

## AMERICAN MORNING, CNN

Malpractice Costs

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ROBERTS: Even though the first family is on vacation this week, you can bet that President Obama is keeping an ear on his make or break push for health care reform during this month of August. Some critics say his plan doesn't do enough to drive down malpractice costs for doctors. But maybe that's by design. Here he is talking to the American Medical Association back in June.

(BEGIN VIDEO CLIP)

OBAMA: I want to be honest with you. I'm not advocating caps on malpractice.

(END VIDEO CLIP)

ROBERTS: So how much does malpractice really add to our health care price tag and what, if anything, should be done about it?

Joining me now is **Dr. Jamie Grifo**. He is the program director at NYU's Fertility Center and a partner with the Covington and Burling Law firm, Philip Howard here to talk about malpractice reform. Dr. Grifo, medical malpractice often used as a catch all for anything that goes wrong with a patient. How much is malpractice and how much is bad outcomes?

**DR. JAMIE GRIFO, PROGRAM DIRECTOR, NYU FERTILITY CENTER:** Well, clearly there's malpractice that occurs. Doctors are human and they make mistakes. But a lot of what gets told as malpractice is really just bad outcome. We have a baby that's born with a problem. And the doctor did everything right but there's a bad outcome. And that's a problem. We need a way to compensate that victim but we need a system that actually compensates the victim instead of 60 percent of the dollar going to a system that doesn't really work very well.

ROBERTS: That's a topic I want to talk about just a second. But Philip, President Obama told the American Medical Association that he'd like to initiate some sort of medical malpractice reform but rejected a cap on malpractice awards. As long as you have those big malpractice awards, can you really have malpractice reform?

PHILIP HOWARD, PARTNER, COVINGTON & BURLING LLP: Well, most civilized countries have limit on non-economic damages. The most important reform is to make justice reliable. I mean it's only when doctors feel that justice is reliable that they can focus on curing the patient and not protecting themselves. And the big cost is - it's a big cost, all the insurance and the awards but 10 times bigger than that is the amount of defensive medicine. Doctors ordering too many tests in order to protect themselves.

ROBERTS: Well, let's talk about this - this idea of defensive medicine. The "Journal of the American Medical Association" back in 2005 did a survey, doctors in Pennsylvania and

Massachusetts found 93 percent of high-risk specialists admitted to practicing defensive medicine, that would be ordering tests after tests after tests, you know, a little bit of CYA there.

In Massachusetts that number was 83 percent. We should ask the doctor, do you do extra testing just to make sure that if somebody ever comes to you for a malpractice suit, you can say, hey, we did all of this and we still have a bad outcome?

**GRIFO:** Oh, absolutely. That happens on a daily basis and some of it is well meaning. We want to avoid the one in 1,000 case. But at some point, you can't use your clinical judgement, you can't use it as a defense anymore. So you have to use a test and that's not just good medicine, it's expensive medicine and doesn't make us better as practitioners.

**ROBERTS:** The American Association for Justice which is the trial lawyers, Philip, said, "The notion that defensive medicine is leading to higher health costs is not supported by empirical data or academic literature." So they disagree with you

**HOWARD:** Well, it's very hard to measure precisely how much it is. Most estimates put it at \$1 to \$200 billion a year, which is by the way, more than enough to pay for all the uninsured. But it's very hard to measure exactly when the MRI is needed or not. That's why it's an estimate. But you cannot find anyone in the health care business, anyone, patient safety groups, legitimate consumer groups, who won't say that medicine today is dominated by defensive medicine. Doctors practice it all day long.

**ROBERTS:** OK. But what about the cost of malpractice insurance? You know, it depends on what specialty you're in, I guess. OB-GYNs and neurologists are very high. I mean, in a field like yours, what are your malpractice...

**GRIFO:** I don't deliver babies, so mine is just \$70,000, but for obstetricians it's \$200,000, neurosurgeons up to \$400,000. And those are costs. Those costs are paid for by patients. And it's not a good system. That system eats up money that should go to victims, instead it goes to trial lawyers and administration and it doesn't protect patients. We need a better system. This isn't the system.

**ROBERTS:** The "New York Times" looked at this a while ago, did a calculation and found that OB-GYNs where premiums are \$200,000 a year. If they deliver an average of 100 babies a year, which is about average, there's \$2,000 in the costs of the delivery of that baby that goes purely to paying malpractice premium. Is that outrageously high?

**HOWARD:** It's outrageous. Many hospitals have stopped delivering babies. And many hospitals do it essentially as a public service, they lose money on it. But if looking at the macro picture here, overall, the name of the game is creating a reliable system of justice so that doctors can get back to practicing medicine. They are taking care of patients and not protecting themselves.

**ROBERTS:** The "Atlantic Monthly" magazine looked at all of this and said that medical malpractice premiums account for less than one percent of health care costs. Do you agree with that? Is that true?

**GRIFO:** I have no reason to disagree with that. But that's not the whole cost of this system.

There are cases that are settled out of court that never make it to a court where you didn't have to - there was no malpractice but you settled because it's cheaper to settle than it is to defend. I had a bruise from surgery, settled for \$75,000 because the hospital said: look, it's a business decision. We know you didn't do nothing wrong.

ROBERTS: Seventy-five thousand dollars for a bruise.

**GRIFO:** Yes. Well, it was a significant bruise - two weeks of pain but yes, it's outrageous. That's not a good system.

ROBERTS: Philip, one of the things that you're advocating is disagreement over medical treatment would go through that as opposed to going into an open court. You mention add lot of money associated with malpractice awards goes to the trial lawyer as opposed to the patient. Do you know what the ratio is and how would special health care courts reduce that?

HOWARD: Well, upwards of 60 cents on the dollar goes to lawyers fees and administrative costs today.

ROBERTS: So the patient would only get 40 percent.

HOWARD: Yes. With an average of five years to settlement. That's now how any other country does it. And so what we proposed, a group called Common Good, that I chair, is a system special health courts which we devised for the partnership of the Harvard School of Public Health, where you have expert judges with neutral medical experts in each case, where cases would be resolved in a matter of months.

We think more people would be compensated. But the main point of this is it's reliable. So doctors can go through the day focusing on their best judgment not ordering extra tests. And defensive medicine is upwards of 10 percent of the cost. That's huge.

ROBERTS: And Dr. Grifo, what do you say to critics who say doctors just want to reduce liability and these insurance companies whose business it is to sell insurance just wants to make sure that they maximize their profits.

**GRIFO:** Well, the liability of premiums is passed on as cost to patients. I don't pay my malpractice premiums - my patients pay it. We all pay it. We pay for it in every product in medicine. We pay for it in drugs. When you think the cost of class action suits on drugs is not passed on and the cost of medicine, is there a reason why our drugs are more expensive in the U.S. versus other parts of the world?

Yes, this system is the reason. And it needs to be fixed. Because we need to get more people health care. Without fixing the system that's not going to happen easily.

ROBERTS: Another part of the health care debate. Philip Howard, Dr. Jamie Grifo, good to talk to you this morning. Thanks for coming in. Really appreciate it.