



Center for Justice & Democracy  
90 Broad Street, Suite 401  
New York, NY 10004  
Tel: 212.267.2801  
[centerjd@centerjd.org](mailto:centerjd@centerjd.org)  
<http://centerjd.org>

## CRITIQUE OF FEBRUARY 2011 AAOS “DEFENSIVE MEDICINE” SURVEY

In a widely-reported “survey” of 56 (according to American Academy of Orthopaedic Surgeons’ on-line summary of presentations) or 72 (according to the Academy’s news release) Pennsylvania orthopedic surgeons, these surgeons claim that 19.7 percent of the imaging tests that they ordered were for defensive purposes – i.e. to avoid being sued. This supposedly amounts to 34.8 percent of total imaging costs because “the most common test was an MRI, which costs more than an X-ray.” This information was presented at the Academy’s annual meeting in San Diego on February 16, 2011.

CJ&D requested Fred Hyde, M.D., Clinical Professor in the Department of Health Policy and Management at Columbia University’s Mailman School of Public Health, to review this study.

His comments follow:

- In searching for the actual paper containing these findings, it turns out that there is no paper, much less one peer reviewed prior to publication. Instead, this was a podium presentation by a medical student, accompanied by a faculty supervisor.
- The methodology, according to news and public relations reports, was this: to ask the ordering doctor whether or not he or she was ordering a test for reasons having to do with “defensive medicine.”
- However, the issues are not straightforward. For example, a moderator of the presentation suggested other possible explanations for the MRI exams. He noted that MRIs and other imaging studies are frequently ordered “unnecessarily” for reasons *other than malpractice avoidance*.
  - The moderator noted that many MRIs are required by insurers before those insurers will authorize an arthroscopy (a minimally invasive surgical procedure in which an examination and treatment of damage of the interior of a joint is performed using an arthroscope, an endoscope inserted into the joint through a small incision).
  - The insurers require the imaging study in an attempt to protect against fraud. Orthopedic surgeons believe the MRI study prior to arthroscopy to be

unnecessary; this was affirmed by a show of hands in the audience for the San Diego presentation.

- No mention was made of the potential for fraudulent billing if the MRI studies ordered were not for the benefit of the patient. If the box checked “defensive” were accompanied by a box that indicated “no bill to be rendered” or “bill referring physician” this would undoubtedly have been included in the report. It would be a reasonable assumption that, to the contrary, a bill was rendered to the patient or to the insurance company for the MRIs as ordered. Were the physicians really uninterested in the results of the MRI tests, and willing to risk sanction? Or did they “check the box” to “show support” without realizing that it might indicate a potentially fraudulent act?
- Finally, appearing in Pennsylvania especially,<sup>1</sup> this study should be regarded primarily as an advocacy position. This advocacy presentation has received disproportionate attention due to its timing in the context of current proposals before the Congress, not because of the credibility of the survey. The difficulty facing physicians especially in Pennsylvania concerning the cost and availability of malpractice insurance are well known, but are due to insurance issues, and not to causes directly related to tort law.

---

<sup>1</sup> Malpractice insurance has been an extremely difficult issue for Pennsylvania physicians and hospitals in the time period (1994 to present) since the Office of Technology Assessment dismissed "defensive medicine" as a minor, even illusory issue. That is, in part, because physicians and hospitals indulged in the self-insurance business, through the now insolvent MIIX and Hospital Association of Pennsylvania misadventures. Commercial insurers often avoid markets where "home grown" and "provider owned" insurance is their competitor. As a result of these insurance problems, Pennsylvania has compelled a variety of taxes and insurance surcharge premiums for purposes of providing affordable malpractice insurance coverage. Quite aside from the limitations of studies in this area, the controversies stemming from insurance problems facing Pennsylvania physicians and hospitals--some self-inflicted--would color and may overshadow any attempt to generalize findings from that state.