

N.Y. Malpractice Program May Offer Model For Medical Liability Cases

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NOV 21, 2011

Medical malpractice lawsuits can be complicated, expensive and emotionally wrenching for patients, doctors and hospital officials alike. Now a program pioneered by a Bronx judge that speeds up the resolution of these cases is expanding into other parts of New York.

Policy experts say the program, funded in part by a [\\$3 million grant](#) from the federal Agency for Healthcare Research and Quality, could provide a national model for handling medical liability cases.

"We're excited about it," says James B. Battles, who oversees this grant for AHRQ. "It uses the existing court system, and didn't require any special legislation. That has some real advantages." So far, some 200 cases have begun the process, although not all have completed it.

Providers, patients and policymakers generally agree that the current medical liability system doesn't serve anyone very well. A number of [remedies](#) have been tried, including caps on damage awards and programs that encourage providers to admit errors early and offer compensation to patients.

The Designated Jurist

At its core, the New York program, called judge-directed negotiation, is simple: When a medical malpractice lawsuit is filed, a judge with expertise in medical matters becomes the point person for that case. He or she supervises the entire process and brings the parties together as often as necessary to discuss the case and help broker a settlement.

This is very different from what typically happens now: The pre-trial discovery phase, in which depositions are taken and other evidence is gathered, sometimes drags on for months or even years. A number of judges may be involved over that period, and with no one person pushing the parties toward resolution, serious settlement discussions generally don't happen until late in the process, often after a court date has been set.

A judge overseeing the entire case can make sure the parties don't dawdle over such things as procedural meetings to set up discovery dates. From the beginning, that designated jurist can delve into the case with an eye toward settlement, says [Judge Douglas E. McKeon](#), an administrative judge in the Supreme Court of Bronx County, who pioneered this approach in 2002. He discovered that "if you created a process that people knew had the potential to get a case settled sooner rather than later for significant sums of money, they came in and they were ready to talk," he says.

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The program started with an agreement between McKeon and the [New York City Health and Hospitals Corp.](#), which operates 11 public hospitals, to try to identify cases that were good candidates for prompt settlement and funnel them to the judge. The AHRQ grant has enabled the program to expand to more city hospitals and judges. A similar program is just getting underway in Buffalo.

The judge facilitates negotiations but doesn't impose a settlement amount. If the parties can't agree on a figure, nothing would prohibit the plaintiff from moving ahead with a lawsuit through the court system. The plaintiff must participate in judge-directed negotiation if the judge wants that.

A typical medical malpractice case takes three years from the date a claim is filed until the case is closed, says [Michelle M. Mello](#), a professor of law and public health at Harvard's School of Public Health. The typical time frame for settling one of McKeon's cases? Six to nine months.

A [study](#) published in the journal *Health Affairs* last year estimated that medical liability costs ran \$55.6 billion in 2008 dollars, an amount equal to 2.4 percent of total health-care spending. That includes expenses attributed to the practice of defensive medicine, in which providers do unnecessary tests and other treatments to forestall liability problems.

Quick resolution of malpractice cases benefits all parties. The court system gets to put its limited resources elsewhere. Providers can put the episode behind them, and hospitals can glean information to help improve patient safety efforts.

Hospitals can trim their malpractice costs as well. The New York Health and Hospitals Corp. has seen average malpractice payouts decline to \$428,000 in 2010 from \$567,000 in 2003 since it began participating in the program, though it's not clear how much of this was due to the program and how much to other efforts to resolve medical liability issues.

Although some plaintiffs may receive slightly lower settlement awards, judge-directed negotiation is a good option for them as well, says Leslie Kelmachter, president of the New York State Trial Lawyers Association. "Many families would rather have 5 percent less now than [a larger amount] three years down the road," she says. Prompt resolution allows them to get financial compensation and some degree of closure, so they can move on with their lives.

A Sample Case

Plaintiff's lawyer [Jeff Korek](#) has participated in judge-directed negotiation, including a case five years ago in which a 19-year-old was hit by a drunk driver. The patient was brought to a hospital with a severe head injury. The young woman survived, but in a lawsuit she claimed she suffered permanent psychological problems because the hospital didn't conduct appropriate diagnostic tests or perform surgery promptly.

The case was not a slam dunk, says Korek, because he knew the hospital could argue that it had saved her life. But through judge-directed negotiation he believed he would be able to get at the nuances and complexities of the case with an experienced judge who understood the medical issues. The program "eliminates much of the posturing and negotiating which unfortunately is part of getting cases resolved," he says. He described the settlement as "fair."

The \$3 million federal award to the New York program is one of seven announced last year by the Obama administration. The grant provides for two related activities. When something goes wrong, participating hospitals commit to a process that involves disclosing errors promptly to patients and offering them fair compensation. If that fails, hospitals refer cases to a judge-directed negotiation program.

"Our hope is that the [early disclosure] process will take care of most of these cases," says Mello, who is evaluating the project for AHRQ. So if all goes well, cases will be resolved before they even make it to the judge for negotiation.



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