Judge Offers Malpractice Fix

Ricardo Alonso-Zaldivar, AP

To settle medical malpractice lawsuits, Judge Douglas McKeon sometimes quietly listens to heartbroken family members as they vent their anger. He calls it humanness. Curiosity about medical matters led the longtime New York City judge to become a specialist in resolving wrenching cases that involve life-changing harm to patients.

Taking note, the Obama administration is spending $3 million to see if McKeon's methods and insights resolving medical liability cases can work on a broader scale. The New York state court system is one of 20 recent recipients of federal grants to find answers to such problems as getting hospitals and doctors to acknowledge mistakes, rather than cover them up, and protecting clinicians who follow best practices and still have something go wrong.

The goals are preventing errors that injure patients, reducing lawsuit costs by avoiding lengthy trials and discouraging the wasteful practice of defensive medicine, when doctors order costly but usually unnecessary tests more to protect themselves than to aid the patient. McKeon, describing what works for him, says it's the willingness to bring humanness to the process. “I don't discuss settlement offers with families right away,” he says. “I just say, ‘Tell me a little bit about your loved one’”.

The judge also does his homework. McKeon has sat in on medical school anatomy classes to gain clinical knowledge to help him evaluate cases. He reads medical journal articles and writes notes to himself on new terminology.

The medical liability system has no shortage of critics. Many patients who suffer harm are never compensated. Incompetent doctors can practice for years, while good ones can get dragged into court. Defensive medicine is estimated to cost Medicare and Medicaid billions of dollars a year.

The most commonly advocated fix — limiting jury awards for a victim's pain and suffering — has mostly been a political nonstarter. Unusual for a Democrat, President Obama readily acknowledges that defensive medicine is a problem. The grants under his new health care law are an effort to find changes that can win political support.

The New York grant was the only one awarded to a court system where malpractice cases are litigated. The rest of the $23 million went to hospitals, universities and state health departments. McKeon kept his malpractice specialty as he worked his way up. He continues to preside over all malpractice cases involving New York City hospitals in the Bronx and Manhattan. His approach has saved hospitals up to $50

million a year, combined with their own programs that stress early disclosure of medical errors.

With the grant, five of the city's best-known private hospitals will join, including New York Presbyterian/Columbia, where former President Bill Clinton had heart bypass surgery. Each hospital will create an early disclosure program, owning up to mistakes. Cases that aren't settled by the hospitals will go to a special courtroom staffed by judges trained with a curriculum McKeon helped develop and calls Medicine for Judges.

Plaintiffs don't have to settle. They can insist on a jury trial at any point. McKeon says one advantage is that courts can adopt it on their own, without legislation. But will he be able to able to impart to other judges the patience and creativity that seem to have succeeded for him?

He worked for months with a man whose elderly father banged his head in a fall on the sidewalk and wound up paralyzed from the neck down, apparently because paramedics didn't realize how severe the injury was. The hospital system was offering a significant settlement — possibly better than the son could have gotten in a trial in which defense lawyers would have blamed the fall on the father. The son refused.

“He basically felt he needed to have a trial so he could do justice by his father,” McKeon said. With approval of lawyers on both sides, the judge invited the son to participate in settlement negotiations. Over time, the son came to see past his outrage and accepted the settlement.

“This man had a particularly heartfelt motivation,” McKeon said. “I was afraid, that in pursuing a trial, he would have wound up with nothing. That, coupled with the feeling that he hadn't gotten justice for his father, would have been far worse than anything.”

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