



# MEDICAL MALPRACTICE

# Notice from Plaintiff Attorney



Attorney may request to meet with physician



Attorney may request medical records



Attorney may send a legal notice of “Intent to Sue”



These may (or may not) be a “lawsuit”

# If Contacted by a Plaintiff Attorney

## Do Not Discuss It

Keep all information confidential until you have representation

## Refer Caller to Risk Management

If your hospital has a Office of Risk Management, refer all calls to the Risk Manager

## Call Malpractice Carrier

If you carry your own malpractice insurance, call your malpractice insurance carrier immediately

# Initiating the Lawsuit

## The Complaint

Identifies Plaintiff  
Usually Patient / Family

Identifies Defendant  
MD / RN / Hospital

Short and plain statement of facts that  
form basis of claim against Defendant

List of Causes of Action

# Causes of Action



# Causes of Action

Wrongful death

Loss of a Chance

Promise to cure

Battery &  
Assault

Abandonment

Breach of  
confidentiality

*Respondeat  
superior*

Negligent  
referral

False  
imprisonment

Defamation

Failure to warn

Negligent  
infliction of  
emotional  
distress

Failure to report

Altered medical  
records

Fraud &  
Misrepresentation

*Res Ipsa  
Loquitur*

# Res Ipsa Loquitur

“The thing speaks for itself”

Requires Three conditions:

- ❖ Injury could not have occurred without negligent act
- ❖ Defendant had direct control over cause of injury
- ❖ Patient did not and could not contribute to the injury

# Malpractice vs. Negligence

## Malpractice

Professional misconduct or demonstration of an unreasonable lack of skill with the result of injury, loss, or damage to the patient

## Negligence

Unintentional action that occurs when a person performs or fails to perform an action that a reasonable person would or would not have committed in a similar situation



# Negligence

## Malfeasance

Performing a wrong or illegal act

## Misfeasance

Improperly performing an otherwise proper or lawful act

## Nonfeasance

Failure to perform a necessary action



---

Duty

---

Dereliction

---

Direct or proximate cause

---

Damages

---

**Negligence Requires the Four Ds**



## First Element of Negligence

## DUTY

---

Plaintiff must prove there was a doctor-patient relationship

---

Doctor-Patient relationship establishes the legal duty to conform to a standard of conduct



## Second Element of Negligence

# DERELICTION

Provider failed to conform to the relevant  
Standard of Care

- Standard of Care:  
What a reasonable person would have done under the same or similar circumstances
- The applicable standard of care is provided by the testimony of experts
- But NO NEGLIGENCE if:
  - ✓ Patient recognized & accepts risks
  - ✓ There is no requirement of a perfect result



## Third Element of Negligence


# DIRECT OR PROXIMATE CAUSE



Cause in Fact – Plaintiff must prove defendant’s negligence caused the injury



Proximate Cause - There exists a reasonably close connection between the defendant’s conduct and the patient’s injury



Fourth  
Element of  
Negligence

**DAMAGES**

**Compensatory Damages**


Economic Damages

Non-Economic Damages

**Punitive Damages**

Punish defendant

Exemplary



## Fourth Element of Negligence

# OTHER DAMAGES

### Hedonic Damages

“Loss of enjoyment of life”

### Nominal Damages

Token payment awarded by court

### Attorney Fees

Usually awarded to prevailing party

### Court Costs

Usually awarded to prevailing party



# California Medical Injury Compensation Reform Act



Unlimited economic damage compensation



Non-economic damages capped at \$250,000



Model for legislative reform at state level



Premiums in California rose much slower



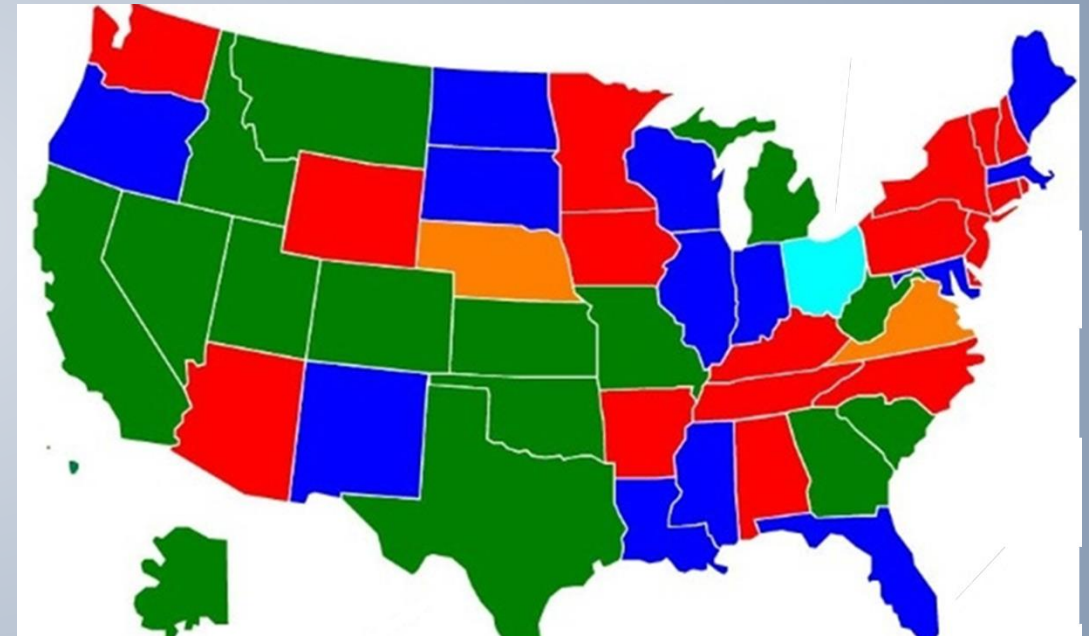
# Non-Economic Caps in United States

Red: No Cap

Green: \$250,000 to \$400,000

Blue: \$500,000 to  
\$1,000,000

Orange: \$1,000,000 or more





# DEFENSES

## Affirmative Defenses

---

Denial

---

Assumption of risk

---

Contributory negligence

---

Comparative negligence

---

Statute of limitations

---

*Res Judicata*



# DEFENSES

## Denial

---

Most common defense

---

Plaintiff must prove all elements of wrongful or negligent act

---

Usually requires testimony of expert witness

---

Jury determines if Defendant caused injury and is liable



## DEFENSES

# Assumption of Risk

---

Plaintiff understood risk involved

---

Plaintiff chose to accept risk

---

No recovery if plaintiff voluntarily accepted risk

---

Signed document shows patient authorized procedure, understood risks, & consented to treatment



## DEFENSES

### Contributory Negligence

---

Plaintiff's conduct contributed to injury

---

Complete bar to recovery of damages

---

Plaintiff will receive no monetary damages



## DEFENSES

### Comparative Negligence

---

Like contributory negligence

---

Plaintiff's own negligence helped cause the injury

---

Not a complete bar to recovery

---

Allows Plaintiff to recover damages based on proportion of Defendant's fault



# DEFENSES

## Statute of Limitations

---

Plaintiff loses right to sue if lawsuit not filed by deadline (2-6 yrs)

---

**Discovery Rule** – extends S of L until plaintiff actually or *reasonably should have* discovered injury

---

**Statute of Repose** – an absolute deadline (e.g., ten years) after which lawsuit cannot be filed

---

Statute of Limitations may be different for minors



## DEFENSES

### *Res Judicata*

---

“The thing has been decided by judgment”

---

Once the Court decides a case, Plaintiff cannot bring new lawsuit on same subject





# DISCOVERY

## Peer Review Documents

---

Not discoverable in most states

---

Protected by state statute so protection may vary

---

Court may order “in camera” examination of documents (rare)

---

Exception: Voluntary disclosure by third party



# DISCOVERY

## Medical Records

---

Medical records are discoverable

---

General rule: Do not alter medical records

---

May correct mistake in record but label “Addendum”, sign, date; do not change original text

---

Metadata of electronic medical records (“EMR”) are discoverable



# DISCOVERY

## Expert Witness

---

Participate with the selection process

---

Choose truly independent expert - no friend/relative, regular contact

---

Choose expert with quality credentials

---

Choose an expert with medicolegal experience

---

Expert should be contacted only by defense attorney



# DISCOVERY

## Testimony

---

Vitally important – prepare thoroughly

---

Meet with defense attorney

---

Read before and after deposition

---

Mentally prepare for deposition testimony

---

Dress and demeanor are important



# ALTERNATIVE DISPUTE RESOLUTION

---

Method other than court trial to settle dispute

---

**Arbitration** – settling dispute without a judge; decision is binding

---

**Mediation** – Opinion of third party for non-binding decision

---

# SETTLEMENT

---

Authority to settle often lies with the Defendant

---

Differs from typical lawsuits where insurer has final settlement authority

---

Settlement reported to National Practitioner Databank

# TRIAL



---

## Preponderance of the Evidence

One side must demonstrate a greater weight of evidence than the other side

---





# TRIAL

## Possible Outcomes

---

Voluntary dismissal by Plaintiff

---

Dismissal by judge with prejudice

---

Summary judgment motion granted

---

Settlement (ADR)

---

Trial and jury verdict

---

Appeal by Plaintiff or Defendant





# Golden Rules

- Prevention is better than the best outcome
- Relate well to your patients
- Keep good medical records
- Document informed consent discussions
- Don't trust patients to follow through on referrals
- Track test results (tickler system)
- Chart when ordering medications



# Golden Rules

- Avoid diagnosing on the telephone
- Never “fix” medical records (“spoliation”)
- Spend sufficient time with patients
- Listen carefully to patient/family concerns
- Explain honestly but carefully after an adverse event
- Care deeply whether patients like you as their doctor

