

Doctors, Lawyers, and Patients: Three's a Crowd

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MOST people understand the role of the patient and the doctor in the patient-physician relationship. The patient wants to stay healthy or get relief or cure for an illness. The doctor wants to cure, comfort, relieve pain, and teach.

In the 50 years since I received my M.D. degree, I have witnessed the science-fiction of yesterday become the reality of today. When I finished medical school, my pediatric textbook had many pages on diagnosis of childhood leukemia but one paragraph on treatment: no treatment, always fatal. Today, 85% of children are cured. I also witnessed transplant surgery and many other dramatic innovations. I had the joy of saving many lives, including young people who were in shock from internal injuries sustained in accidents. Any doctor in practice for many years can relate similar success stories. But two intervening forces continue to create difficulties for doctors and interfere with the patient-physician relationship.

The first is the escalation of third-party entities, including the government, into the relationship of patient and doctor. That problem is not the subject of this discussion, although I have written about it on many occasions elsewhere.^{1,2,3}

This paper will focus on the second intrusion into the patient-physician relationship, namely, the plaintiff attorney filing a suit against a doctor for alleged malpractice and the response of physicians to the current medical liability system.

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In my view, suits are filed against doctors usually for one of three reasons: actual malpractice, poor communication about a complication not related to negligence, and the contingency fee charged by plaintiff attorneys which can make the attorney's net worth increase by millions akin to a lottery win. The latter reason is akin to the irresistible song of the Sirens in Homer's *Odyssey* and allows greed to overcome fairness and justice.

If actual malpractice occurs, patients expect that the doctor will admit it and explain what is being done to prevent this complication from happening to other patients. The injured person also would like an apology. A reasonable settlement then can follow.

Physicians who have patients with complications from treatment need to explain in plain English how this can occur without negligence. Informed consent can inform the patient prior to treatment and help remove unrealistic expectations.

But the third root cause of suits, contingency fees, is the difficult one to fix.

Statistics show that medical liability suits without merit abound. The lack of accountability of plaintiff attorneys when they file meritless suits, hoping perhaps to intimidate the doctor or medical liability carrier into a settlement continues over the decades. Why file a meritless suit or file a suit without the proper investigation and obtaining expert opinions confirming negligence? The obvious reason, in my opinion, after studying this malady for decades, is the contingency fee that allows the plaintiff attorney to collect 33 1/3 to 50% of any settlement or court award.⁴ The attorney contract might specify one-third of the settlement, 40% if a win at trial, or 50% if the case goes to appeal and is won by the plaintiff. These large percentages also are taken out of the money needed for future medical care. If the

patient does not have enough money over the years for treatment of the medical injury that generated the future medical portion of the award, the plaintiff attorney doesn't give back the money. The patient ends up on Medicaid and the taxpayers pay for the care.

Remember this in any attempt to change the medical liability law at the state legislature or in Congress. Always have a provision regarding the contingency fee. It is the Achilles' Heel of the plaintiff trial bar. When push comes to shove, they will give up almost anything to retain the contingency fee. A provision on the contingency fee can be a powerful negotiating tool.

A point I made to my tort professor in a law school class is why are ethics for lawyers called legal ethics rather than just ethics? Why does the law allow contingency fees? Doctors certainly don't get contingency fees. It is not allowed for the ethical behavior of physicians. If someone is poor and can't afford an attorney, perhaps society should have LegalAid akin to Medicaid. Pay the attorney on a per hour basis set by the judge. Or imagine if such attorneys had to accept the per hour amount set by an equivalent Sustainable Growth Rate (SGR) similar to the price-fixing doctors have to live with. Imagine if the Independent Payment Advisory Board (IPAB) of the Patient Protection and Affordable Care Act (PPACA) rationale was applied to attorneys. You would hear some screaming by attorneys. Of course attorneys also could accept only meritorious cases and then bill the client after the win on a per hour basis but that is unacceptable to the attorneys.

In 1975, during the successful medical liability reform effort in Louisiana, I debated a representative of the trial bar on television with three reporters questioning us. I raised the issue of the contingency fee. I told them to imagine that a plaintiff attorney was in the emergency department with a ruptured spleen and dropping blood pressure. Suppose the surgeon said "No charge if you die, but if I save your life, I just want 20% of lifetime earnings, not 33 1/3 to 50%. You have to hurry as your pressure is dropping and you should make the decision before I have to make the decision for you under the emergency consent statute."

Of course, plaintiff attorneys get upset with this logic. Their response is "You want us to take all the risks." No, just act like other professionals. You can view an excerpt of the exchange on YouTube.⁵ During the 37 years since that debate, the law has not changed the methodology for attorneys to represent their clients the attorneys claim were injured by the negligence of doctors. There is no effective remedy for a doctor who has a meritless suit filed against him or her. Plaintiff attorneys usually point to Federal Rule 11 that forbids

frivolous claims. That rule allows sanctions for violation. State courts have equivalent rules that allow the judge to sanction the attorney for a meritless suit. My response in TV debates is to request examples of this happening. Silence then follows. It is a rule that is applied as rarely as the sighting of the ivory-billed woodpecker (*campephilus principalis*).

The doctor can control poor communication and admission to the patient. So what can be done about the powerful incentive of the contingency fee?

Here are three possibilities to solve the incentive of the contingency fee.

1. Eliminate it. It is essential to make it public policy and not allow the plaintiff attorney and client to sign an agreement voiding any law forbidding or limiting contingency fees.
2. Allow countersuits against attorneys who file suits without merit. If the attorney is negligent by not properly evaluating the suit, hold the attorney liable to the person sued using negligent standards. I wrote a law review article on this topic in 1981 and pointed out the obstacles to collecting on countersuits, including the impossible requirement of "special injury" in some states if malicious prosecution theory is used as a cause of action. Special injury is the imprisonment of the doctor or taking the doctor's property.⁶
3. Loser pays other side's legal fees and costs of litigation. This would apply to both sides in the litigation. For the plaintiff, the claimants and any attorney on a contingency fee (they are in essence partners in the suit and the attorney is obligated to research the merits of the claim) would be responsible for the fees defending the suit when the plaintiff suit is lost.

Be prepared for the plaintiff attorney to state that they take the risk of funding the case and if it is without merit they don't get reimbursed. Many don't spend much money but use the suit to intimidate and try to force a settlement.

Consider the statistics of suits closed without payment of a settlement or award. In "1975, a study of the 71,782 claims closed nationwide during the years 1975-1978 and reported by 100 insurance companies to the National Association of Insurance Commissioners showed that 62% of the claims were closed with no payment. Only 18% of the cases closed in 1978 were resolved by court disposition; the defendant physician won in nine out of ten such cases."⁷ Over the years, the cases closed without payment has increased. The largest physician medical liability carrier in the USA reported in its 2008 Annual Report that it paid no

indemnity on 82% of the claims made against its members. For claims that went to trial, more than 87% resulted in member victory.⁸

Surely objective reviewers can agree that there is a lack of peer review among plaintiff attorneys and a failure to adequately screen cases. Again, I submit it is because there is no risk to the plaintiff attorney for filing the suit; no accountability.

Suits without merit cause much stress among physicians. Research the writings of the scholarly Dr. Sara Charles. She has documented this repeatedly over the years.⁹ In addition, the jackpot liability system adds billions to health-care costs with defensive medicine.

In January 2013, Rand released a study published in *Health Affairs* showing “On average, physicians spend nearly 11% of their 40-year careers with an open, unresolved malpractice claim.”¹⁰

Medical Liability Reform in the USA

There is much written about medical liability reform. Reform has occurred in many states but some state supreme courts overturned the reforms, including caps on damages.

When a cap on damages is overturned in a state, it is because of the wording of the state constitution and the current judges interpretation of that state constitution. The federal constitution does not prohibit caps. For example, Pennsylvania’s state constitution states there shall be no caps on damages. So for a cap to be upheld in that state, the constitution must be changed. Texas did exactly that. In 2003, the legislature again passed a cap on noneconomic damages — the previous cap was voided by the Texas State Supreme Court — but the people of Texas also passed Proposition 12 in 2003, which is summarized as follows,

“The constitutional amendment concerning civil lawsuits against doctors and health-care providers, and other actions, authorizing the legislature to determine limitations of noneconomic damages.”

The people of Texas approved it and the Democrats and Republicans voted for it because the people of Texas were fed up with the lack of doctors in an emergency. Punish doctors with unfair laws and the result is loss of access to care. Texans understand that.

After passage, there was a migration of doctors into Texas and the licensure board had to hire more people to process the applications. The Texas Medical Association has compiled the advantages that have occurred with the passage of Proposition 12 that changed the constitution and House Bill 4 of 2003 that created the medical liability reforms.¹¹ These advantages include the following facts compiled by the Texas Medical Association (TMA):

“Texas has enjoyed a 61% greater growth rate in newly licensed physicians in the past four years compared to the four years preceding reforms.”

In addition, the TMA reports, “Since Prop. 12, Texas has licensed more than 28,000 new physicians. In the nine years since Prop. 12, we have added an average of 3,135 newly licensed each year. This average is 772 more than the average of 2,363 per year for the nine years before the passage of Prop. 12, a gain of 33% in the annual average.”

I consider Texas the gold standard of medical liability award limitation because there the state constitution is removed as an impediment to maintaining the law. Of course, the doctors and patients must be vigilant that the legislature doesn’t eliminate the three-tier noneconomic damage cap of \$250,000. California and Louisiana have had their caps upheld by their supreme courts but there always is the risk that a change in judges could void the caps. Louisiana’s constitution states “adequate remedy” for damages. Four judges said yes, it is adequate and the other three said no. Change one judge in the majority and the decision could change. That is why the Texas law is so effective.

Remember that all of the current medical liability reforms are defensive in nature. Physicians and patients who want to maintain access to care need to push for an offensive weapon. The proven offensive weapon in other spheres is accountability. Let’s advocate accountability for attorneys and for experts who give unscientific testimony.

This article cannot go into all of the nuances of medical liability law options but there is excellent research material available for further reading:

1. A book entitled “A Comprehensive Review of Alternatives to the Present System of Resolving Medical Liability Claims” written by a Physicians Insurers Association of America (PIAA) committee in 1989. It is out of print but PIAA gave me permission to share a PDF copy to interested parties. I had the privilege to serve on that two-year committee composed of doctors, lawyers, actuaries, and insurance experts, “The Committee to Study Alternatives to the Present System.” Although an older book, it contains valuable information that remains relevant. I sent a copy to *Connecticut Medicine* for its archives.
2. American Medical Association publications updated annually and available at AMA Website, “Medical Liability Reform – NOW!” and the State Laws Charts. If you cannot access them on AMA Website, contact the AMA Advocacy Resource Center. These publications inform as to liability reforms in each state and why the current system is broken. These are excellent resources.

3. Review the work of attorney Philip Howard and Common Good regarding Medical Courts.¹² This could be an excellent alternative to the current system if the details are done carefully. I write about Philip Howard's leadership in my books on leadership.¹³
4. Another source of good information on the current medical liability system and proposed changes is "Medical Malpractice: A Physician's Sourcebook."¹⁴

The current broken medical liability system wastes money, time, and decreases access to care.^{15,16,17} Contingency fees and expert witnesses who give unscientific testimony are major drivers to the current problems. America needs a better system. Errors need to be studied and the root causes eliminated. Shame and blame fails to fix the system. The only consistent beneficiaries of the current system are plaintiff trial lawyers. Let's get the plaintiff attorneys out of the patient-physician relationship. They only adversely affect medical care for their own advantage. Let's get all third parties out of the examining room.

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