

# 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

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

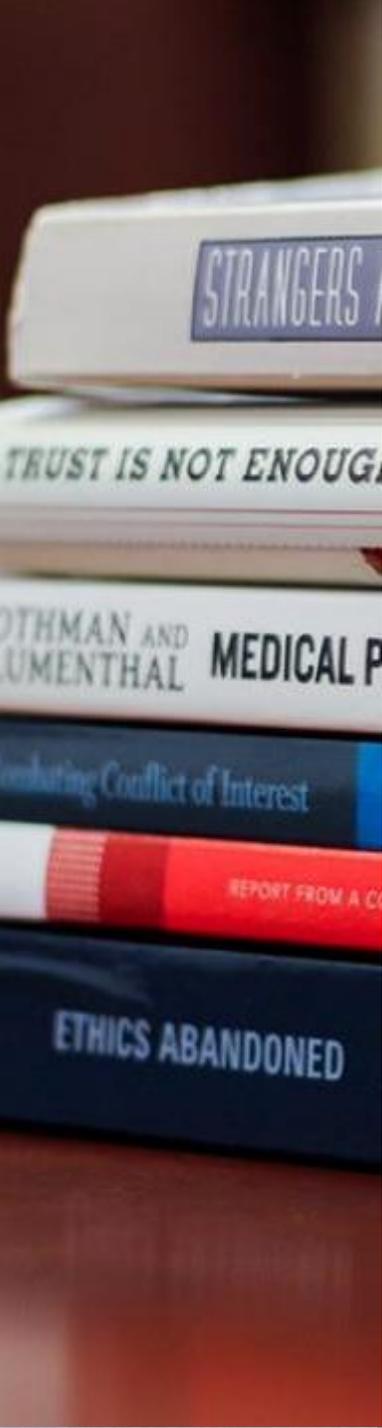
Performing a wrong or illegal act

## Misfeasance

Improperly performing an otherwise proper or lawful act

## Nonfeasance

Failure to perform a necessary action



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Duty

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Dereliction

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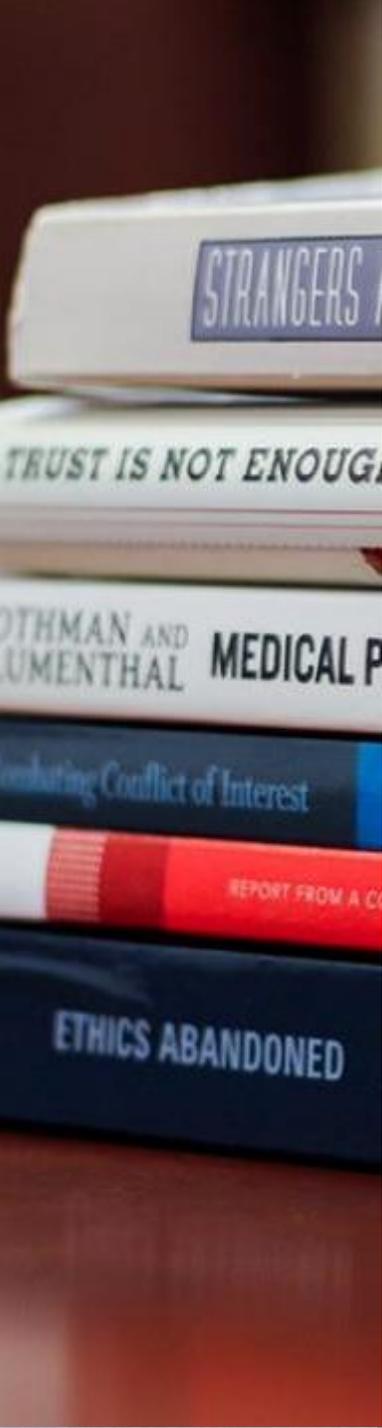
Direct or proximate cause

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Damages

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**Negligence Requires the Four Ds**



## First Element of Negligence

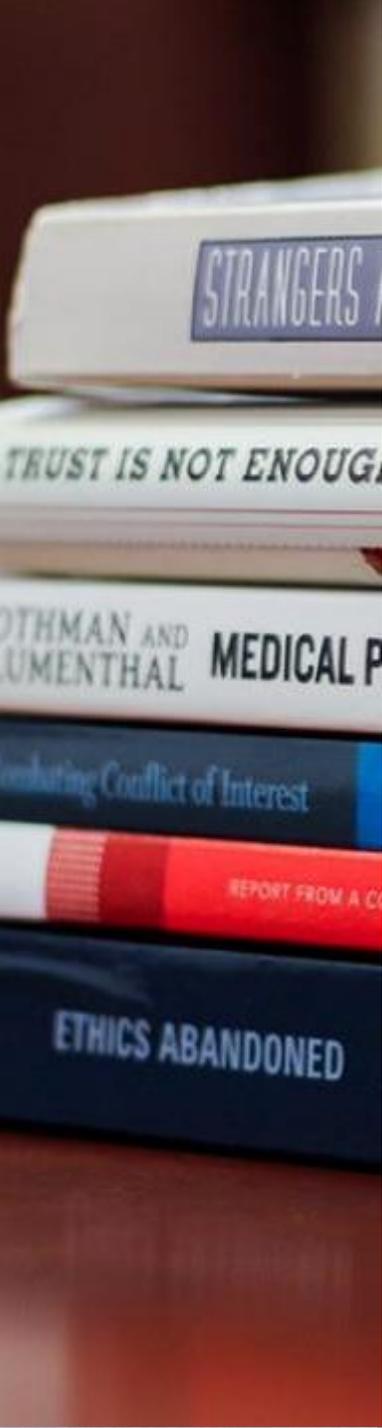
# DUTY

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Plaintiff must prove there was a doctor-patient relationship

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

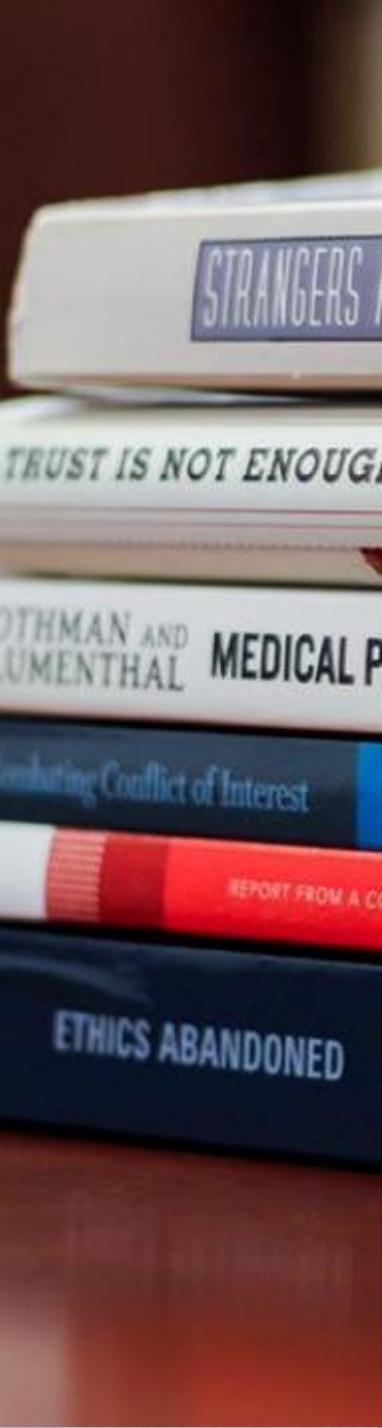


## Second Element of Negligence

# 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

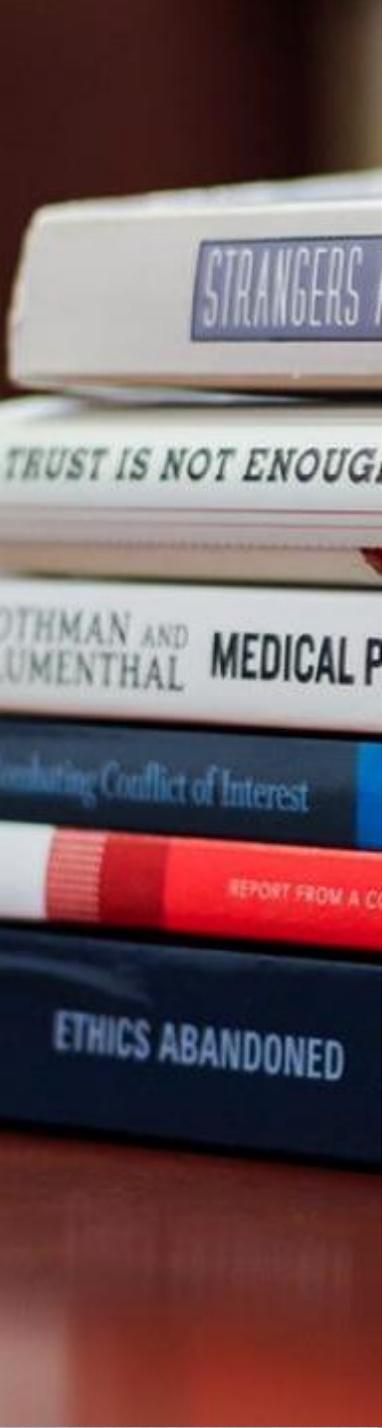
# DIRECT OR PROXIMATE CAUSE



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

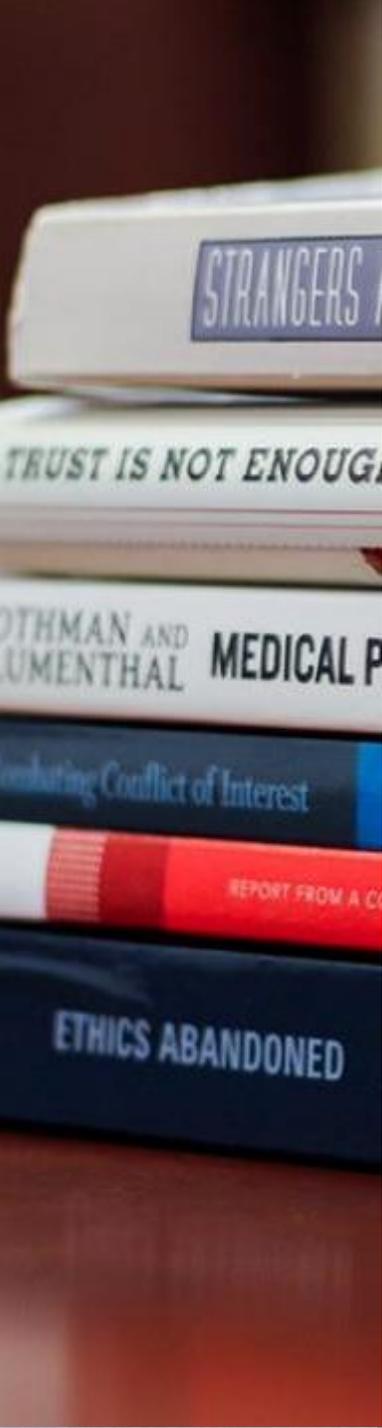
## **DAMAGES**

### **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

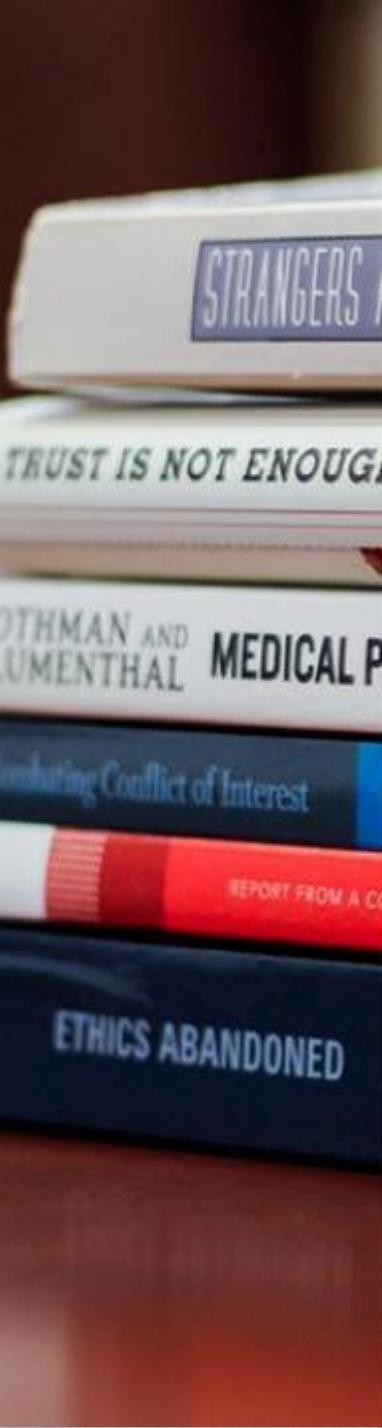
Token payment awarded by court

### 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

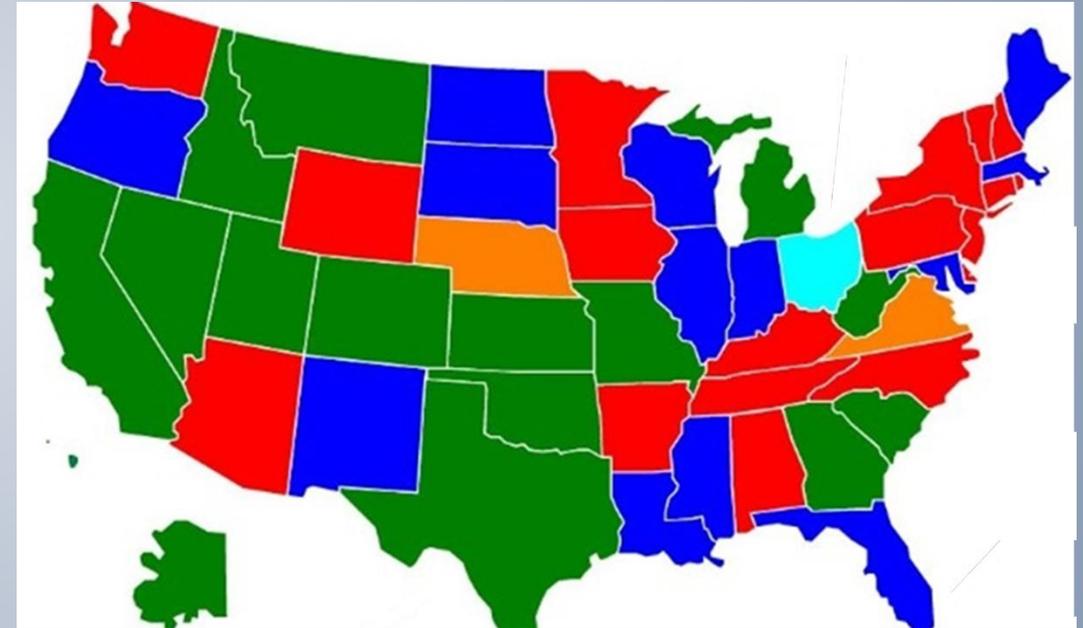
# Non-Economic Caps in United States

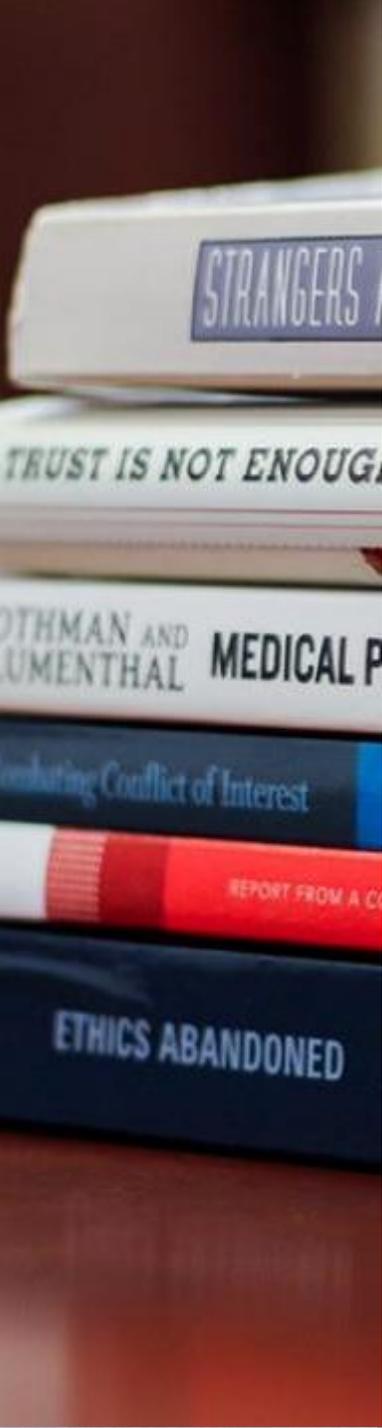
Red: No Cap

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

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

Orange: \$1,000,000 or more





# DEFENSES

## Affirmative Defenses

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Denial

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Assumption of risk

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Contributory negligence

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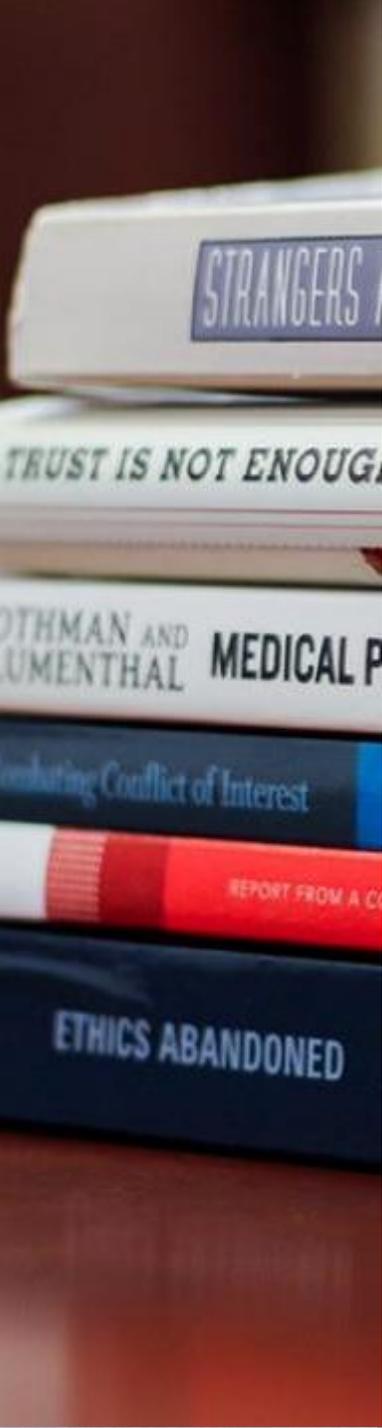
Comparative negligence

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Statute of limitations

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*Res Judicata*



# DEFENSES

## Denial

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Most common defense

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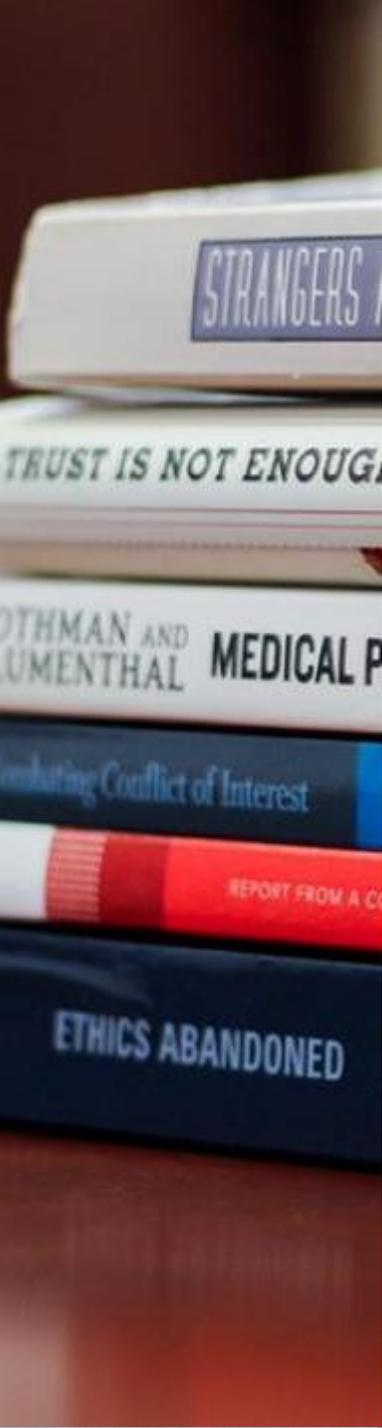
Plaintiff must prove all elements of wrongful or negligent act

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Usually requires testimony of expert witness

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Jury determines if Defendant caused injury and is liable



## DEFENSES

# Assumption of Risk

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Plaintiff understood risk involved

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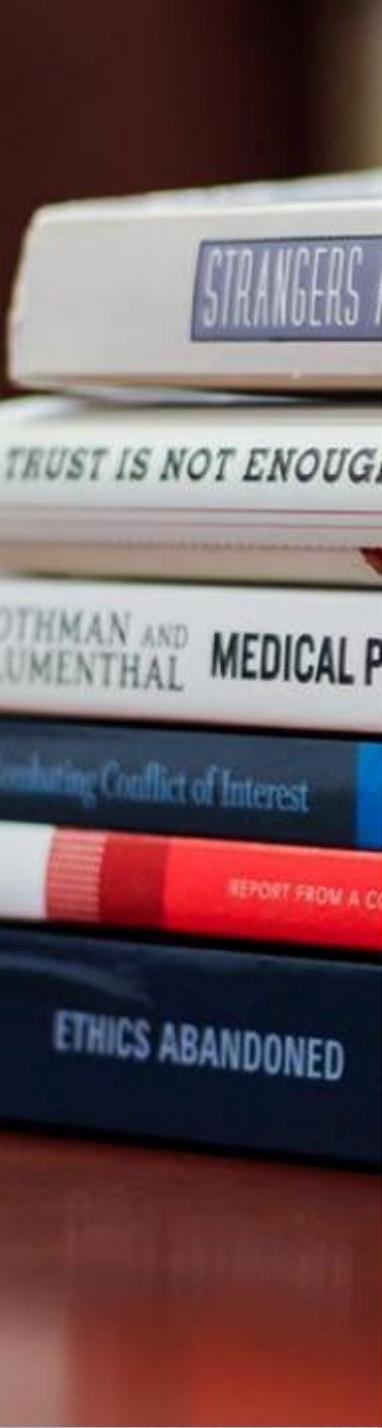
Plaintiff chose to accept risk

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No recovery if plaintiff voluntarily accepted risk

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



## DEFENSES

### Contributory Negligence

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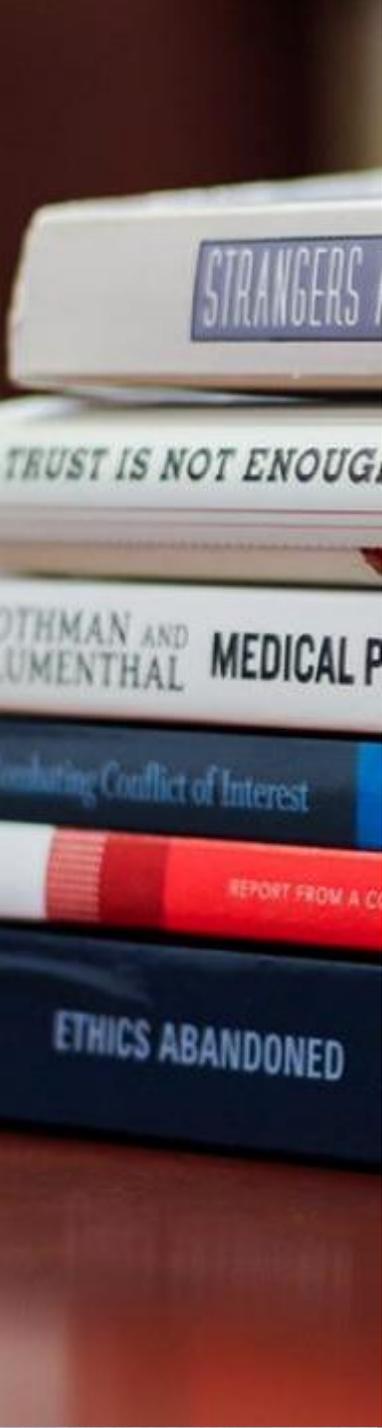
Plaintiff's conduct contributed to injury

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Complete bar to recovery of damages

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Plaintiff will receive no monetary damages



## DEFENSES

### Comparative Negligence

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Like contributory negligence

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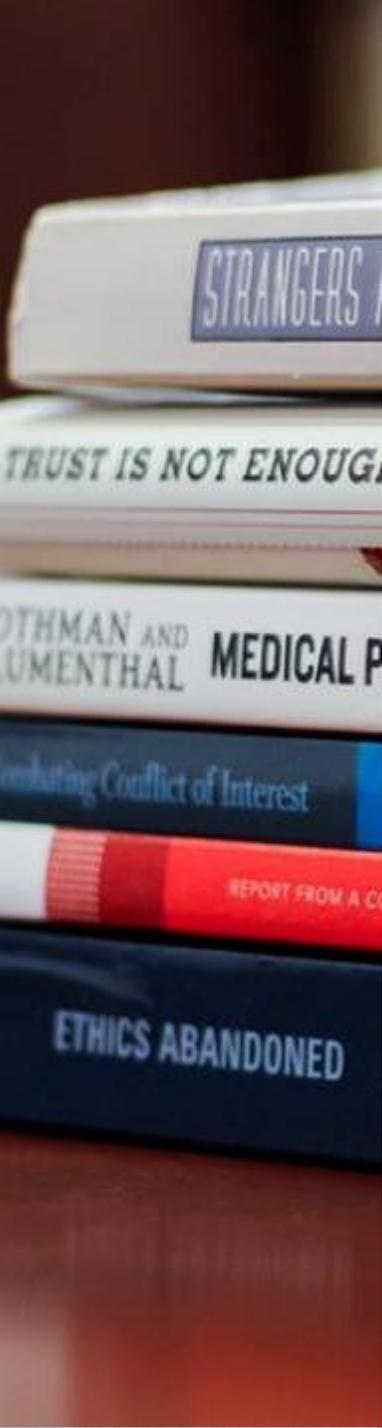
Plaintiff's own negligence helped cause the injury

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Not a complete bar to recovery

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



# DEFENSES

## Statute of Limitations

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

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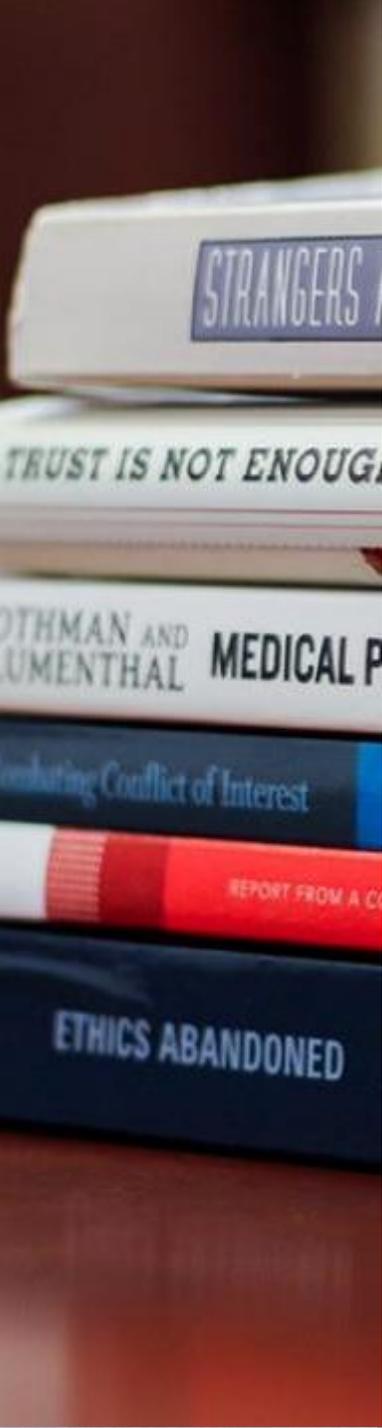
**Discovery Rule** – extends S of L until plaintiff actually or *reasonably should have* discovered injury

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

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Statute of Limitations may be different for minors



## DEFENSES

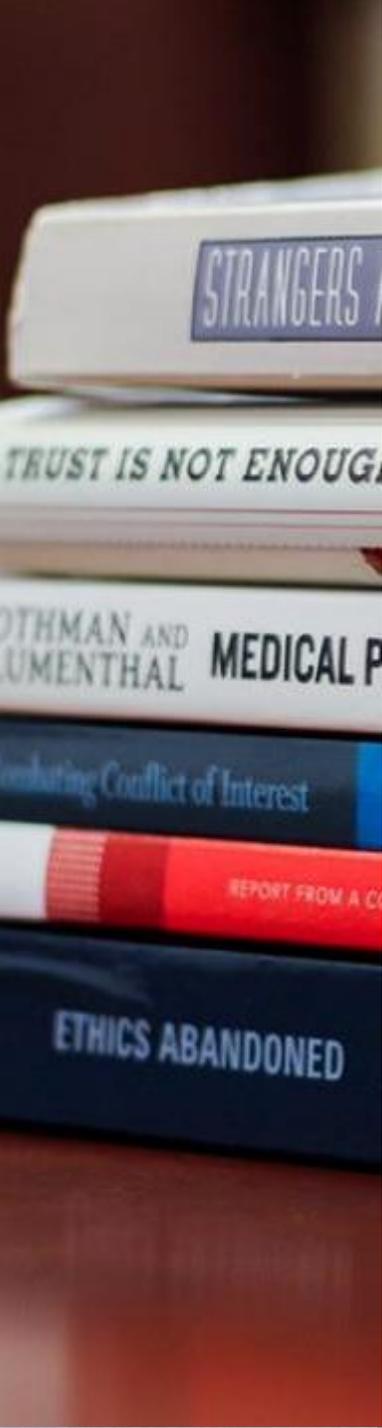
### *Res Judicata*

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“The thing has been decided by judgment”

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



# DISCOVERY

## Peer Review Documents

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Not discoverable in most states

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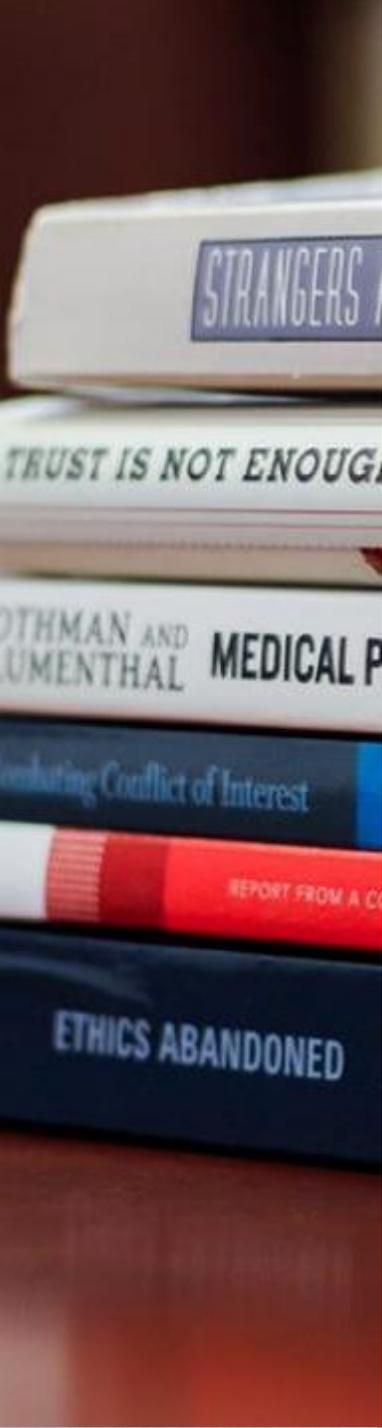
Protected by state statute so protection may vary

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

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Exception: Voluntary disclosure by third party



# DISCOVERY

## Medical Records

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Medical records are discoverable

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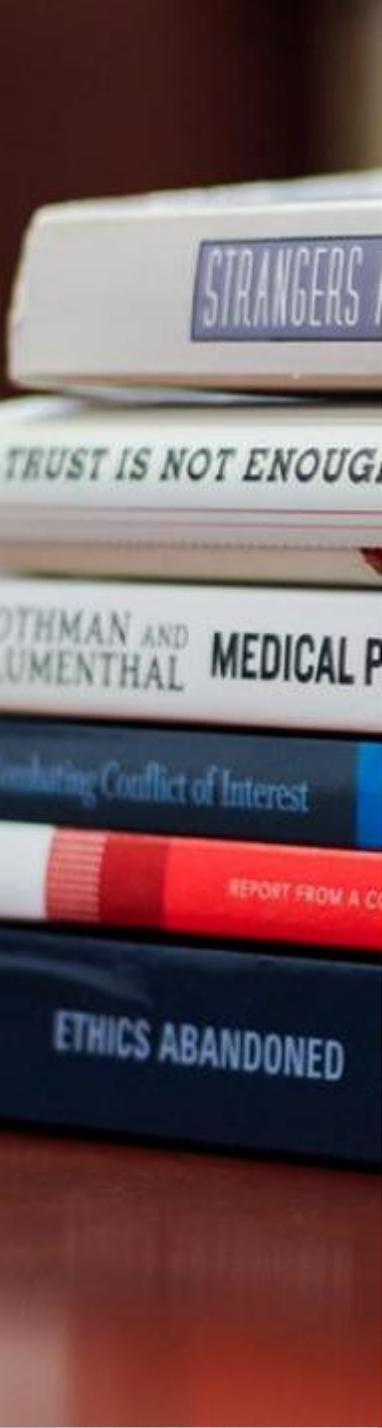
General rule: Do not alter medical records

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

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



# DISCOVERY

## Expert Witness

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Participate with the selection process

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

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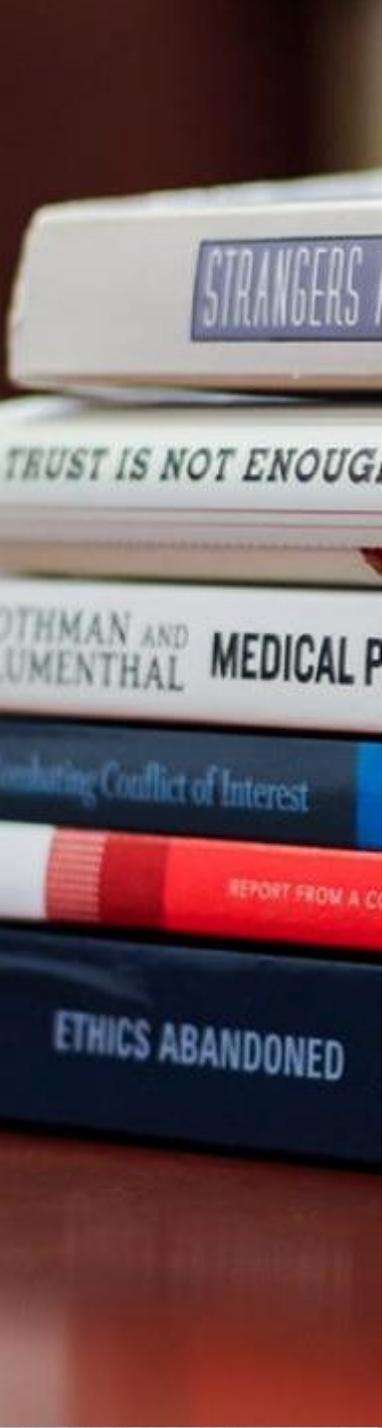
Choose expert with quality credentials

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Choose an expert with medicolegal experience

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Expert should be contacted only by defense attorney



# DISCOVERY

## Testimony

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Vitally important – prepare thoroughly

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Meet with defense attorney

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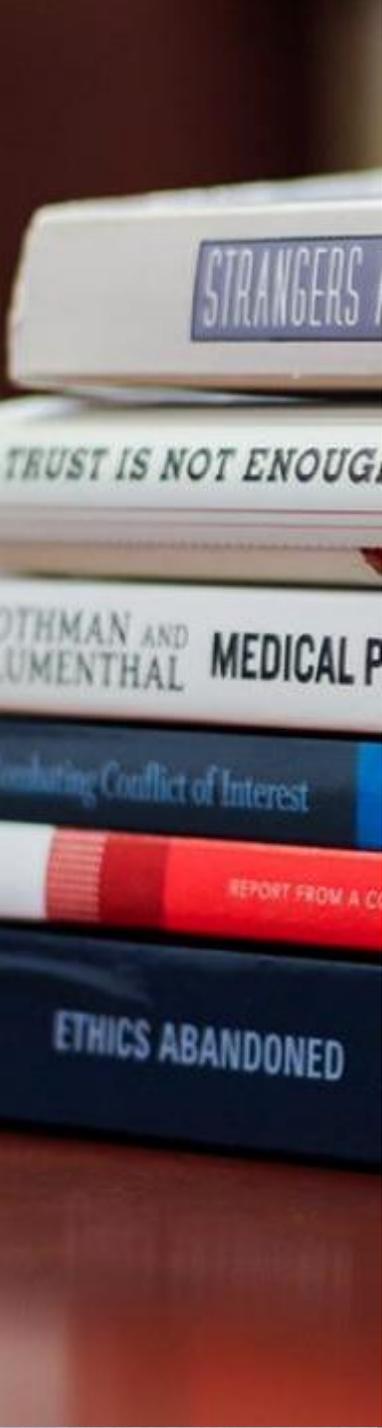
Read before and after deposition

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Mentally prepare for deposition testimony

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Dress and demeanor are important



# ALTERNATIVE DISPUTE RESOLUTION

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Method other than court trial to settle dispute

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

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

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# SETTLEMENT

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Authority to settle often lies with the Defendant

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Differs from typical lawsuits where insurer has final settlement authority

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Settlement reported to National Practitioner Databank

# TRIAL

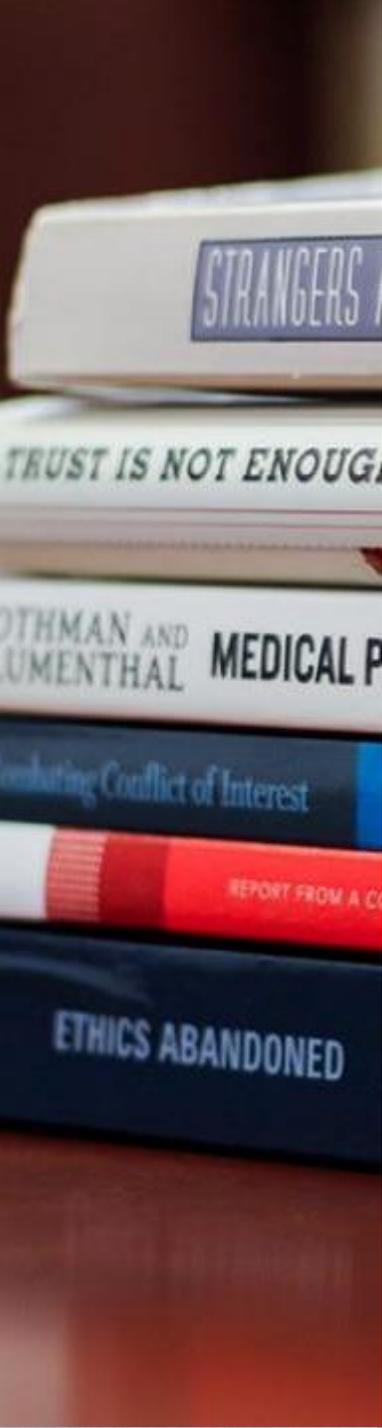


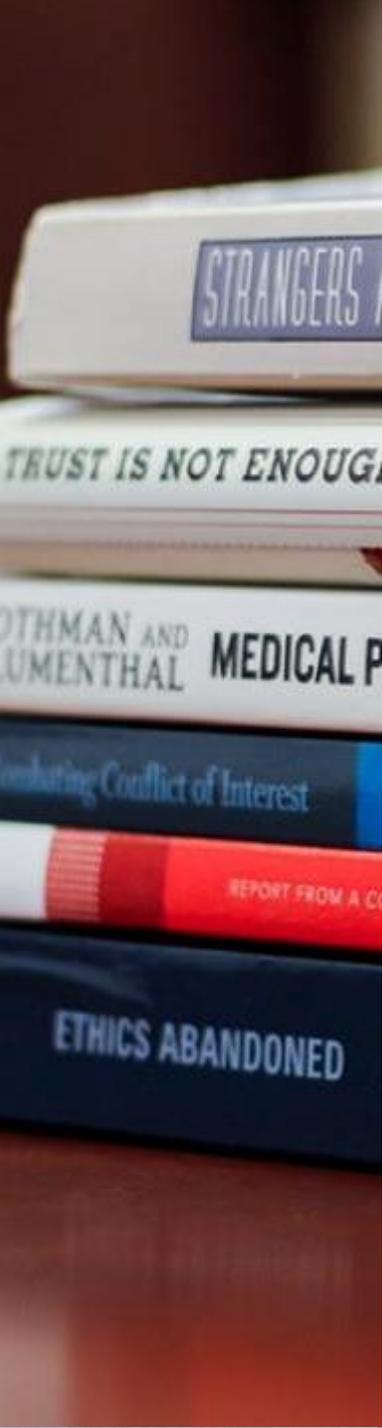
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## Preponderance of the Evidence

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

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# TRIAL

## Possible Outcomes

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Voluntary dismissal by Plaintiff

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Dismissal by judge with prejudice

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Summary judgment motion granted

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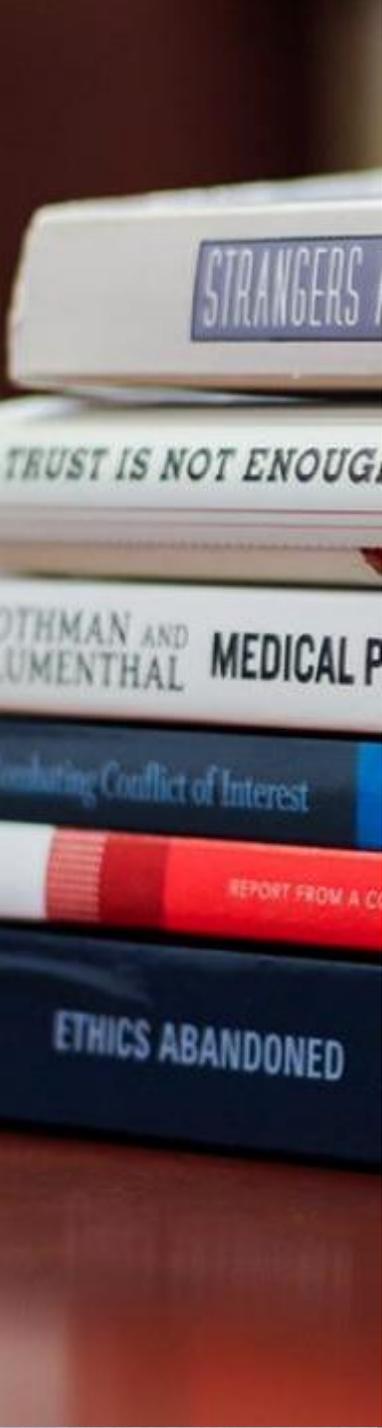
Settlement (ADR)

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Trial and jury verdict

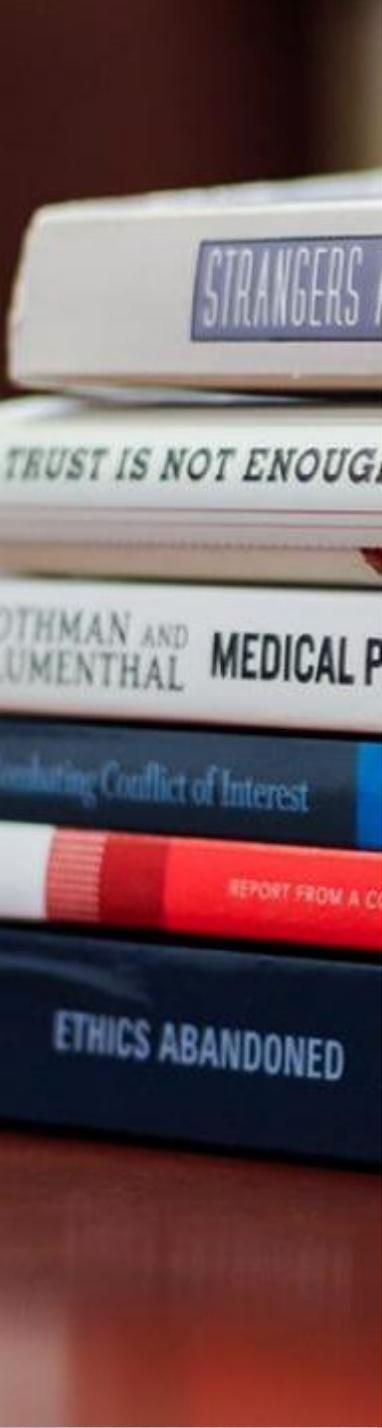
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Appeal by Plaintiff or Defendant



# 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

