

The myth of defensive medicine

Link between tort reform, health costs unfounded

By Patrick J. Filan

One point of contention in the current debate over reforming our expensive health insurance system concerns the practice of so-called "defensive medicine." Defensive medicine has been defined in the medical literature as "a deviation from sound medical practice that is induced primarily by a threat of liability." In practice, defensive medicine includes additional testing or treatments, avoidance of risky procedures, referral to specialists or even the refusal to take care of certain patients. Defensive medicine is considered by many as costly as well as unnecessary for proper medical care while adding a dimension of mistrust between doctor and patient. Defensive medicine has been used as an argument for medical malpractice tort reform.

The fact is that any time this issue has been studied -- and it's been studied numerous times over the last 25 years -- no significant relationship has been demonstrated between the risk of being sued and increased costs due to "defensive medicine." As early as 1994, a study by Congress' Office of Technology and Assessment concluded that the effects on defensive medicine of tort reforms "are likely to be small." More recently, the General Accounting Office in a 2003 study rejected the medical profession's claims that the practice of defensive medicine was widespread and costly. The GAO criticized the medical profession's self-serving studies as unreliable and based on inadequate response rates. These studies consisted of little more than sending doctors questionnaires asking if they practiced defensive medicine and then receiving, quite predictably, the desired response.

The GAO noted that "officials from AMA and several medical, hospital and nursing home associations in the nine states we reviewed" cited surveys and published research but could not provide additional data demonstrating the extent and costs associated with defensive medicine." The GAO report

concluded that while "defensive medicine may be practiced in specific clinical situations, the findings are limited and cannot be generalized to estimate the prevalence and costs of defensive medicine nationwide." Similarly, the insurance industry's use of bogus statistics and arguments that medical malpractice limits would save health care costs based on considerations like defensive medicine was rejected in 2005 by the Annenberg Center's reputable Factcheck.org. A 2004 CBO report concluded that "defensive medicine may be motivated less by liability concerns than by the income it generates for physicians or by the positive (albeit small) benefits to patients. On the basis of existing studies and its own research, CBO believes that savings from reducing defensive medicine would be very small." Limiting tort liability would have no significant impact on health care spending, according to the CBO.

In 2004, the National Bureau of Economic Research similarly concluded that there is "very little evidence of widespread physician exodus or dramatic increases in the use of defensive medicine in response to increases in state malpractice premiums. ... The arguments that state tort reforms will avert local physician shortages or lead to greater efficiencies in care are not supported by our findings." That study went on to "call into question the view that states with traditional tort reforms have lower levels of premiums or defensive medicine than states that have not implemented such reforms. There is "little evidence that malpractice payments are driving the dramatic increase in overall health care expenditures," the authors concluded.

In fact "defensive medicine" is nothing more than doing the type of thorough type evaluation that every patient deserves. Doctors have a duty to consider most if not all possibilities that may be responsible for a patient's symptoms, findings or complaints. Ordering tests that lead to a timely and correct diagnosis should not be considered unnecessary or defensive.

The point is that a test is not unnecessary if it yields a positive finding. For years, many surgeons were reluctant to perform breast biopsies out of concern that these procedures were considered unnecessary. These doctors thought that rather than taking a tissue sample and sending it to pathology lab to make a definitive cancer diagnosis, it was acceptable to wait and watch the patient -- or, more accurately, wait and watch the undiagnosed cancer grow and spread. As more breast biopsies were performed, breast cancer became diagnosed more frequently and at an earlier stage, all to the patient's benefit. A biopsy that turned out to be malignant is hardly

"unnecessary." Similarly, symptoms of what a physician felt to be "indigestion" but actually turned out to be a heart attack would not have been diagnosed but for unnecessary cardiac testing, evaluation by a cardiologist and careful monitoring of the patient.

Sending patients to other doctors for special care or just for a second opinion may sound like defensive medicine to some, but to me, it simply represents good medical care. Defensive medicine is really just thorough, comprehensive and diligent medical care, the type we all should receive.

The real medical malpractice problem confronting doctors today is not "defensive medicine." Rather, the problem is medical errors. The real challenge facing doctors today is analyzing and reducing medical errors by adopting practices that assure patient safety.

Patrick J. Filan is a malpractice attorney with offices in Westport and White Plains, N.Y. He is a member of the Connecticut Lawyers Medical Malpractice Committee and the American Association of Justice's Breast Cancer Committee.