



## To Curb Malpractice Costs, Judges Jump In Early

By WILLIAM GLABERSON | June 12, 2011

In Justice Douglas E. McKeon's fluorescent-lighted chambers in the Bronx, a new way of handling medical malpractice suits was on full, and sometimes gruesome, display. Around a polished wood table, lawyers haggled over the price for a lost nose (\$300,000) and the missing tip of a finger (\$50,000).

The discussion was like some kind of malpractice bazaar, with lawyers blurting out terrible facts and big numbers.

"Our offer of \$500,000 is more than we've ever had on a dead baby case," said Margaret Sherman, a lawyer for the New York City Health and Hospitals Corporation, which runs 11 public hospitals.

The patients were not there, but the lawyers and Justice McKeon — who has better-than-average medical knowledge — were. Cajoling, flattering and arguing, Justice McKeon, of State Supreme Court, worked to bring about settlements long before the cases moved toward trials.

The approach, known as judge-directed negotiation, is seen by the Obama administration as offering states a way to curb liability expenses that have sharply increased health care costs nationally. Getting judges involved earlier, more often and much more actively in pushing for settlements, is its crucial ingredient — evident in the recent session watched by this reporter, one of many that are usually not attended by the public.

New York officials say the program bypasses years of court battles, limiting legal costs while providing injured patients with compensation that is likely to be less than a jury would award but can be paid out years earlier, without lengthy appeals.

Under a \$3 million federal grant, the city courts are now expanding the program beyond the Bronx, where it started in cases against city hospitals, to courts in Brooklyn and Manhattan, as well as to cases against private hospitals. It is to begin in Buffalo courts in the fall.

"We would hope that other states across the country would look at this as a model they might want to replicate," said James B. Battles, the official overseeing the grant at the federal Agency for Healthcare Research and Quality. By some estimates, the program could save more than \$1 billion annually if state courts adopted it nationally, Dr. Battles said. The city's public hospitals say the program, along with other changes, like sharply increased attention to safety, has helped save \$66 million in malpractice costs a year. During the recent session in Justice McKeon's chambers, the lawyers seemed more relaxed than they would be with patients watching. After he agreed to take \$1.5 million for a child with cerebral palsy, a plaintiffs' lawyer, Louis G. Solimano, seemed disappointed. "I didn't get a grand slam," he said.

Malpractice costs have been at the center of the debate about health care expenses for decades, with some states enacting legislation to limit awards. But the lawsuits have been difficult for judges to control, partly because the cases can go on with little judicial involvement for years, pushing up legal expenses and solidifying positions.



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Michelle M. Mello, a Harvard professor of law and public health who is evaluating the New York experiment, said the program represented a major cultural change in malpractice cases. “Ordinarily when the parties come to a settlement conference, it’s late in the game,” she said. “It’s often a pro forma exercise rather than an attempt to grapple with the tricky issues in the case.”

Under the New York program, cases are assigned from their earliest stages to a judge with training in medical issues who holds frequent settlement conferences, often after months, rather than years. A nurse with legal training helps the judge. Lawyers are required to have the authority to settle. Justice McKeon, who started the approach when handling cases against public hospitals in the Bronx, said settlement became more difficult the longer a case lingered. State court officials say statistics indicate he settles about 20 percent more cases than other judges.

Under standard practice in New York courts, several different judges would typically handle a case before it goes to trial. But Justice McKeon, the administrative judge for civil matters in State Supreme Court in the Bronx, keeps certain malpractice cases from their start.

Some plaintiffs’ lawyers say the meetings can be daunting. “There’s pressure to take less than might be fair compensation,” said Nicholas I. Timko, the president of the New York State Trial Lawyers Association.

Suzanne S. Blundi, the deputy counsel of the Health and Hospitals Corporation, said the hospitals’ average payment in malpractice cases last year had declined to about \$428,000, from about \$567,000 in 2003, as a result of a series of measures to reduce liability costs, including earlier settlements.

Ms. Blundi said Justice McKeon’s settlement conferences could have a sobering effect. “The process forces parties to really evaluate their case and look at the strengths and weaknesses,” she said.

As the Wednesday meeting stretched through the day, Justice McKeon, in a monogrammed shirt and black suspenders, walked lawyers to the narrow hallway leading to his chambers, for private chats. He sweet talked and wheedled. “Here’s the story,” he confided to a lawyer in the hallway.

The judge mentioned a \$500,000 offer from the hospital lawyers. “I can get you more than that,” he said. He did.

In another case, he warned hospital lawyers that jurors were unlikely to be influenced much by their claim that a patient was partly responsible for his fate because he ignored his doctors. The man was dead, the judge noted, and that has a way of winning sympathy.

Plaintiffs’ lawyers in expensive suits came and went with claims of botched operations and missed diagnoses in their briefcases. At the table, the judge would drop an observation to help jolt one side or another: “He’s one of these guys, who, to make a point, will try the case,” he said when one of the plaintiffs’ lawyers walked in.

A veteran of the courthouse, and Democratic organization politics, Justice McKeon told lawyers what he thought their cases would be worth if they went to a Bronx jury. In the hallway, while the judge had shuttled off to the other side’s lawyers at the table, one of the plaintiffs’ lawyers, Ronald J. Landau, said he tended to listen. “When he gives an opinion to me about how he thinks a jury’s going to respond to a case, he’s generally on target,” Mr. Landau said.

Late in the afternoon, there were no lawyers in the hallway. They were all waiting at the polished table to discuss the next case. Justice McKeon spoke for a minute before he headed back to the table. “You’ve got to keep them talking,” he said.