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A Medical Liability Reform That Will Actually Work

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On Wednesday, the U.S. House Judiciary Committee began marking up a bill (H.R. 5) that is a top priority for *some* in the new Republican House — federalizing state medical malpractice laws by taking away the legal rights of sick and injured patients. (Incredibly, Tea Party Caucus member Rep. Ted Poe (R-TX) raged against the bill, saying it violated the Constitution, forcing the markup into next week.)

I actually testified against this bill at Judiciary hearings on January 20, 2011. Committee Chair Lamar Smith (R-TX) laid out his goals for the legislation pretty clearly — to stop

"frivolous" medical malpractice lawsuits. We hear about these so-called "frivolous lawsuits" over and over again — at the state level, in Congress, and even lately, from our president.

Ok, who doesn't oppose frivolous lawsuits? Yet there are powerful reasons to oppose H.R. 5. (See this consumer and patient safety group letter.) Among those reasons: bills like H.R. 5, which propose "caps" on non-economic (i.e. quality of life) compensation, have nothing to do with "frivolous" lawsuits. They hurt only the most seriously injured patients, who have already proven a hospital or doctor's negligence. There is nothing frivolous about those cases. Even Victor Schwartz, general counsel of the American Tort Reform Association in Washington, admitted to the subscriber-only insurance trade publication, *Business Insurance*, that H.R. 5 "does not mention sanctioning frivolous lawsuits."

Actually, Schwartz said more than that. He also admitted that "it is 'rare or unusual' for a plaintiff lawyer to bring a frivolous malpractice suit because they are too expensive to bring," agreeing with the Harvard School of Public Health on this point. HSPH found, "portraits of a malpractice system that is stricken with frivolous litigation are overblown." Lead study author, David Studdert, associate professor of law and public health, said in announcing the study,

> *Some critics have suggested that the malpractice system is inundated with groundless lawsuits, and that whether a plaintiff recovers money is like a random 'lottery,' virtually unrelated to whether the claim has merit. These findings cast doubt on that view by showing that most malpractice claims involve medical error and serious injury, and that claims with merit are far more likely to be paid than claims without merit.*

In fact, no matter how you look at it, the number of medical malpractice lawsuits pales in comparison to the amount of medical negligence that goes on. In 1999, the Institute of Medicine found that up to 98,000 patients die in hospitals each year due to medical errors. In November 2010, the Department of Health and Human Services found that 1 in 7 hospital patients suffer an error, 44% of which are preventable. But very few of those patients file lawsuits. As Harvard put it, "the great majority of patients who sustain a medical injury as a result of negligence do not sue."

So how could it be that my co-witness before Congress last month, representing the American Medical Association, testified that "nearly 61 percent of physicians age 55 and over have been sued." How could so many doctors be sued, when almost no one sues and those who do are not suing frivolously? Who's lying?

Well, maybe no one is. Here's why.

When a patient or parent comes to an attorney believing medical negligence has caused their serious injury or death, there is no way to know at first who is responsible. Only the hospital has the medical records, not the patient. No one is admitting anything. There is a process called "discovery" where documents are turned over, people are questioned, and eventually with the help of experts, the attorney for the patient can figure it out. However, as soon as someone is injured or killed, state statue of limitations laws begin to run. These laws provide strict time limits for filing a suit. There's a race against the clock. If time runs out and the attorney hasn't already "sued" everyone who might be responsible for the injury or death, someone later found negligent cannot then be brought into the case. An attorney is obligated to protect his or her client's rights, and so initially they must file against every possible institution and health care provider. Later, many claims are dismissed. This process understandably annoys and frustrates doctors. In fact, no one is happy about it, but that's the law.

Doctors call these claims "frivolous," but the lawsuits clearly are not. Harvard School of Public Health put it this way:

> *The profile of non-error claims we observed does not square with the notion of opportunistic trial lawyers pursuing questionable lawsuits in circumstances in which their chances of winning are reasonable and prospective returns in the event of a win*

> *are high. Rather, our findings underscore how difficult it may be for plaintiffs and their attorneys to discern what has happened before the initiation of a claim and the acquisition of knowledge that comes from the investigations, consultation with experts, and sharing of information that litigation triggers.*

So what's the solution? Believe it or not, there really is a sensible one. When I served on the New York State Governor's Medical Malpractice Task Force in 2007 and 2008, the New York State Academy of Trial Lawyers put forth a proposal that even doctors seemed to like. It's called "enterprise notification" and the Academy described it this way:

> *Rather than requiring a plaintiff to commence a lawsuit against every potential defendant, toll the statute of limitations against all health care providers for injuries and damages arising from the events referred to in a complaint upon the filing of a summons & complaint against one defendant and the service of a copy of time-stamped summons & complaint, by certified mail return receipt requested, upon each of the medical malpractice insurance carriers and risk retention groups doing business in [the] State.*

In other words, let the attorney sue the main hospital or individual who seems responsible. But if later it's found that someone else is responsible, bring him or her in at that time.

Not only does "enterprise notification" get to the heart of what doctors' most complain about, but also it preserves the rights of the sick and injured. Let's be smart about medical liability reform and do something that will actually fix the problem, instead of doing what H.R. 5 and similar state laws would do (and do) — impose cruel measures that try to solve the problem on the backs of the innocent and injured.