Jury Still Out on Viability of Health Courts System

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WASHINGTON — The concept of using administrative law judges instead of civil jury trials to settle malpractice suits has gained some admirers in the U.S. Congress and generated interest among state legislatures. But it is uncertain whether such a system is the solution to skyrocketing malpractice premiums and jury awards, according to academics, attorneys, and consumer and legislative representatives who met at a meeting sponsored by Common Good and the Harvard School of Public Health, Boston.

Under the "health court" concept, fleshed out earlier this year by Michelle Mello and David Studdert of Harvard, specially trained judges would make compensation decisions based on whether an injury was "avoidable" or "preventable" (Milbank Quarterly 2006;3:459-92). The plaintiff would have to show that the injury would not have happened if best practices had been followed. Impartial experts would help set compensation, based on scientific evidence and what is known about avoidability of errors. Decisions would be made quickly. Such a system would likely increase the number of people eligible for compensation, but decrease the size of awards, Ms. Mello said.

Unlike the current tort system, a health court system could also help deter medical errors by collecting data that would then be given back to hospitals and practitioners for root-cause analyses, she explained.

In 2005, Sen. Michael Enzi (R-Wyo.) and Sen. Max Baucus (D-Mont.) introduced the Fair and Reliable Medical Justice Act (S. 1337), which provided money for demonstration projects on alternative methods to address malpractice, including health courts. The Senate Health, Education, Labor, and Pensions Committee held a hearing on the bill in June 2006, but there has been no further action.

At the symposium, Stephen Northrup, the health policy staff director for that committee, said it is not clear whether the incoming Democratic-controlled Congress will consider alternatives such as health courts. Because Democrats are unlikely to approve of caps on damages as a tort reform, he said, it is incumbent on physicians to promote alternatives.

The National Committee for Quality Assurance supports the move toward an administrative court, said Sharon Donohue, the committee's general counsel. But, there is no evidence that rewards will decrease, and with an expanding number of claimants, malpractice premiums might still increase because they are based on the number of claims paid, she said.

Some consumer groups oppose the idea. Linda Kenney, president of the advocacy group, Medically Induced Trauma Support Services, said patients should not be required to start the claims process, as is proposed under the health court system.

Dr. Dennis O'Leary, president of the Joint Commission on Accreditation of Healthcare Organizations, also said he saw some basic impediments to using the courts to improve patient safety. Overall, 85% of errors are owing to systems issues; only 15% are related to competency, so solutions should focus on systems design, he argued.

Despite JCAHO's voluntary reporting requirements of the last 10 years, there are few reports of adverse events—about 450-500 a year. Most reports concern errors that are not easy to hide, such as patient suicides, the top category, and surgical misadventures, the number two category, Dr. O'Leary said. At least eight cases of wrong-site surgery are reported each month.

Several states have looked at or adopted "I'm sorry" statutes to address malpractice. Under the 2003 law, physicians can apologize, admit fault, and explain the cause of an error without it being held against them in court. The law has reduced the number of cases going to trial in Colorado.

So far, 2,835 of the 6,000 physicians covered by the COPIC Insurance Co., a malpractice insurer, have participated in a program implementing the law, said George Dikeou, a legislative consultant to the company. Participating physicians have had at least 3,200 discussions with patients, and in about 2,000 cases, the discussion was all that was needed to close the case, he said.

The insurer is authorized to pay up to $30,000 per case; the average payout over 711 cases has been about $5,300, Mr. Dikeou said. Of 116 cases that went to court, 54 cases were closed without payment and without attorney involvement. Six cases were closed with payment, 40 are still open, and 16 have gone to trial. ■