AMERICAN MEDICAL ASSOCIATION

Getting the most for our health care dollars
Medical liability reform

Rising liability costs, combined with the increased fear of being sued, are leading three-quarters of American physicians to practice defensive medicine, ordering tests or procedures that are more about protecting against the threat of litigation than improving patient care. The costs associated with defensive medicine drain between $70 and $126 billion out of the health care system each year.

The AMA supports efforts to fix the broken medical liability system by limiting non-economic damage awards, and exploring alternative reforms such as health courts, processes for early disclosure of and compensation for adverse events, and safe harbors for the practice of evidence-based medicine. The Congressional Budget Office estimates that liability reforms such as those enacted in California and Texas would reduce federal budget deficits by approximately $54 billion over 10 years.

Background

In an increasingly litigious society, physicians practice under the very real threat of being sued by a patient. The number of lawsuits against physicians—especially those without merit—is alarming, and is costing the health care system billions of dollars. More than 60 percent of liability claims against physicians are dropped, withdrawn or dismissed without payment, yet even these cases cost an average of more than $22,000 to defend.[1] Of the cases that go to trial, 90 percent are resolved in the physician's favor; but these claims cost more than $110,000 per case to defend.[2]

Physicians turn to "defensive medicine" as a way to protect themselves against medical liability lawsuits. The liability climate has forced doctors to become overly cautious in the treatment of their patients. Excessive numbers of lab tests, imaging services, specialist referrals or hospital admissions are used by physicians to help shield themselves against accusations of negligence. A Gallup poll released in February 2010 found 73 percent of physicians surveyed said they practiced some form of defensive medicine in the past year.[3]

The cost to patients: Limited access to care

Another way physicians practice "defensive medicine" is by eliminating high-risk procedures from their practices.

- One in 12 obstetricians who have reported changes in their practice have stopped delivering babies (American Congress of Obstetricians and Gynecolologists 2009 Survey on Professional Liability).
- 75 percent of neurosurgeons who have reported changes in their practice no longer operate on children (Alliance of Specialty Medicine, Feb. 17, 2005).
- 39 percent of orthopedic surgeons have stopped performing spine surgery (Alliance of Specialty Medicine, Feb. 17, 2005).

Practice changes like these leave communities without critical medical services, and threaten patient access to care.

Effect of medical liability pressures on health care costs

The toxic medical liability climate affects health care costs in a myriad of ways.

- **Defensive medicine.** Excess spending on unnecessary tests and procedures costs between $70 and $126 billion annually.[4]
- **Professional liability insurance premiums.** Premiums are determined in large part by the payouts insurers can expect to pay in the event of a claim, and premiums for professional medical liability insurance are at or near historic highs. The high cost of insuring against liablity claims increases practice costs for physicians at a time when their incomes are shrinking.
- **Limits on medical practice.** High-risk specialties, and specialties that perform high-risk procedures are hardest hit by the liability crisis. Some doctors are forced to make significant changes in their practices in order to minimize their risk of being sued. In some cases, doctors are closing their practices altogether. As described in the text box in the left-hand column, the current medical liability system is leading to access problems for patients, and patients who lack access to care ultimately drive up health care costs for everyone.

Recent federal action

In September 2009, President Obama authorized the Department of Health and Human Services (HHS) to commit $25 million to implement a state-based demonstration project on medical liability reform and patient safety. The goal of the demonstration is to help states and health care systems test models that:

- Put patient safety first and work to reduce preventable injuries
- Foster better communication between doctors and patients
- Ensure that patients are compensated in a fair and timely manner for medical injuries, while also reducing the incidence of meritless lawsuits
- Reduce liability premiums

The Agency for Healthcare Research and Quality (AHRQ) is implementing the demonstration, and is offering one- and three-year grants to allow states and health systems to pursue and evaluate medical liability models that promote patient safety and liability reform.

The American Medical Association (AMA) remains committed to traditional liability reforms such as a cap on non-economic damages, and supports testing a range of alternative models that would address medical liability concerns. The AMA is encouraged that the Patient Protection and Affordable Care Act, which was signed into law in March 2010 (Public Law 111-148), authorizes the Secretary of HHS to award five-year demonstration grants to states beginning in 2011 for the development, implementation and evaluation of alternatives to current tort litigation. The law also extends medical liability protections under the Federal Tort Claims Act to officers, governing board members, employees and contractors of free clinics.

How to get the most for our health care dollars

The Congressional Budget Office estimates that medical liability reform would reduce federal budget deficits by approximately $54 billion between 2010 and 2019.[5] The AMA is actively advocating for the following:

- A federal cap of $250,000 on non-economic damages. Reforms in California (specifically the Medical Injury Compensation Reform Act) and Texas show that reasonable caps on non-economic damage awards lead to slower growth in indemnity payments and premiums, as well as improved access to physicians relative to areas without caps.
- Funding for state-based pilot programs to develop promising alternative reforms to help improve access to care, reduce the incidence of meritless lawsuits, reduce liability premiums, and decrease the sense of fear that drives physicians to practice defensive medicine.

The AMA supports testing the following alternative mechanisms for addressing medical liability issues, in addition to caps on non-economic damages:

- **Health courts.** The health court would provide a forum where medical liability actions can be heard by judges specially trained in medical liability matters and who hear only medical liability cases. The AMA adopted principles in 2007 to assist state medical associations in establishing health courts.
- **Early disclosure and compensation programs.** Such programs would allow a physician to notify a patient of an adverse event within a limited period of time. Those offering patients or their families compensation for injuries in good faith would be provided immunity from liability.
- **Administrative determination of compensation.** A state's administrative entity would set a compensation schedule for injuries, resolve claims for injury, and establish compensation based on the patient's net economic loss subject to periodic payment and offset by collateral payments from other sources such as insurance.
- **Defined expert witness qualifications.** Establish statutory qualifications for those who may serve as a medical expert witnesses at trial.
- **Safe harbors for the practice of evidence-based medicine.** In June 2009 the AMA adopted a set of principles to be used to grant physicians liability protection when they practice in accordance with evidence-based medical practice guidelines. A key principle is that courts not allow a presumption of negligence if evidence-based medicine guidelines are not followed.

Spotlight: MICRA

California's Medical Injury Compensation Reform Act (MICRA) has been in place for over 30 years, and the AMA believes it is a model for medical liability reform. Between 1976 and 2007, medical liability premiums increased more than 1,029 percent throughout the country—except in California, where premiums grew by less than one-third of that amount (National Association of Insurance Commissioners, Profitability by Line by State in 2007 and previous editions). MICRA protects patients and physicians by:

- Providing full compensation for all economic damages, including medical bills, lost wages, future earnings, custodial care and rehabilitation.
- Placing a fair and reasonable limit of $250,000 on non-economic damages.
- Establishing a statute of limitations on claims.
- Ensuring that the bulk of any award goes to the plaintiffs, not attorneys.

Meaningful liability reforms, such as those included three decades ago in MICRA, have the potential to lower health care costs, improve patient access to physician services, and provide fair compensation to patients who are truly harmed by medical negligence.

References

1. Guardado, Jose, Professional Liability Insurance Indemnity and Expenses, Claim Adjudication, and Policy Limits, 1999–2008. American Medical Association Economic and Health Policy Research, October 2009.
2. Ibid.
3. Gallup poll for Jackson Healthcare, February 22, 2010.
4. U.S. Department of Health and Human Services, Addressing the New Health Care Crisis, March 2003.
5. Congressional Budget Office, letter to Senator Orrin Hatch, October 9, 2009.

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