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Tort reformers want cruel cure for fictional ill

defensive medicine myth should not cost victims their rights
At issue
Various commentaries calling for tort reform
By **Robert L. Abell**

The claim advanced by tort-reform advocates that "defensive medicine" practiced by significant numbers of doctors solely for the purpose of avoiding a groundless medical malpractice lawsuit drives up unnecessarily health care costs is (and has to be) a total myth.

If it is true, then it must also be true that a significant number of health-care providers in Kentucky and elsewhere are routinely, as a matter of everyday standard procedure, doing the following:

- Violating the standard of care that governs their treatment of patients,
- Defrauding health insurance companies and
- Engaging in criminal activity by violating federal mail and wire fraud statutes.

Because none of these can be presumed true to any degree, it must be concluded that the claims of tort reform proponents of "defensive medicine" are simply unfounded myth.

Kentucky law requires only that a doctor treat patients consistent with the "standard of care" - the care required of a reasonably competent practitioner in acting in the same or similar circumstances. Medical malpractice occurs where a deviation from the applicable standard of care causes harm.

"Informed consent" is an element of the standard of care. This requires a doctor to explain to the patient the potential risks and benefits of a course of treatment or testing. The decision about treatment is the patient's and Kentucky law simply requires a doctor to tell his or her patient enough about a course of treatment or tests that a reasonable person can make an informed decision.

It is patently unbelievable, if not wholly fictional, that Kentucky doctors (or doctors anywhere) are routinely recommending to their patients treatments and tests that the doctor believes unnecessary or without benefit. It is incredible on its face that doctors would do so solely to avoid a medical malpractice lawsuit.

Remember, medical malpractice occurs only where harm is caused by a deviation from the standard of care.

A decision not to go forward with a test or procedure not required by the standard of care cannot, by definition, be a deviation from the standard of care and cannot be medical malpractice.

The claim of defensive medicine is also an admission of widespread insurance fraud. Every health insurance policy has language in it to the effect that the insurance company is bound to pay only those expenses reasonably necessary for the care and treatment of the insured patient.

An unnecessary test administered as a measure of "defensive medicine" to avoid what would be a totally groundless medical malpractice lawsuit cannot be, by definition, reasonably necessary for

the care and treatment of the patient.

Defensive medicine and the insurance fraud that it admits is also a violation of federal mail and wire fraud statutes.

If a doctor has falsely certified that an unnecessary test was reasonably necessary and that certification is put in the mail in order to get paid for the test, it violates the mail fraud statute. If it is transmitted over the Internet or by e-mail, it is wire fraud.

Tort-reform advocates cannot and will never able to back up their claims of defensive medicine with any real evidence.

Any survey of doctors reporting the alleged incidence of defensive medicine is suspect and unreliable; they are responses believed to advance a particular political position, not a true representation of actual medical practice.

Tort reform advocates' proposed "cure" of for the evil of defensive medicine - the reduction of damages recoverable by persons and families most grievously harmed and injured by proven instances of medical malpractice - is both illogical and immoral.

It is proposed that we unburden hospitals, doctors and other health care providers from the commission and perils of deviating from the standard of care, insurance fraud and mail and wire fraud by reducing the rights of victims of medical malpractice.

While advancing this proposal is a chilling demonstration of power politics, it is also a demonstration of how unfounded and ultimately empty are the defensive medicine claims of tort reform advocates.

Robert L. Abell is a Lexington lawyer who handles personal injury, accident, insurance claims, employment law and workers' compensation cases. He is author of the Bluegrass Law Blog on Kentucky.com.