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FEAR OF LITIGATION IS NOT WHY DOCTORS FAIL TO REPORT ERRORS OR COMMUNICATE WITH THEIR PATIENTS

- According to a recent study by Dr. Thomas Gallagher, a University of Washington internal-medicine physician and co-author of two studies published in the *Archives of Internal Medicine*,

“Comparisons of how Canadian and U.S. doctors disclose mistakes point to a ‘culture of medicine,’ not lawyers, for their behavior.” In Canada, there are no juries, non-economic awards are severely capped and “if patients lose their lawsuits, they have to pay the doctors' legal bills... yet “doctors are just as reluctant to fess up to mistakes.” Moreover, “doctors' thoughts on how likely they were to be sued didn't affect their decisions to disclose errors.” The authors believe “the main culprit is a ‘culture of medicine,’ which starts in medical school and instills a ‘culture of perfectionism’ that doesn't train doctors to talk about mistakes.” Carol M. Ostrom, “Lawsuit fears aren't reason for docs' silence, studies say,” *Seattle Times*, August 17, 2006, citing from Thomas Gallagher, M.D., et al, “Choosing your Words Carefully: How Physicians Would Disclose Harmful Medical Errors to Patients,” *Archives of Internal Medicine*, Aug. 14, 2006.
- A May 11, 2006 article in the *New England Journal of Medicine* noted that only one quarter of doctors disclosed errors to their patients, but “the result was not that much different in New Zealand, a country that has had no-fault malpractice insurance” [i.e., no litigation against doctors] for decades. In other words, “There are many reasons why physicians do not report errors, including a general reluctance to communicate with patients and a fear of disciplinary action or a loss of position or privileges.” George J. Annas, J.D., M.P.H., “The Patient’s Right to Safety – Improving the Quality of Care through Litigation against Hospitals,” *New England Journal of Medicine*, May 11, 2006.
- In Massachusetts, nearly all hospitals fall under the state’s charitable immunity laws that cap their liability at \$20,000. Yet hospitals are still “vastly underreporting their mistakes to regulators and the public.” According to *Boston Magazine*, “The biggest challenge is finding a way to break the culture of silence in hospital corridors that has long crippled efforts to cut medical errors, just as the blue wall of silence has stifled police investigations. Doug Most, “The Silent Treatment,” *Boston Magazine*, Feb. 2003.
- Tom Baker, Connecticut Mutual Professor of Law and Director of the Insurance Law Center at the University of Connecticut School of Law, has written, “to prove that lawsuits drive medical mistakes underground, you first have to prove that mistakes would be out in the open if there were no medical malpractice lawsuits. That is clearly not the case.” Tom Baker, *The Medical Malpractice Myth* (2005) at 97.

- According to David A. Hyman, Professor of Law and Medicine at the University of Illinois College of Law, and Charles Silver of the University of Texas at Austin School of Law, who have researched and written extensively about medical malpractice:

“No statistical study shows an inverse correlation between malpractice exposure and the frequency of error reporting, or indicates that malpractice liability discourages providers from reporting mistakes.” David A Hyman and Charles Silver, “The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?,” 90 Cornell L. Rev. 914 (2005).

“Exhaustive chronicles of malpractice litigation’s impact on physicians never once assert that physicians freely and candidly disclosed errors to patients once upon a time, but stopped doing so when fear of malpractice liability increased. Instead, the historical evidence indicates that there was never much *ex post* communication with patients, even when liability risk was low.” David A Hyman and Charles Silver, “The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?,” 90 Cornell L. Rev. 925-26, 947-48 (2005).

Hyman and Silver offer a number of explanations for physicians failure to report errors: a culture of perfectionism within the medical profession that shames, blames, and even humiliates doctors and nurses who make mistakes; fragmented delivery systems requiring the coordination of multiple independent providers; the prevalence of third-party payment systems and administered prices; overwork, stress, and burnout; information overload; doctors’ status as independent contractors and their desire for professional independence; the Health Insurance Portability and Accountability Act (HIPAA); a shortage of nurses; and underinvestment in technology that can reduce errors. David A Hyman and Charles Silver, “The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?,” 90 Cornell L. Rev. 897-99 (2005).

They write, “It is naive to think that error reporting and health care quality would improve automatically by removing the threat of liability.” David A Hyman and Charles Silver, “The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?,” 90 Cornell L. Rev. 897-99 (2005).