

Medical Malpractice Reform: The Costs of Defensive Medicine

While the unsustainably high costs of medical malpractice coverage are often cited as a primary reason for malpractice reform, the cost of defensive medicine practiced due to fears of malpractice litigation probably dwarfs the direct costs of malpractice liability. In this installment of the *Health Care News In-Depth* series on medical malpractice, GNYHA looks at why policy makers attempting to address health care costs and inefficiencies should focus on reforming the medical malpractice system.

“Defensive medicine” has been defined as “a deviation from sound medical practice that is induced primarily by a threat of liability.”¹ Most often, it is discussed in terms of providing additional testing or treatment, but it can also encompass “replacing” care—such as when a physician refers a case to another physician—or “reducing” care by a physician’s refusal to treat certain types of patients. As the term is used with respect to providing additional services, it is sometimes called “assurance behavior” and involves delivering or ordering additional services “of marginal or no medical value with the aim of reducing adverse outcomes, deterring patients from filing malpractice claims, or persuading the legal system that the standard of care was met,” according to a 2005 study published in the *Journal of the American Medical Association* by researchers from Harvard and Columbia universities.

Survey Finds Defensive Medicine Prevalent

In this study, David Studdert, Michelle Mello, Troyen Brennan, William Sage, and others examined the prevalence and characteristics of defensive medicine among physicians practicing in high-liability specialties in locations with unstable or high malpractice costs. They hy-

pothesized that physicians’ concerns “about the costs and availability of coverage may induce a wider array of defensive practices, affecting not only the cost of health care but also its accessibility and quality.” The team surveyed hundreds of physicians practicing in high-risk specialties in Pennsylvania about their defensive medicine practices. The behaviors studied included:

spondents reported that “they sometimes or often engaged in at least one type” of defensive medicine. Nearly 60% of respondents “often ordered more diagnostic tests than medically indicated,” the authors said. More than half of respondents said they referred patients to another specialist when it was unwarranted. The authors said this practice was “particu-

HOW PREVALENT IS DEFENSIVE MEDICINE?

In a 2005 study of physicians practicing in high-risk specialties,

- 59% said they often ordered more diagnostic tests than medically necessary
- 52% said they often referred patients to other specialists in unnecessary circumstances
- 33% said they often prescribed more medications than medically necessary
- 32% said they often suggested invasive procedures that were unwarranted

-Studdert, et al.

1) ordering more tests than medically necessary; 2) prescribing more medications than medically necessary; 3) referring to specialists in unnecessary circumstances; 4) suggesting invasive procedures against professional judgment; 5) avoiding certain procedures or interventions; and 6) avoiding caring for high-risk patients. The researchers also inquired about a number of measures, including several related to physicians’ perceptions of their medical malpractice coverage, e.g., its financial burden.

According to the study, 93% of the 824 re-

larily common” among obstetricians and gynecologists. A third of respondents said they prescribed more medications than indicated, and a third of respondents also often suggested “invasive procedures which, in their professional judgment, were unwarranted.” The survey also asked about the doctors’ most recent encounter with defensive medicine. For more than 40%, that incident involved using imaging studies.

Studdert and his colleagues noted that medical malpractice insurance influenced many doctors’ defensive medicine practices. The doctors surveyed who were concerned about

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1. Studdert, David M. LL.B., Sc.D., M.P.H., Michelle M. Mello, J.D., Ph.D., M.Phil., William M. Sage, M.D., J.D., Catherine M. DesRoches, Dr.P.H., Jordon Peugh, M.A., Kinga Zappert, Ph.D., Troyen A. Brennan, M.D., J.D., M.P.H. “Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment.” *Journal of the American Medical Association* 293 no. 21 (June 1, 2005): 2609–2617.

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the effectiveness of their medical malpractice insurance “were more than twice as likely as other specialists” to engage in defensive medicine behaviors. Those surveyed who reported that their medical malpractice premium burden was “extreme” were more than 1½ times as likely to engage in defensive practices such as ordering unnecessary tests and overprescribing medicines.

cine between \$70 billion and \$126 billion per year.⁴ Even the most conservative estimates suggest that defensive medicine represents at least 1% of the nation’s health care expenditures, or \$25 billion each year. However, even this conservative estimate translates into \$350 billion over the next ten years when accounting for projected inflation in national expenditures.

IS THERE A RELATIONSHIP BETWEEN FEARS OF MALPRACTICE LIABILITY AND DEFENSIVE MEDICINE?

Specialists who perceived their premium burden to be extreme were more than 1½ times as likely to overprescribe medications, refer patients unnecessarily, and order unnecessary tests.

– Studdert, et al.

Other Studies Show Prevalence

Subsequent surveys by others support the wide scope of defensive medicine. For example, in 2007 and 2008, the Massachusetts Medical Society surveyed physicians practicing in Massachusetts in eight specialty areas. Those surveyed reported that 22% of all x-rays, 28% of CT scans, 27% of MRIs, and 24% of ultrasounds were ordered for defensive reasons. Similarly, 28% of specialty referrals or consultations were motivated by liability concerns, with OB/GYNs reporting that 40% of their referrals and consultations were not driven by medical need. Finally, 18% of all laboratory tests and 13% of all hospital admissions were motivated by liability concerns.²

The Added Costs

How much defensive medicine costs the nation and how sensitive defensive medicine is to malpractice reforms have been called controversial questions. But over time there has been growing recognition that whatever defensive medicine costs, it is a significant amount. To provide a sense of numbers discussed, at the high end, McKinsey & Company has estimated that defensive medicine costs the nation as much as \$150 billion to \$190 billion each year.³ A 2003 report from the U.S. Department of Health and Human Services pegged the cost of defensive medi-

Would Reform Reduce Defensive Medicine?

A recent Congressional Budget Office (CBO) analysis reflects the growing recognition of defensive medicine’s impact on health care costs and its sensitivity to malpractice reform. The CBO examined how medical malpractice reforms could lead to potential reductions in malpractice premiums as well as reductions in health care utilization caused by defensive medicine practices. In an October 9, 2009, letter to Senator Orrin Hatch (R-UT), who had requested the study, the CBO stated that recent research has provided evidence that malpractice reforms do reduce the use of health care services. In light of the research, CBO included, for the first time, indirect savings from reduced utilization of health care services in its most recent analysis of the impact of malpractice reforms.

While not quantifying the cost of defensive medicine, the CBO estimated that if a package of specified malpractice reforms were adopted, Federal health care spending under Medicare, Medicaid, the Children’s Health Insurance Program, and the Federal Employees Health Benefits program would decrease by \$41 billion over the next ten years. The CBO stated that its estimate accounted for the fact that many states have already adopted a number of the

suggested reforms, as well as the fact that some reforms might actually increase the volume of services provided. The lesson is clearly that the right mix of reforms in certain states could result in meaningful savings for state Medicaid and other health-related programs.

The CBO also calculated that the Federal government would enjoy an additional \$13 billion in increased tax revenues due to related reductions in health care spending and health insurance costs and corresponding potential increases in taxable wages. Thus, the CBO estimated that the Federal deficit would be reduced by \$54 billion over 10 years as a result of the reforms discussed.

West Virginia Senator John D. Rockefeller, IV, raised questions about the CBO’s analysis. In a letter dated December 10, 2009, the CBO explained that its estimates of savings had increased over time because “the weight of empirical evidence now demonstrates a link between tort reform and the use of health care services.”

Malpractice Reform Will Reduce Health Care Costs

The practice of defensive medicine to avoid litigation is pervasive and takes many forms. It is also closely correlated with providers’ concerns about malpractice premiums and adequacy of insurance coverage. Although difficult to quantify, the costs of defensive medicine are significant, if not extraordinary. It has also been demonstrated that defensive medicine is sensitive to reforms that reduce the pressures of malpractice liability on providers. For the foregoing reasons, the Federal government and all states should seriously consider the savings that will accrue from reductions in health care utilization as a result of malpractice reforms. Such savings could be dedicated to creating special compensation funds for neurologically impaired newborns, supporting patient safety, or promoting other initiatives. Both health care and malpractice reform discussions must therefore consider the prevalence, causes, and costs of defensive medicine. ■

2. “Investigation of Defensive Medicine in Massachusetts.” Massachusetts Medical Society, Nov. 2008. Available at http://www.massmed.org/AM/Template.cfm?Section=Advocacy_and_Policy&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=23557.

3. “Accounting for the Cost of US Health Care: A New Look at Why Americans Spend More” McKinsey & Company, December 2008.

4. “Addressing the New Health Care Crisis: Reforming the Medical Litigation System to Improve the Quality of Health Care.” U.S. Department of Health & Human Services Office of the Assistant Secretary for Planning & Evaluation. March 2003. Available at <http://aspe.hhs.gov/daltcp/reports/medliab.pdf>.

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