A COSTLY DEFENSE: PHYSICIANS SOUND OFF ON THE HIGH PRICE OF DEFENSIVE MEDICINE IN THE U.S.

By Jackson Healthcare
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WE HAVE TWO GOALS THROUGH PUBLICATION OF THIS BOOK:

1. To voice physicians’ growing concerns over the negative impacts of defensive medicine, and the way it is affecting their relationships with their patients, and

2. To encourage physicians, patients, attorneys and state and federal representatives to work together to find a solution that eliminates defensive medicine practices, protects physicians from frivolous lawsuits, penalizes true malpractice and compensates patients for negligent care.

This book is designed to share the key findings of Jackson Healthcare’s ongoing research, including written comments from physician participants.
FINDINGS AT A GLANCE

Defensive medicine is a significant force driving the high cost of healthcare in the U.S. Not only are the vast majority of physicians practicing defensive medicine, more and more younger physicians are taught to do so in order to protect their livelihoods and reputations against the threat of lawsuits.

Plus, defensive medicine appears to be unique to U.S. physicians in the private sector.

Here are highlights from Jackson Healthcare’s ongoing research:

- Physicians estimate the cost of defensive medicine to be in the $650-$850 billion range, or between 26 and 34 percent of annual healthcare costs in the U.S.
- Physician compensation accounts for only about eight percent of total U.S. healthcare costs
- About six percent of physicians’ total compensation comes from medical orders such as prescriptions, imaging, lab tests, admissions and surgery fees
- Many physicians reported practicing “rule-out medicine” rather than “diagnostic medicine” out of fear that they will miss a diagnosis and be sued
- 76 percent of physicians reported that defensive medicine decreases patients’ access to healthcare
- 53 percent reported delaying adoption of new medical techniques, procedures and treatments due to fear of lawsuits
- 75 percent of physicians believe defensive medicine will adversely impact the physician shortage
FINDINGS AT A GLANCE (CONTINUED)

- Patients most likely affected by defensive medicine are those requiring surgery and those visiting emergency rooms.
- Women are more often affected by defensive medicine than men.
- Emergency room, primary care and OB/GYN physicians are the most likely to practice defensive medicine.
- Surgeons and OB/GYNs are most affected by the threat of lawsuits with 79 percent and 83 percent, respectively, having been named in lawsuits.
- Younger physicians and female physicians reported less tolerance for risk and are more likely to practice defensive medicine.
- Physicians contracted with the federal government practice significantly less defensive medicine than their private sector peers because of protections under the Federal Tort Claims Act.
- 48 percent of physicians working for the federal government claim to practice defensive medicine.
- When asked, physicians in New Zealand, Canada, the United Kingdom and Sweden claimed to order no tests, treatments or consultations in an effort to prevent a lawsuit.
- Two separate studies of U.S. physicians in 2010 found that 73 percent and 92 percent, respectively, admitted to making medical decisions to avoid lawsuits.
- 89 percent of physicians support the right of patients to be fairly compensated in cases of true negligence.
- Hospital administrators estimate that one-third of healthcare costs are the result of defensive medicine.
WHY ASK PHYSICIANS ABOUT DEFENSIVE MEDICINE PRACTICES?

Our original research focus was not on defensive medicine. It was on healthcare reform. In October 2009, we surveyed physicians representing all specialties and states in an effort to qualify their attitudes on healthcare reform.

Defensive medicine surfaced as a driving physician concern for containing healthcare costs. Our secondary research found no publicly reported studies that quantified the extent and economic impact of defensive medicine practices in the U.S. Therefore, in December 2009, we retained Gallup to conduct an independent national physician poll to quantify the economic cost of defensive medicine. We conducted our own follow-up study in parallel with Gallup’s efforts. Gallup’s findings, though slightly more conservative than ours, confirmed the pervasive nature of defensive medicine in the United States.

In this second phase of research, a number of non-economic, patient care issues surfaced as additional impacts rooted in defensive medicine. Since then, Jackson Healthcare has continued to survey physicians to discover, not only the primary driving reasons for defensive medicine practices, but why defensive medicine is a problem unique to the U.S.

What follows is an exploration of the five primary economic and non-economic impacts of defensive medicine according to physicians. We believe that, given the role physicians play as sole prescribers of tests and treatments, physicians are in the best position to identify where opportunities exist to improve the care we receive as patients, while eliminating unnecessary costs.
The vast majority of physician survey respondents – 73 percent of those participating in the Gallup poll and 92 percent in the Jackson Healthcare survey – said they practiced some form of defensive medicine in the prior year, and in open-ended responses, these physicians consistently listed defensive medicine as the primary problem driving healthcare costs.

Their estimates placed annual defensive medicine costs in the $650-$850 billion range. In light of a Centers for Medicare and Medicaid Services estimate that overall U.S. healthcare spending in 2009 was $2.5 trillion, this means that $1 of every $4 spent on healthcare each year is spent on unnecessary tests and treatments ordered by physicians solely to protect themselves against lawsuits.

The rising C-section rate sheds light on the economic impact of defensive medicine at a micro-level. The U.S. Department of Health and Human Services reports that one in every three babies is now born by Cesarean section, an increase of 53 percent since 1996.

Obstetricians interviewed in our study estimated that 38 percent of all C-sections are performed to avoid litigation. Using 2007 data from the National Center for Health Statistics and the March of Dimes, we estimate the total annual cost for medically unnecessary C-sections in the U.S. to be more than $5 billion (multiplying 1.4 million C-section births by an average cost of $10,958, then dividing by 38 percent claimed to be defensive).
ECONOMIC IMPACT: UNNECESSARY TESTS, TREATMENTS AND ADMISSIONS ORDERED

Physicians reporting they practiced defensive medicine estimate the following breakdown of orders that were medically unnecessary and defensive in nature:

- 35 percent of diagnostic tests
- 29 percent of laboratory tests
- 19 percent of hospitalizations
- 14 percent of prescriptions
- 8 percent of surgeries

In addition to economic costs created by these unnecessary tests, treatments and admissions, this exposes patients to risks unrelated to their medical conditions. For example, a physician may under-treat cancer to avoid being sued by the patient for the side effects, or a child may be over-exposed to radiation in an effort to “rule out” future risks.

In their write-in responses, many physicians reported that they practice “rule-out medicine” rather than “diagnostic medicine” out of fear that they will miss a diagnosis or be accused of delaying diagnosis. This creates an inability of physicians to trust their own clinical judgment and first-round tests. The results of this reality are additional tests ordered to confirm the initial results.

72 percent of respondents in our final survey said they feel that the practice of defensive medicine negatively impacts patient care.
A majority of respondents (76 percent) in our final survey reported that defensive medicine decreases patients’ access to healthcare. Seventy-one percent said that it has had a negative effect on the way they view patients, which has led to many physicians believing lawsuits have come between them and their patients (67 percent).

Physicians admitted avoiding tests and treatments that would increase medical malpractice insurance premiums and/or pose too great a risk to their practices. Some also acknowledged that they avoid high risk patients altogether; bad outcomes are associated with increased chances of litigation.

“Every word that I write on every form is crafted with the idea that a malpractice attorney will challenge me to defend my practice.”

*quote from physician respondent*
In addition to fearing they will miss a diagnosis or be charged with delayed diagnosis, many physicians said the perceived risks – and associated increases in malpractice premiums – of adopting medical innovations far outweigh the benefits of practicing such innovations.

Forty-nine percent of physicians surveyed said that defensive medicine has had a negative impact on medical innovation. **Fifty-three percent reported that they have delayed adopting new techniques, procedures and/or treatments because they fear lawsuits.**

“Patients in America are not willing to take risk especially if it doesn’t cost them to have the extra labs or imaging studies done.”

*quote from physician respondent*
Physicians’ comments indicated a broad dissatisfaction and a high level of frustration with what they consider to be the necessary practice of defensive medicine. Fifty-seven percent claimed defensive medicine hampers their decision-making ability.

Not only is the practice pervasive – it is increasingly being taught as standard medical practice. In fact, 83 percent of physicians ages 25 to 34 reported being taught in medical school or residency (by attending physicians or mentors) to avoid lawsuits.

Some physicians believe that defensive medicine is a factor in the national physician shortage. Physicians reported that they are considering leaving the profession as a result of their growing frustrations. The majority of respondents said they fear that the problems associated with defensive medicine are deterring students from entering the field of medicine. Fully 75 percent of respondents said that defensive medicine will impact the already worrisome physician shortage by decreasing the number of physicians in the U.S.

“"It doesn’t matter if you win or lose a malpractice suit, your reputation is still damaged"”

and your insurance premium still goes up.

* quote from physician respondent
IS TORT REFORM THE ANSWER?

The traditional approach to addressing the threat of lawsuits and rising medical malpractice premiums has been tort reform at the state level. However, our research found that tort reform in Texas failed to significantly decrease the practice of defensive medicine. Tort reform was passed in Texas in 2001, but defensive medicine practices among Texas physicians who participated in these surveys did not differ significantly from the overall practices of respondents.

In our research, physicians overwhelmingly (89 percent) support the right of patients to be fairly compensated in cases of true negligence. The issue goes much deeper than tort reform. It appears to stem from the fact that U.S. physicians, unlike physicians in all other major countries, are personally liable if they are named in a lawsuits.
DO PHYSICIANS PROFIT FROM THEIR MEDICAL ORDERS?

The results of a 2011 online survey of 1,512 physicians debunk the common myth perpetuated by critics of tort reform that even without the threat of a lawsuit, physicians will continue to prescribe unnecessary tests, procedures and admissions, because they make money by doing so.

Actually, only about six percent of physicians’ total compensation comes from orders such as prescriptions, imaging, lab tests, admissions and surgery fees, and most of those orders are not defensive in nature. In fact, the vast majority of respondents (82 percent) said they earn no income from the tests, prescriptions, procedures and admissions, regardless of why they are ordered. They are compensated through a combination of fixed payments (such as salary or hourly pay), and variable payments (typically tied to productivity, bonuses and ownership).

The remaining 18 percent of respondents reported that they receive compensation (less than a third of their incomes, on average) for some portion of these medical orders and treatment – many of which are medically necessary and not defensively driven.

Physician compensation accounts for roughly eight percent of the total annual healthcare costs in the U.S.
MORE EVIDENCE OF THE DANGERS OF PERSONAL LIABILITY: FEDERAL VS. PRIVATE SECTOR PHYSICIANS

According to our research, defensive medicine appears unique to U.S. private sector physicians because they are the only physicians in the world personally financially liable for patient awards.

Supporting this premise are findings from surveys including almost 3,000 physicians on how the defensive medicine practices of federal and private sector physicians differ. **Compared with the 92 percent of physicians overall who practice defensive medicine, only 48 percent of those who work or have worked for the federal government do so.** Additionally, 62 percent of those who have worked both for the government and in the private sector say they practice more defensive medicine in the private sector.

Open-ended responses to our surveys indicate that this is a result of protection from lawsuits and punitive damages provided by the Tort Claims Act for federal physicians, as well as by the differences in personal liability. This is underscored by the fact that the surveys revealed an even greater difference between Department of Defense physicians and private sector physicians (compared with the differences between all federal physicians and private sector physicians). Department of Defense physicians practiced the least amount of defensive medicine (19 percent of their practice was defensive, compared with 30 percent for both private sector and VA physicians), and the open-ended responses suggest this is partly because of the lessened litigiousness in the military environment.

“There was a **climate** of less litigious vulnerability and less adversarial attitudes among patients who **do not** see clinicians as **economically profiting** from service deliveries.”

*quote from physician respondent on why they practice less defensive medicine in federal vs. private sector*
MORE EVIDENCE OF THE DANGERS OF PERSONAL LIABILITY: INTERNATIONAL PHYSICIANS

Further evidence that the fear of personal liability is driving defensive medicine in the United States is found in the results of a 2011 survey of 700 physicians in New Zealand, Canada, the United Kingdom and Sweden: None reported ordering tests, treatments or consultations in an effort to avoid lawsuits. This contrasts with similar studies of U.S. physicians in 2010, in which Gallup and Jackson Healthcare found that 73 percent and 92 percent, respectively, admitted to making medical decisions to avoid lawsuits.

In fact, only eight percent to 14 percent of physicians in these other countries had even heard of defensive medicine. Defensive medicine appears to be unique to U.S. physicians in the private sector. The apparent reason physicians in other countries don’t make medical decisions to avoid lawsuits is that they are not personally financially liable for errors. They enjoy protections under their medical malpractice systems that U.S. physicians don’t.
PHYSICIANS SAY TRADITIONAL TORT REFORM FAILS TO REDUCE DEFENSIVE MEDICINE

When asked which tort reform efforts are most likely to curb defensive medicine practices, physicians reported the most common civil justice reform effort—caps on pain and suffering—does little to change their behavior concerning defensive medicine. Seventy-seven percent of doctors said they would not change or would increase the practice of medicine despite the cap on damages related to pain and suffering.

Seventy-seven percent of doctors in Texas, a state that enacted high-profile constitutional amendment to limit damages for pain and suffering, also responded they would not change or would increase their practice of defensive medicine.

In Massachusetts, where the Legislature recently enacted a “Disclosure, Apologize and Offer” law, 90 percent of physicians surveyed said they would increase or leave unchanged their practice of defensive medicine. Oregon is considering a similar measure. Ninety percent of Oregon physicians surveyed also said that proposal would increase or leave unchanged their practice of defensive medicine.

The survey also found that among the ideas to reform or replace the medical malpractice system, a no-fault, administrative patients’ compensation system would be the proposal most likely to curb the practice of defensive medicine.

Which solution is most likely to curb defensive medicine?
APPENDIX A: HOSPITAL EXECUTIVES: 32 PERCENT OF HEALTHCARE COSTS DUE TO DEFENSIVE MEDICINE

Hospital Executives Agree Defensive Medicine Drives Up Costs

Hospital administrators estimate that one-third of healthcare costs are the result of tests and treatments that aren’t medically necessary and ordered to prevent lawsuits.

Ninety-four percent of executive participants affirmed that the practice of defensive medicine drives up healthcare costs in the U.S. They also estimated an average of 57 percent of physicians practice defensive medicine.

Survey participants were divided on how defensive medicine impacts the quality of patient care. Thirty-two percent believe it has a negative impact. Thirty-one percent said it has a positive impact and 30 percent said it had no impact.

When it comes to hospitals’ financial performance, 65 percent of executives believe defensive medicine negatively impacts performance. Only 27 percent reported a positive impact.
What Is Defensive Medicine?

Defensive medicine describes the practice of ordering medical tests, procedures or consultations of doubtful clinical value in order to protect the prescribing physician from malpractice lawsuits.

Fear of litigation has been cited as the driving force behind defensive medicine.

Defensive medicine takes two main forms: assurance behavior and avoidance behavior. Assurance behavior involves charging for additional, unnecessary services in order to a) reduce adverse outcomes, b) deter patients from filing medical malpractice claims, or c) provide documented evidence that the practitioner is practicing according to the standard of care, so that if, in the future, legal action is initiated, liability can be pre-empted. Avoidance behavior occurs when providers refuse to participate in high risk procedures or circumstances to avoid litigation.

* In 2011, the following Merriam-Webster definition of defensive medicine has been provided to physicians:

“The practice of ordering medical tests, procedures or consultations of doubtful clinical value in order to protect the prescribing physician from malpractice suits.”
APPENDIX C: METHODOLOGY

Gallup Survey Methodology: Cost of Defensive Medicine
Between December 2009 and January 2010, Gallup conducted telephone interviews with 462 randomly selected practicing physicians from across the U.S.

Jackson Healthcare Survey Methodology: Cost of Defensive Medicine
In December 2009, Jackson Healthcare invited 138,686 physicians to participate in a confidential online survey in an effort to quantify the costs and impact of defensive medicine. More than 3,000 physicians spanning all states and medical specialties completed the survey, a 2.21 percent response rate. The survey error range is at the 95 percent confidence level: +/-1.15 percent.

Jackson Healthcare Survey Methodology: Impacts Beyond Costs
In March 2010, Jackson Healthcare invited 124,572 physicians to participate in a confidential online survey in an effort to quantify the costs and impact of defensive medicine. More than 1,400 physicians spanning all states and medical specialties completed the survey, a 1.13 response rate. The survey error range is at the 95 percent confidence level: +/- 1.7 percent.

Jackson Healthcare Survey Methodology: Obstetrician Views on C-Section Rate
In June 2010, Jackson Healthcare invited 8,669 obstetricians to participate in a confidential online survey in an effort to qualify reasons for the increasing C-section rate in the U.S. More than 700 physicians completed the survey, an 0.8 percent response rate. The survey error range is at the 95 percent confidence level: +/-2.4 percent.

Jackson Healthcare Survey Methodology: Physician Compensation Sources
In April 2011, Jackson Healthcare conducted a web-based survey of 1,512 physicians. The survey has an error range of +/- 1.6 percent, at the 95 percent confidence level.
APPENDIX C: METHODOLOGY CONTINUED…

Jackson Healthcare Survey Methodology: Federally Contracted Physicians
Jackson Healthcare conducted a web-based survey of 347 physicians. The survey has an error range of +/- 3.42 percent, at the 95 percent confidence level.

Jackson Healthcare Survey Methodology: International Physicians
Jackson Healthcare retained Survey Pacific to complete telephone surveys of physicians in four countries. Results are based on telephone interviews with 200 randomly selected physicians in each country.

Jackson Healthcare Survey Methodology: Tort Reform Efforts
Jackson Healthcare conducted an online survey from August 31, 2012 to October 31, 2012. Respondents were self-selected with 1,548 respondents completing the survey. The error range for this survey at the 95 percent confidence level is +/- 2.5 percent.

Jackson Healthcare Survey Methodology: Hospital Executives
A total of 106 hospital executives completed the Jackson survey between February 7 and March 25, 2014. To qualify, participants answered that they believe some physicians practice defensive medicine. The error range for the survey was +/-9.5 percent at the 95 percent confidence level.