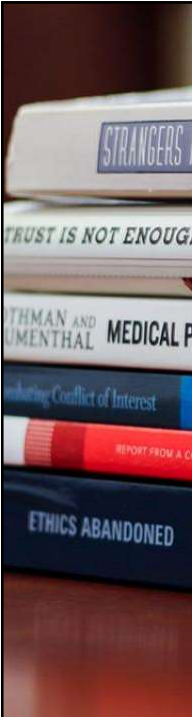








MEDICAL MALPRACTICE




1



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"



2




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


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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



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Causes of Action

The following causes of action are listed on the cards:


- Abandonment
- Breach of confidentiality
- Wrongful death
- Fraud & misrepresentation
- Res Ipsa Loquitur
- Altered medical records
- Battery & Assault
- Failure to report
- Negligent referral
- Defamation
- False imprisonment
- Respondeat superior


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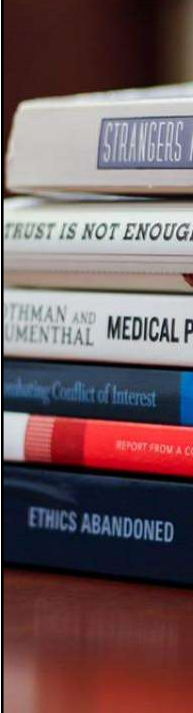
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Causes of Action

Wrongful death	Loss of a Chance	Promise to cure	Battery & Assault	Abandonment
Breach of confidentiality	<i>Respondeat superior</i>	Negligent referral	False imprisonment	Defamation
Failure to warn	Negligent infliction of emotional distress	Failure to report	Altered medical records	Fraud & Misrepresentation
		<i>Res Ipsa Loquitur</i>		


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Res Ipsa Loquitur

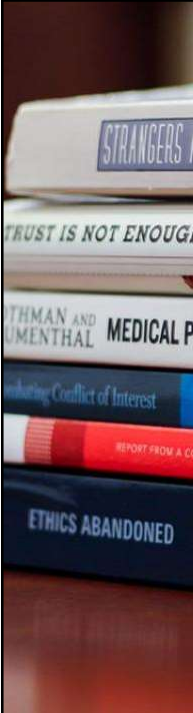
“The thing speaks for itself”

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


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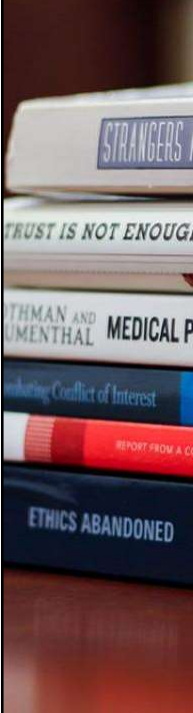


Malpractice vs. Negligence

Malpractice	Negligence
<p>Professional misconduct or demonstration of an <u>unreasonable lack of skill</u> with the result of injury, loss, or damage to the patient</p>	<p><u>Unintentional action</u> 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</p>


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Negligence

Malfeasance	Misfeasance	Nonfeasance
Performing a wrong or illegal act	Improperly performing an otherwise proper or lawful act	Failure to perform a necessary action

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Duty

Dereliction

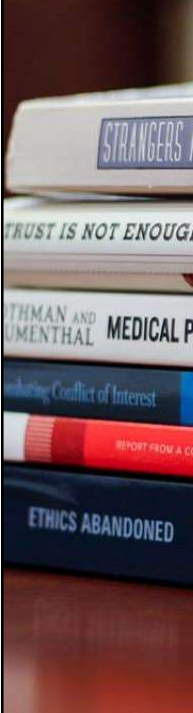
Direct or proximate cause

Damages

Negligence Requires the Four Ds

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First Element of Negligence

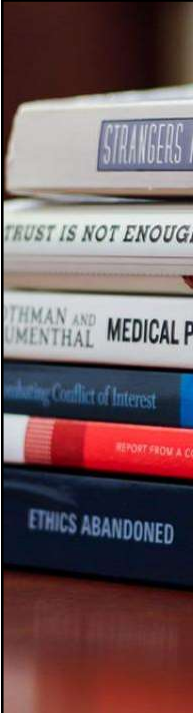
DUTY

Plaintiff must prove there was a doctor-patient relationship

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

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Second Element of Negligence

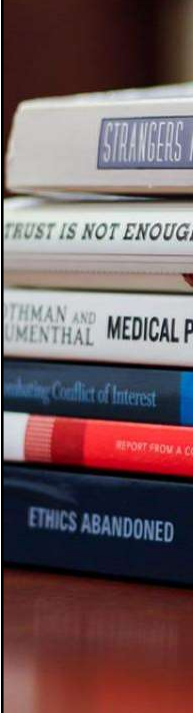
DERELICTION

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


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Third Element of Negligence


DIRECT OR PROXIMATE CAUSE



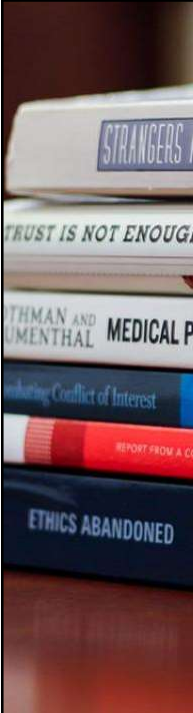
Cause in Fact – Plaintiff must prove defendant’s negligence caused the injury



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



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Fourth Element of Negligence


DAMAGES

Compensatory Damages

Economic Damages
Non-Economic Damages

Punitive Damages

Punish defendant
Exemplary




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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


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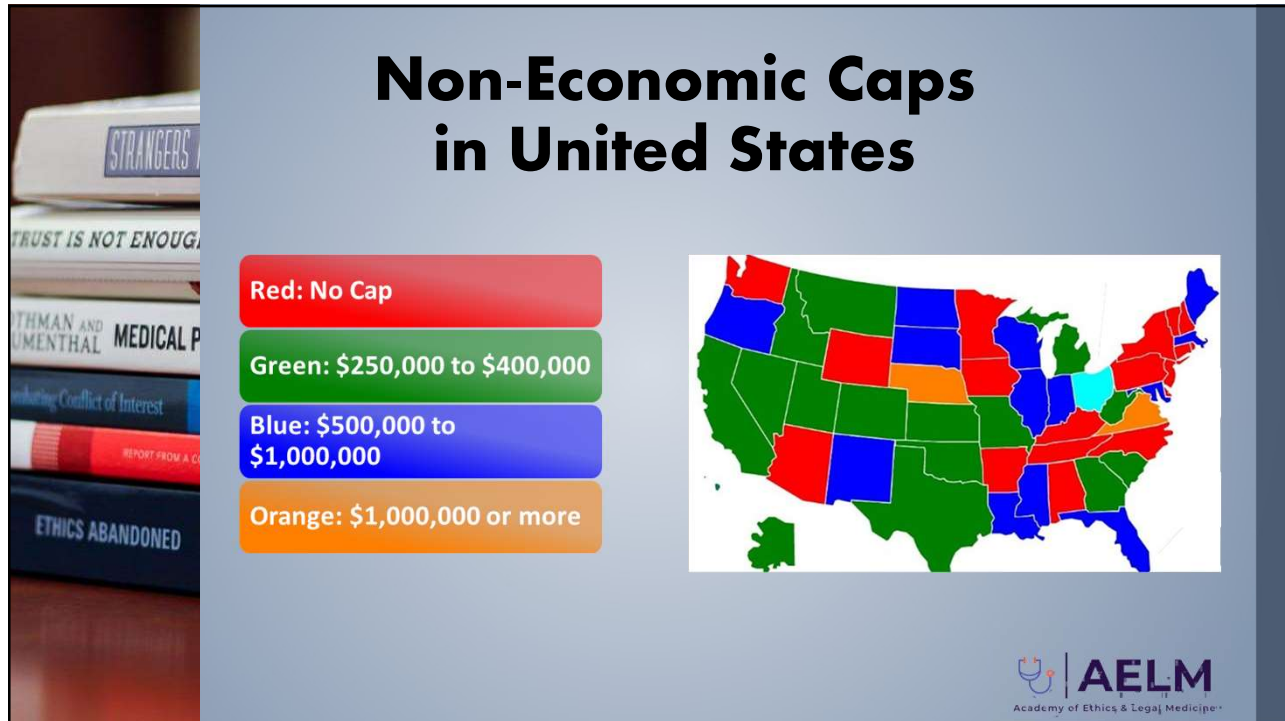


California Medical Injury Compensation Reform Act

-  Unlimited economic damage compensation
-  Non-economic damages capped at \$250,000
-  Model for legislative reform at state level
-  Premiums in California rose much slower


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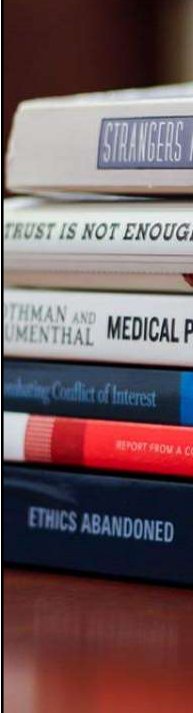
DEFENSES

Affirmative Defenses

- Denial
- Assumption of risk
- Contributory negligence
- Comparative negligence
- Statute of limitations
- Res Judicata*

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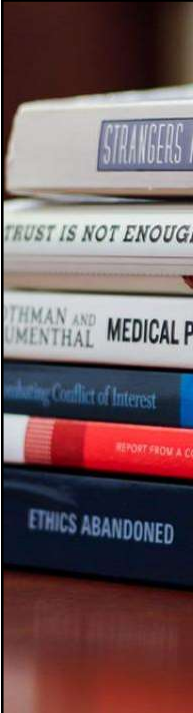
DEFENSES

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




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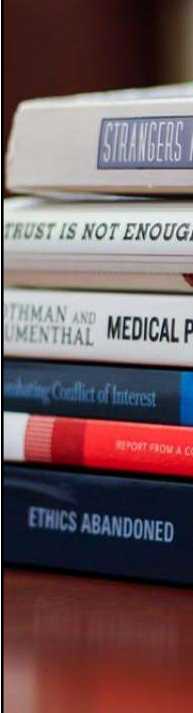
DEFENSES

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




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DEFENSES

Contributory Negligence

- Plaintiff's conduct contributed to injury
- Complete bar to recovery of damages
- Plaintiff will receive no monetary damages



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DEFENSES

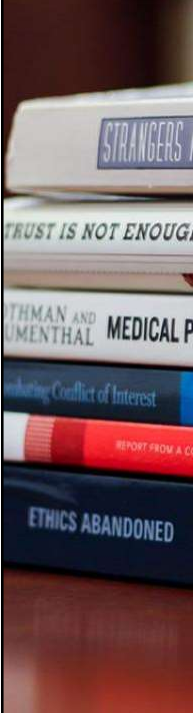
Comparative Negligence

- 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



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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

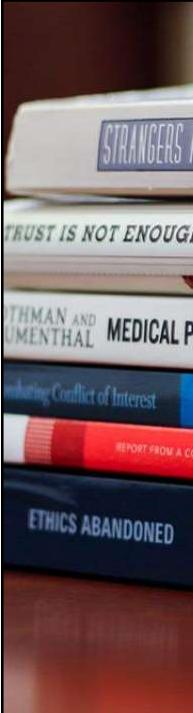
Statute of Repose – an absolute deadline (e.g., ten years) after which lawsuit cannot be filed

Statute of Limitations may be different for minors



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DEFENSES

Res Judicata

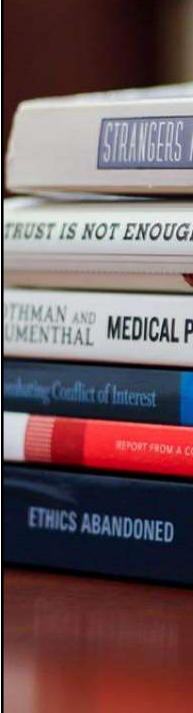
“The thing has been decided by judgment”

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



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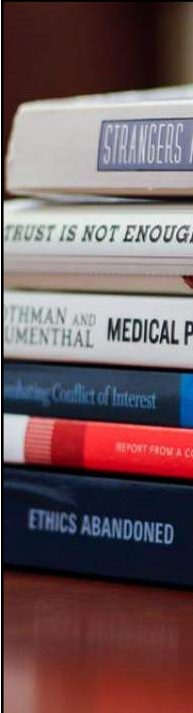
DISCOVERY

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




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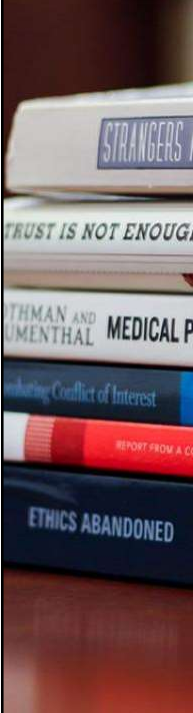
DISCOVERY

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




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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

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DISCOVERY

Testimony

- Vitaly important – prepare thoroughly
- Meet with defense attorney
- Read before and after deposition
- Mentally prepare for deposition testimony
- Dress and demeanor are important

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ALTERNATIVE DISPUTE RESOLUTION

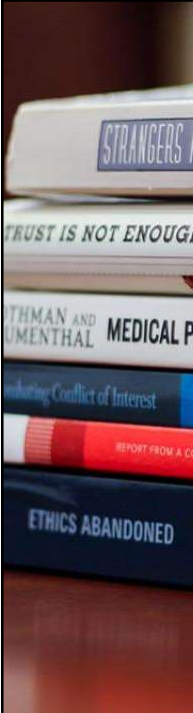
Method other than court trial to settle dispute

Arbitration – settling dispute without a judge; decision is binding

Mediation – Opinion of third party for non-binding decision



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SETTLEMENT

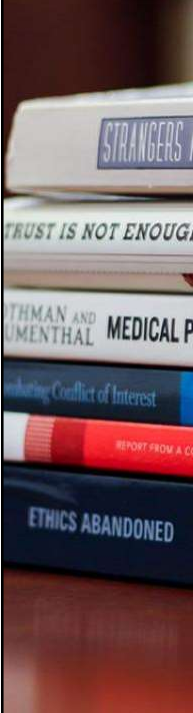
Authority to settle often lies with the Defendant

Differs from typical lawsuits where insurer has final settlement authority


Settlement reported to National Practitioner Databank



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TRIAL




Preponderance of the Evidence

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




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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



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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



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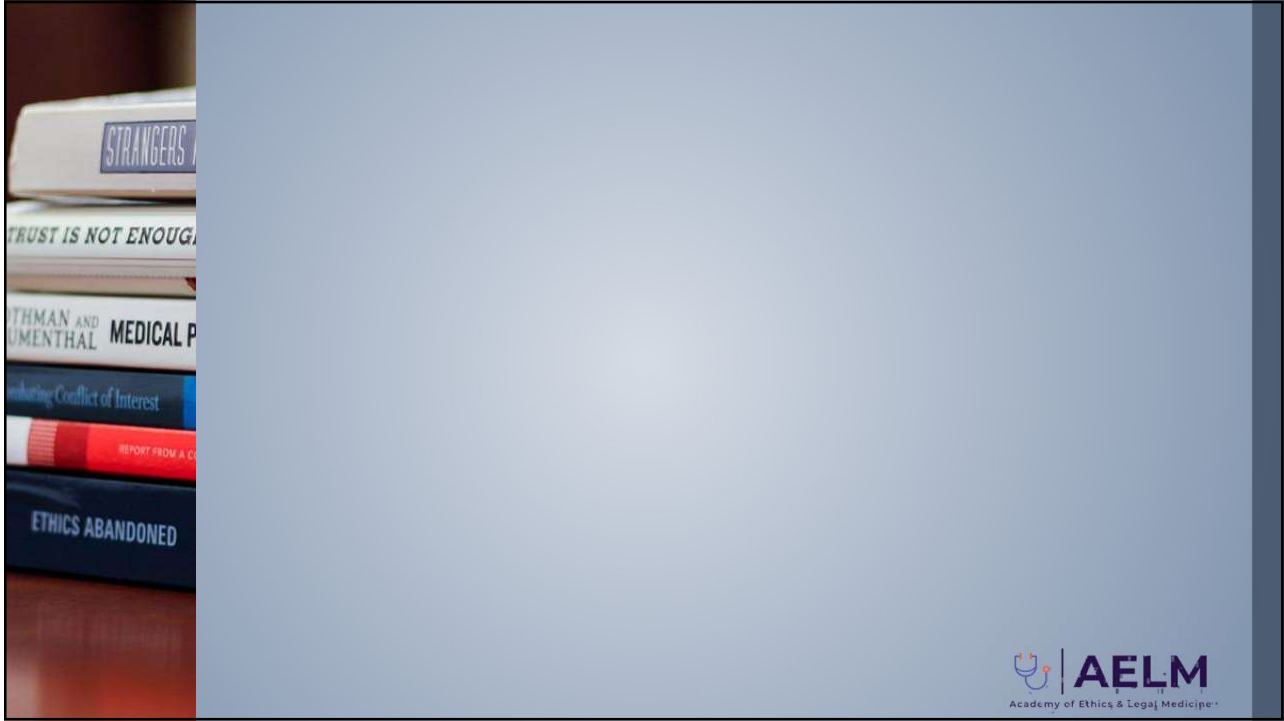


Golden Rules

- 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



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