This is a reply to an article that appeared in the March 2010 medical journal Obstetrics & Gynecology, vol. 115, No. 3 titled "Cost-Containment and the Need for Medical Justice Reform" written by Philip K. Howard.

The author makes the following statement in support of his claim that too many tests are unnecessary and therefore ruining our health care system:

"A few years ago, I was not allowed to have minor knee surgery at an orthopedic hospital unless I went through a comprehensive 'preoperative examination'. There was no financial incentive to the hospital because this preoperative examination was to be done elsewhere. As it turned out, I recently had endured all those tests in my annual physical. But the orthopedic hospital would not accept month-old test results, nor even an explicit waiver by me of any liability. The result was pure waste: more than $1,000 spent on wholly unnecessary tests."

What the author fails to recognize is that unbeknownst to him, during that one month period of time between his physical and his surgery, his blood results *may* have changed. The hospital is right to require up-to-date pre-operative blood work to determine whether he is medically capable to have this surgery.

He claims that he wanted to sign a waiver absolving the hospital of any liability. The hospital was right not to agree to this. If he suffered injury from medical negligence, there are many arguments that would make his waiver useless. What if he slipped and fell in the hallway fracturing his femur on the way to the waiting area in the operating room? Does his 'waiver' absolve the hospital of ordinary negligence, or a lack of reasonable care? Or does his 'waiver' only apply to intra-operative injury? What about injury that occurs post-operatively? Again, the hospital was right to refuse to accept Mr. Howard's waiver of liability. (It's ironic that as a New York medical malpractice plaintiff's trial attorney I am standing up for the hospitals' decision).

The theme of the article is to contain costs. I am pleased to see the author acknowledge the need to create a system in order to quickly compensate patients injured by medical errors.

The writer states that the trial lawyers continue to point to a study by the Institute of Medicine that over 98,000 people are killed every year by preventable medical errors. He then says that trial lawyers have not reduced the errors, rather they have caused the fear.

This statement is ridiculous. It is not the trial lawyers job to reduce medical errors. That is for the medical profession to do. Our job as trial lawyers is to obtain compensation for injured victims. That should not instill fear. Actually, I have the solution to all the cries of tort reform. It will put all the medical malpractice lawyers out of business and fix the legal system with one fell swoop. Are you ready? Here's my solution:

Crack down on negligent physicians. Eliminate the medical malpractice and you will save the health care system in this country billions of dollars per year. People will live longer; they will go home from the hospital sooner; they will require less medication; they will not need physical therapy and rehabilitation; no longer will they require corrective surgery to fix a problem that never should have happened.

Stop focusing on lawyers who are trying to right a wrong. Focus instead on the physicians who are causing the medical errors. Eliminate that and you will have solved medical malpractice in the United States.

The author states that an early offer program is a useful idea because it limits attorney's fees to 10%. Since this is a 'cost-containment' study it is odd that the focus of cost-containment focuses on the fee an attorney receives for achieving full and fair compensation for the injured victim. He then says that many observers like this efficient way to resolve cases. His next statement is troubling: "But it does not address the problem of judicial unreliability that is the main driver of defensive medicine- early offers do not protect the doctor who did nothing wrong."

This opinion asserts two points that show the author's bias. One, that 'judicial unreliability' is the driving force for doctors ordering defensive tests. That appears to be more anecdotal than anything else. The second point is that the author is more concerned about physicians who did no wrong than the injured victim who is left to find a way to obtain compensation and seek corrective treatment and rehabilitation. Clearly, the physician isn't going to turn around at the time of the malpractice and make an immediate settlement offer. Malpractice cases are fiercely litigated and the value of every case is fought tooth and nail. The defense is always trying to limit the payout a victim receives and the plaintiff's attorney is always trying to obtain the maximum value for the patient.

The author neglects to mention that early offers are drastically discounted in an effort to contain costs. It's offered as an incentive to save attorney costs, fees, court costs and 2-3 years to bring a malpractice lawsuit to conclusion. The only benefit to an injured patient to accept an early settlement offer is if they need the money now. It is also a guaranteed payment.

The author also says that the incentive to get physicians to apologize forms a bond with the patient, but again, *does nothing to help the doctor who is wrongly accused.* Guess what? It shouldn't. The early offer plan and the sorry works program isn't designed to impact a physician who did nothing wrong. The writer's priority is again misplaced.

Focus instead on the doctors who commit malpractice; limit their ability to practice; compel them to take remedial classes or practice under the direct supervision of a competent board certified physician. Doing so will likely reduce the common errors seen in hospitals and office-based practices, thus reducing costs for patients, insurers, hospitals and even Medicare and Medicaid.

Listen to this and tell me if this statement bothers you? “...we cannot afford to pay doctors for unneeded services.” How could the author possibly know it’s unneeded? The author’s credentials indicate he is a partner in the law firm of Covington & Burling. How can he, as an attorney, determine what medical services are required? As a patient, the only person I want making decisions about my medical care is my physician, who is making decisions that is in my best interests without regard to reimbursement. While this may not be true for all physicians, I believe that the treating physician is the only one qualified to determine what treatment a patient should receive; not insurers and certainly not lawyers.

The more I read of this article the more I realize that the author has an inherent bias. He says “But Congress is not responding to the real needs of Americans. Liability overhaul is supported by every legitimate health care constituency, including consumer and patient safety groups, as well as by an overwhelming 83% of voters.” Where is the injured victim in this shout for overhaul? Aren’t those victims “Real Americans?” Aren’t those victims voters? Is the author suggesting that the remaining 17% of voters are injured victims and trial lawyers? Such a statement is nonsense.

The bottom line? The author correctly concludes that in the present political climate, health care reform cannot and will not change.

Cost-Containment and the Need for Medical Justice Reform