical care. This is fundamentally unfair. Mediation and arbitration decisions must be made post-dispute, and be truly voluntary and non-binding so that the right to trial by jury is preserved.