

Commentary

Costs to Prove Malpractice Are the Crisis

By Armand Leone Jr.

Malpractice claims are not currently causing disruption of the health-care system. The number of claims and average payout for claims is lower today than 10 years ago. Paid claims declined from 18.6 to 9.9 per thousand physicians, and median payments declined from \$218,400 to \$195,000.

However, statistics show that the number and frequency of medical errors has increased over the same period, with up to 400,000 negligent deaths a year from malpractice (this number does not include severely injured patients) (*JAMA*, Oct. 30, 2014). But medical professionals and insurance companies still complain that there is a crisis caused by plaintiff's attorneys who bring malpractice cases on a contingency fee basis. The crisis is not the contingency fee compensation for attorneys that represent plaintiffs; the crisis is the high cost and time required to prove a claim and receive compensation for a negligently injured patient.

There is an extremely high cost required to prove both liability and causation in a malpractice case coupled with the associated risk of loss. On average, costs to prove a malpractice claim are between \$50,000 and \$100,000 for medical records, expert reviews, expert reports, expert depositions and expert trial appearances. No physician, hospital, defense attorney or insurance carrier will pay a claim unless the medical basis for an error is established. This requires medical specialty experts to look at records at rates upwards of \$500 per hour in order to merely determine if there is a probable claim under New Jersey's Affidavit of Merit statute.

Preliminary screening of a potential malpractice case for merit entails a cost of \$2,000 to \$5,000 for

just one specialty review, but multiple initial reviews are almost always required on the liability issue alone. Under New Jersey law, each different medical specialty involved in the case requires a similar medical specialist



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review. Overlapping of medical expert testimony that crosses medical specialties is not allowed. See, e.g., *Meehan v. Antonellis*, Docket No. A-0140-13T4 (App. Div. Aug. 21, 2014) (dismissing dental malpractice complaint for having a prosthodontist render an affidavit of merit against an orthodontist). Each possible

specialty and defendant in the case needs to be evaluated, because failure to include a potential health-care provider in a complaint without a preliminary negative review opens the door for the empty chair defense at trial. The investigating attorney cannot pick and choose which defendants to file against. If preliminary merit reviews are negative, that money is not recovered. Cases that go forward then require significant funding for the medical experts' testimony, which may include multiple medical specialty areas on liability, additional medical specialty opinions on causation of harm that was otherwise avoidable, and life care and economic loss experts.

Injured patients in New Jersey are simply not able to pay for the costs of the initial evaluation, let alone the experts' costs for full reviews, reports, depositions and trial appearances. Plaintiff attorneys take on significant financial risk when accepting a malpractice case. Not all cases are winners, and losses of expended funds occur. The contingency fee arrangement is appropriate when the attorney has to fund a case in excess of \$50,000 without any certainty of recovery. Meritorious cases can be lost for a lot of reasons that have nothing to do with the medicine.

Regardless of the method of resolution, the costs of proving a malpractice case remain substantial and provide a de facto type of tort reform. Cases of malpractice with limited damage simply are not worth the cost to prosecute. One cannot rely on the treating physicians to come forward and prove the case for the plaintiff, and one cannot expect insurers to make a payout unless the medical basis for the claim and the demonstration of damages are shown.

The contingency fee arrangement creates an appropriate risk-benefit proposition for an attorney to take on a plaintiff's malpractice case. Without a contingency fee that provides for appropriate attorney compensation in proportion to the risk of recovery for the negligently injured patient, no lawyer can assume the financial burden of investigating and proving a malpractice claim. The malpractice crisis is in the cost of proving claims and how the cost prevents many injured patients from being able to seek compensation. ■

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