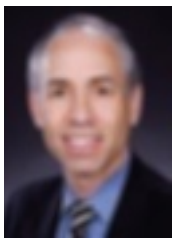
Defensive medicine: Can it increase your malpractice risk?



Douglas Mossman, MD

In his June 2009 address to the American Medical Association, President Obama commented that "doctors feel like they are constantly looking over their shoulder for fear of lawsuits. Some doctors may feel the need to order more tests and treatments to avoid being legally vulnerable."[1] By practicing what the President called "excessive defensive medicine," doctors provide "more treatment rather than better care" and drive up the cost of health care (***Box***).[2-7]

This column takes a look at how defensive practices can make psychiatric care more costly and less effective, by answering these questions:

- What is defensive medicine?
- How much medical practice is "defensive," and what does it cost?
- Do psychiatrists practice defensive medicine?
- Does defensive psychiatric practice lead to suboptimal care?
- Are some defensive practices justified?
- Can you balance good defense with good care?

What is defensive medicine?

In a 1994 study, the U.S. Office of Technology Assessment (OTA) said that defensive medicine occurs "when doctors order tests, procedures, or visits, or avoid high-risk patients or procedures, primarily (but not necessarily or solely) to reduce their exposure to malpractice liability." This definition does not require that defensive clinical practices provide no benefit to patients, only that the expected benefits are small relative to their costs.[8]

Preventing the worst outcome

Studies suggest that doctors develop and maintain practice habits—consciously or not—that aim to reduce their risk of getting sued for malpractice. For example, when patients presenting with tick bites express concern about Lyme disease, doctors overuse tests and needlessly prescribe antibiotics.[9] Although these practices are not evidence-based, they reduce doctors' anxiety by "preventing the worst outcome at relatively little risk and cost and avoiding a potential lawsuit at the same time."[10]

The OTA estimated that up to 8% of diagnostic procedures were ordered primarily because of conscious concern about malpractice liability, based on physicians' responses to a set of written scenarios.[8] In a recent study, 83% of Massachusetts physicians reported practicing defensive medicine and estimated that defensive reasons accounted for why they ordered:

- 18% of lab tests
- up to 30% of procedures and consultations
- 13% of hospitalizations.[11]

Almost all high-liability specialists (such as emergency room physicians, surgeons, and obstetrician/gynecologists) report practicing defensive medicine, often

DO YOU HAVE A QUESTION ABOUT POSSIBLE LIABILITY?

- Submit your malpractice-related questions to Dr. Mossman at douglas.mossman@dowdenhealth.com.
- Include your name, address, and practice location. If your question is chosen for publication, your name can be withheld by request.
- All readers who submit questions will be included in quarterly drawings for a $50 gift certificate for Professional Risk Management Services, Inc's online marketplace of risk management publications and resources (www.prms.com).

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gaging in "assurance behavior"—ordering tests, doing diagnostic procedures, and referring patients to consultants.[12]

Defensive psychiatry

Compared with other specialists, psychiatrists are at lower risk for being sued, but we engage in defensive practices nonetheless. A survey of British psychiatrists found that during the previous month, 75% made clinical decisions—such as "overcautiously" admitting patients or ordering special observation—because of worries about possible legal claims, complaints, or disciplinary action.[13]

Younger psychiatrists and psychiatrists who have experienced complaints and critical incidents are more likely to practice defensive medicine. This is hardly surprising—a malpractice suit can be very stressful.[14] But an amorphous dread of lawsuits affects many psychiatrists, including residents who never have been sued. The result: many needless, countertherapeutic, defensive practices.[15,16]

Unintended consequences

Defensive medicine is not just expensive and wasteful. It could increase your risk of litigation if practices result in harm.[17] Simon and Shuman[16] give examples of how attempts to avoid litigation can compromise clinical care when treating patients at risk for suicide:

- not prescribing clozapine—a treatment known to lower the risk of suicide[18]—to a chronically suicidal patient with schizophrenia because of fears of agranulocytosis (see "Clozapine for schizophrenia: Life-threatening or life-saving treatment?" Current Psychiatry, December 2009, p. 56-63)
- not recommending electroconvulsive therapy—and possibly prolonging the period when a severely depressed patient is at high risk for suicide—to avoid a lawsuit related to memory loss
- hospitalizing a patient at chronic risk for suicide who could be managed as an outpatient with appropriate safeguards, a practice that could undermine a valuable treatment alliance.

Good clinical care lowers the likelihood of harm to patients, making it a sound risk management practice, though not a complete strategy. Even the best doctors can start to think defensively when confronted with awkward, troubling, or life-threatening situations that could have medicolegal implications.[16] For example, when an outpatient threatens to hurt someone else, it may be tempting to just confine him in a hospital (which reduces the doctor's anxiety) even when other less coercive and more therapeutic options might better resolve the patient's problems and the risk of violence.

Recognizing that you're making clinical decisions out of fear of getting sued is the first step toward curtailing needlessly defensive practice. See *Table, page 88*[19] for more strategies.

continued

Box

Adding up the cost of defensive medicine

A 1996 study concluded that Medicare hospital costs for coronary care were 5% to 9% lower in states where effective tort reform has made malpractice suits less lucrative for plaintiffs and lawyers.[2] A recent study estimated that laws limiting malpractice payments lower health care expenditures by up to 4%.[3] Extrapolating these numbers to overall health care costs suggests that defensive medicine generates >$100 billion a year in expenditures.[4]

Defensive medicine has nonmonetary costs as well. In the United States, the rate of additional mammograms after initial screening is twice that in the United Kingdom, although breast cancer detection rates are similar.[5] These differences—which may reflect relative liability fears in the 2 countries[5,6]—mean that more American than British women receive false-positive biopsies and experience needless anxiety, surgery, scarring, and infection.[6,7]

Clinical Point

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Table

3 strategies for avoiding needless defensive medicine

Ask yourself, "If I weren't worried about getting sued, what would I do?" or "If I were my patient, what would I want me to do?" These questions, which help you identify the best clinical response, also may help you to implement it without taking extraneous defensive measures.

"Never worry alone." This recommendation from the Massachusetts General Hospital and McLean Hospital training programs[19] means that if you're concerned about a case, ask a colleague for a consultation. In addition to being helpful and reassuring, an outside perspective can support nondefensive, patient-oriented decision making.

If the treatment course you think is best involves a legal matter, make sure you understand the legal issues. For example, civil commitment is often the right intervention for a mentally ill person who poses a serious risk of harm, but some patients threaten to sue doctors who propose involuntary hospitalization. Your hospital's attorney may provide explanation and legal guidance if you do not thoroughly understand legal mechanisms or whether you are properly invoking them.

Clinical Point

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Justifiable defensiveness

Of course, it's perfectly appropriate for psychiatrists to recognize malpractice risks and take appropriate measures to avoid successful lawsuits. For example, thoughtful documentation of your data gathering, decision making, and informed consent is an appropriate protective practice. Usually, no one sees the documentation, and it contributes little to your patients' well-being. Good documentation can be inexpensive, however, and if done creatively, can improve data recording that in turn contributes to better treatment.[20]

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Bottom Line

Defensive medicine is minimally helpful and often costly. You can avoid being overly defensive—yet still protect yourself from possible malpractice suits—by providing optimal care, seeking sound clinical and legal advice, and documenting the concerns and reasoning that lead to your decisions.