EDITORIAL

THE CALIFORNIA EXPERIENCE: MALPRACTICE, DISCIPLINE AND COMPETENCE

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The battle cry for tort reform can be heard everywhere. It's the holy grail for those in the medical profession and the insurance industries, and promises to treat what ails our current health care system. Proponents point to California's Malpractice Injury Compensation Reform Act (MICRA) to tout its virtues, while opponents point to vilify it for its failures. Our state has had a $250,000 cap on non-economic damage awards and limits to attorney fees, among other reforms, since 1976, and yet our doctors are still complaining about the high cost of medical malpractice insurance. The rhetoric is loud, passionate, and, most often, not very factual.

Congressional leaders and statehouse legislators throughout the country are being treated to emphatic testimony from all sides. Insurers and professional associations complain about run-away jury awards and frivolous filings. Defense attorneys place the blame with bad doctors, and often with medical boards who either don't act or act too slowly to remove them from practice. The media generally reports on the most heartbreaking or ridiculous cases. Statistical information, if it is presented at all, is used out of any meaningful context. Such buzzwords as "crisis" and "collapse" are used so often that their meanings have been neutralized.

Sadly, critical thinking seems to have taken a holiday. There are statistics and facts that could be entered into the debate, but they have taken a back seat to emotional arguments. Fortunately, in California, in addition to the malpractice caps, the law requires malpractice insurers, among others, to report malpractice payments to the board. Records show an average of about 1,000 reports annually, and those numbers are now in significant decline. Those reports, therefore, allow us to look at real figures and draw some reasonable conclusions.

While numbers never paint the entire picture, they do provide some dispassionate illumination. What they tell us, at least for California, is that there is no crisis. Most doctors, despite their considerable payment for malpractice insurance coverage, never have a claim paid on their behalf. They further show that, in some instances, malpractice payments are an indicator of bad medicine and a predictor of disciplinary action.

In 2003, the Medical Board of California had the daunting task of determining which specialties were at "high risk" of settling malpractice lawsuits. The board was directed by legislation to determine the specialties at high risk by consulting with the major malpractice carriers and to use their data for our determination. Not surprisingly, many invitations to the malpractice insurers to share their most current data were met with no response. Without their assistance, the board was forced to manually review 10 years of malpractice settlement reports. It was a tedious, time-intensive task, but the results were fascinating.

The law implied "high risk" specialties were to be categorized as those most likely to settle four or more malpractice suits in 10 years. We ran the data from Jan. 1, 1993, to Dec. 31, 2002 (the latest numbers compiled at the time). Out of about 120,000 physicians with California addresses, only 121 doctors, in 10 years, settled four or more malpractice cases. That didn't seem very helpful, so information on physicians with three or more settlements was extracted. This information was not much better, as the numbers showed only 375 doctors fell into that category.

After looking at the data, the facts show no specialty is at particularly high risk for multiple settlements. Statistically speaking, the highest risk specialties were neurosurgery, orthopedic surgery, and plastic surgery. Even those specialties had less than a 3.5 percent risk of settling over three or more suits in 10 years. Most surprising was the information

on emergency physicians, obstetrician/gynecologists and cardiothoracic surgeons, the specialists expected to be at high risk, showed all were about the same low statistical risk as most other specialties.

What did not come as a surprise to the board's investigation staff was there are some physicians who are sued over and over again. We found one urologist with 80 settled suits, a plastic surgeon with 35, a neurosurgeon with 27, an ophthalmologist with 12 and many other physicians with more than eight. What was their common denominator? They were all bad at practicing medicine. Most were disciplined, or they died or retired while under investigation.

The numbers appear to demonstrate what board staff has suspected for years. While a single lawsuit or payment is not necessarily an indicator of a bad doctor, multiple suits are cause for concern. To examine this theory, staff reviewed a year of disciplinary data. We extracted those who received serious disciplinary action, which was defined as full revocation, probation with actual suspension, or probation of five years or more. What we discovered confirmed our observations.

In the year examined, there were 64 physicians who fell into the "serious discipline" category. Thirty of those had malpractice payments reports on file — well above the average of the general physician population. The breakdown of the numbers tell a more interesting story:

18 physicians had multiple reports, out of which:

- 14 were disciplined for gross negligence and incompetence
- Two were disciplined for prescribing without an examination or excessive prescribing
- One was disciplined for sexual battery
- One was disciplined for fraud and altering records

12 physicians had one report, out of which:

- Five were disciplined for gross negligence and incompetence
- Three were disciplined for sexual misconduct
- Two were disciplined for self-use of prescription drugs
- One was disciplined for excessive prescribing
- One was disciplined for fraud and altering records

The remaining 34 physicians who received serious disciplinary action had no reports. Of those without reports, only six were disciplined for gross negligence and incompetence. The remaining 28 physicians were charged with violations not involving medical mistakes or conduct, but for fraud, theft, self-use of drugs, aiding unlicensed practice and other more business-related offenses.

The board's simple review of disciplinary action and malpractice settlements is not highly scientific nor does it tell the whole story. The numbers, however, appear to show there is cause for concern when a physician is party to multiple malpractice payments, and probably an indicator that competence, or at least reasonable caution, is lacking. Although the numbers don't prove anything, they should whet our appetites for further, more scientific study.

While the medical malpractice industry was not helpful in our data gathering and openly critical of our findings, they offered no contradictory data. Although publicly critical, industry representatives privately told us our conclusions were consistent with their experiences. While publicly espousing that malpractice settlements are no indicator of wrongdoing and payments are made for business reasons due to high legal costs, they know that's not entirely true. They generally settle suits when there's damage done or evidence of wrongdoing. A small percent of physicians are costly, while the vast majority of good doctors pay the price.

There is a correlation between poor medical practice, or at least poor judgment and negligent or careless behavior, and malpractice payments. There is a correlation between multiple malpractice payments and disciplinary action. In California, where we possess the holy grail of tort reform, that's the reality, not just rhetoric.