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Learning From Litigation

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LOS ANGELES — MUCH of the discussion over the Affordable Care Act has focused on whether it will bring down health care costs. Less attention has been paid to another goal of the act: improving patient safety. Each year tens of thousands of people die, and hundreds of thousands more are injured, as a result of medical error.

Experts agree that the best way to reduce medical error is to gather and analyze information about past errors with an eye toward improving future care. But many believe that a major barrier to doing so is the medical malpractice tort system: the threat of being sued is believed to prevent the kind of transparency necessary to identify and learn from errors when they occur.

New evidence, however, contradicts the conventional wisdom that malpractice litigation compromises the patient safety movement's call for transparency. In fact, the opposite appears to be occurring: the openness and transparency promoted by patient safety advocates appear to be influencing hospitals' responses to litigation risk.

I recently surveyed more than 400 people responsible for hospital risk management, claims management and quality improvement in health care centers around the country, in cooperation with the American Society of Health Care Risk Managers, and I interviewed dozens more.

My interviewees confirmed that while hospitals historically took an adversarial and secretive approach to lawsuits and error, that has begun to change. In recent years, hospitals have become increasingly open with patients: over 80 percent of hospitals in my study have a policy of apologizing to patients when errors occur. And hospitals are more willing to discuss and learn from errors with hospital staff.

What accounts for these changes? Several factors appear to have overcome historical resistance to transparency, including widespread laws requiring disclosure to patients and confidentiality protections for internal discussions of error. Hospitals have also found that disclosing errors to patients and offering early settlements reduces the costs and frequency of litigation.

My study also shows that malpractice suits are playing an unexpected role in patient safety

efforts, as a source of valuable information about medical error. Over 95 percent of the hospitals in my study integrate information from lawsuits into patient safety efforts. And risk managers and patient-safety personnel overwhelmingly report that lawsuit data have proved useful in efforts to identify and address error.

One might think that hospitals would have little to learn from lawsuits, given other requirements that hospitals report, investigate and analyze medical error. But participants in my study said that lawsuits can reveal previously unknown incidents of medical errors — particularly diagnostic and treatment errors with delayed manifestations that other reporting systems are not designed to collect.

Lawsuits can also reveal errors that should have been reported but were not — medical providers notoriously underreport errors (although studies have shown that the threat of litigation is not responsible for this underreporting) and lawsuits may fill these gaps.

Moreover, litigation discovery can unearth useful details about safety and quality concerns. Analyses of claim trends can reveal problematic procedures and departments, and closed

litigation files can serve as rich teaching tools.

True, malpractice litigation data also have many flaws: too few malpractice claims are filed to reflect an accurate picture of a hospital's shortcomings, and the amount awarded in litigation may not reflect the merits of the claims. Yet hospitals say they recognize and account for these flaws in their review.

The assumed negative effects of malpractice litigation on patient safety have been used to justify numerous proposals for reform, including damages caps and "health courts," administrative bodies that adjudicate malpractice claims outside the tort system. Politicians, patient safety advocates and medical providers argue that such reforms will encourage more open discussions of medical error by removing the specter of liability.

My study suggests, however, that hospitals can — and have — found ways to increase openness and transparency without these dramatic interventions. Moreover, because lawsuits help to identify incidents and details of medical error, limitations on lawsuits may actually impede patient safety efforts.

The Affordable Care Act pours millions into patient safety for research centers, demonstration projects and other programs. Proposed reforms and initiatives should not rely on conventional wisdom about the negative effects of malpractice litigation. Medical-malpractice lawsuits do not have the harmful effects on patient safety that they are imagined to have —

and, in fact, they can do some good.