

Colorado Medical Society
2009 Spring Leadership Conference

Report of Breakout Group Two:

Adverse Events, Accountability, Compensation: Alternatives

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Notes: Mark Laitos, MD

Guiding principles:

- 1) A reformed system of handling adverse events, accountability and compensation should consider the safety of the patient first and foremost.
- 2) That system should maximize these three objectives:
 - a) Restoration (compensation, resolution)
 - b) Investigation and learning (patient safety)
 - c) Accountability (just and reliable)
- 3) These three objectives will become maximized if they are not linked, as they currently are.
- 4) This would involve three separate and parallel systems:
 - a) Compensation for medical injury that investigates status of injured patient, not process leading to injury (with assurance that that process will be investigated in a separate and parallel process);
 - b) Robust investigation of individual practitioners, not just event / complaint driven, but also ongoing and prospective, with opportunity for feedback and improvement;
 - c) Robust investigation of the safety of systems that patients are exposed to.

Discussion at conclusion of our breakout leading to these guiding principles:

System should provide three objectives (current law's post-event objectives):

1. Restoration (compensation, resolution)
2. Investigation and learning (patient safety)
3. Accountability (just and reliable)

These three functions are currently linked; the system will better meet these three objectives if they become unlinked

- Medical malpractice liability system links Restoration with Accountability
- Regulation of physicians (BME) links Accountability with Investigation & learning

Reformed system should separate the links: Investigate 1) injured patient's restoration, 2) provider's accountability, and 3) safety of system; all separately from one another

Instead do: 1) Compensation for medical injury that investigates status of injured patient, not process leading to injury (with assurance that that process will be

investigated in a separate and parallel process); 2) Robust investigation of individual practitioners, not just event / complaint driven, but also ongoing and prospective, with opportunity for feedback and improvement; 3) Robust investigation of the safety of systems that patients are exposed to.

Comments from participants before presentation:

- Jury at a malpractice trial should be medically trained, indeed a jury of doctors' peers
- System should be able to differentiate between different magnitudes of injury
- Losing side should pay expenses of winning side.
- Evidence applicable in the case at hand should be evidence available at the time of the alleged act, not scientific evidence that is learned after the act.
- Tighter control of fee to plaintiff's attorney
- Provide government immunity (tight govt provider cap on malpractice) to all cases involving Medicaid / Medicare patients.
- Separate adverse outcome from negligence
- Distribution of award: Part should be to the injured patient; part should be to improve the system.
- Evaluation and award should be timely
- Limit to award, should reflect what *society* at large recognizes *it* can afford.
- Compensation to injured patient should allow them to maintain access to their care.
- Alternative settings, e.g. Health Courts
- Model on Vaccine Adverse Events Reporting System; especially high risk / high incidence-high cost cases.

Dauer's comments included:

- Accountability: *Every* adverse outcome gets peer review
- Caps: Not shown to have any effect except on insurance premiums
- Pre-trial screening: Does not change outcome, does delay outcome
- Mediation in isolation: Does decrease total cost of settlement due to reduced processing costs; does *not* decrease front-end costs of case (introduced after most investigation is done). Also does not change the frequency of claims.
- Mediation coupled with voluntary early disclosure: more effective.
- Arbitration (defined as private resolution): Minimal magnitude of effect.
- Medical adversity insurance (system which gives injured party coverage in exchange for waiving right to tort trial): System only works if defined amount of award established when policy issued.
- Mandatory disclosure & reporting: "If you satisfy their needs, you may not need to satisfy their demands.
- Enterprise liability: System, not physician, is liable. Killed by AMA in 1994 health care reform debate

- Health Court: Replace jury with professional panel. Constitutional issues. *Quid pro quo* requires lower standard of proof (ability to avoid damage, rather than negligence) in exchange for reduction in constitutional right to trial by jury

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