

## Mitigating Legal and Ethical Risks

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## Conflict of Interest

- We have no conflicts of interest, commercial or otherwise, that apply to this presentation.
- We are receiving no commercial sponsorship or support for this presentation.

## Goals

- Provide an overview of the liability system
- Dispel misconceptions
- Provide information that will assist you in avoiding litigation
- Provide information that will assist you in winning a lawsuit

## True or False

- There are too many frivolous medical malpractice lawsuits?

*Answer: False*

The number and total value of medical liability payments made on behalf of physicians declined for the eighth consecutive year in 2011, according to the National Practitioner Data Bank

- Too expensive – attorneys more selective.
- Typically \$100,000 in defense expenses (not counting attorney's fees).



"And remember, people, there are no frivolous lawsuits... Only frivolous attorneys!"

## True or False

- Only certain types of people sue?  
*Answer: True and False*
- Patients are predominantly female (62%) and inpatient (63%),
- Mean age = 42 years. Children younger than 10 years old were 70% more likely to receive a large payment and patients older than 70 years were 80% less likely.
- Patient outcomes are the strongest predictor of both payment size and likelihood of a large payment.



## True or False

- Most medical malpractice cases settle?

*Answer: False*

- 75-80% of medical malpractice claims were closed with no payment.
- 15-20% settled.
- 5% go to trial.
  - Of the 5% that go to trial, physicians win 90%



### True or False

- Medical malpractice premiums are driving physicians out of business?  
*Answer: True and False.*
- Nearly 60% of premiums nationwide held steady in 2012, about 26% decreased, and 15% of increased.
- Rates fell 1.7% in 2012, they dipped 0.5% in 2011 and 0.2% in 2010.
- Depends on where you live.



### Liability Premiums?

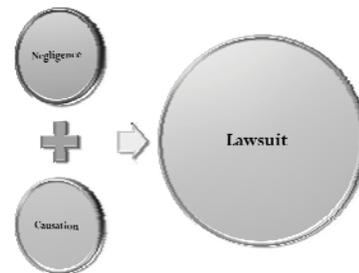
	2011	Highest 2012		2011	Lowest 2012
<b>Internist</b>			<b>Nebraska*</b>	\$2,381	\$2,381
Florida	\$47,731	\$47,731	Minnesota	\$3,375	\$3,375
Illinois	\$40,865	\$40,865	S. Dakota	\$3,697	\$3,697
Michigan	\$35,139	\$35,139	Wisconsin	\$3,946	\$3,946
Conn.	\$34,700	\$34,700	California	\$3,988	\$3,988
New York	\$33,041	\$34,032			
			<b>Surgeon</b>		
<b>Surgeon</b>			Nebraska*	\$8,095	\$8,095
Florida	\$190,926	\$190,926	Minnesota	\$11,306	\$11,306
New York	\$120,228	\$127,233	South Dakota	\$12,569	\$12,569
Illinois	\$127,083	\$127,083	Wisconsin	\$13,813	\$13,813
Michigan	\$142,731	\$121,321	Kansas*	\$17,089	\$14,400
Nevada	\$118,125	\$118,125			
			<b>Ob-gyn</b>		
<b>Ob-gyn</b>			Nebraska*	\$14,286	\$14,286
New York	\$206,913	\$204,684	California	\$15,484	\$15,484
Florida	\$201,808	\$201,808	Minnesota	\$16,449	\$16,449
Illinois	\$177,441	\$177,441	Wisconsin	\$18,154	\$18,154
Conn.	\$170,389	\$170,389	S. Dakota	\$19,946	\$19,282
Nevada	\$168,750	\$168,750			

### True or False

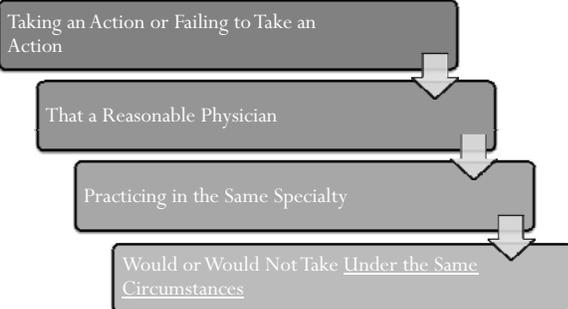
- There is a better system?  
*Answer: Who knows?*
- Depends upon what you believe the liability system is supposed to accomplish.
  - Fair compensation v. Fault
  - Deterrence
  - Accountability
  - Maximize availability of health care.



### Lawyer Math



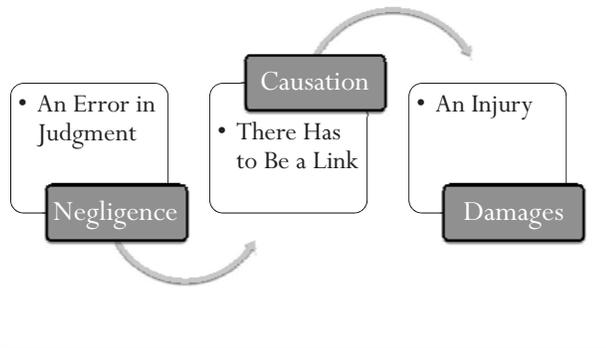
### What Does Negligence Mean?



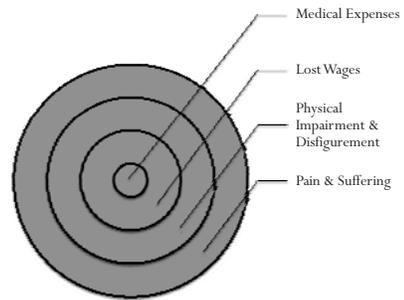
### Is it a Good Standard?



### Did the Negligence Matter?



### What Are They Aiming For?



### Anesthesia Cases

- Reviewed 120 reported anesthesia cases.
- 71 defense verdicts
- 12 verdicts \$1-2MM
- 13 verdicts \$2-5MM
- 5 verdicts \$5+MM (High \$33.2MM – rapid detox)

### Common Themes

- Wrong level of expertise (CRNA)
- Patient left with resident
- Failure to consider pertinent medical history
- Timeliness of intervention
- Hand off to PACU
- Violation of hospital policy
- Inadequate/missing/ altered records
- *Anonymous Patient v. Anonymous Anesthesia Team*

### Avoiding Litigation- Documentation



- "If it's not in the record, it didn't happen."
- Impossible standard, particularly in anesthesia
- We need to see:
  - Information provided by patient
  - Physical assessment
  - Laboratory results
  - Why you select a course of treatment
  - Anticipated follow-up

### Avoiding Litigation - Alteration



- Never "change" a medical record after the fact.
- You will be caught.
- You will lose the lawsuit – even if the care was perfect.
- Time + date any amended entries.
- Explain why you are making the amended entry.

## Avoiding Lawsuits - Communication



- The quality of care does not affect whether you get sued. *NEJM. Blink.*
- The quality of communication affects whether you get sued.
- Anesthesia is particularly hard.
- If the patient feels treated like a commodity, the likelihood of litigation goes up.
- Communication is a two-way process.

## Avoiding Litigation – Informed Consent

- Informed consent is:
  - Substantial risks of the procedure (the patient never hears these).
  - Potential benefits of the procedure (the patient only hears these).
  - The alternatives to the procedure (the physician often forgets to mention, these).



## Avoiding Litigation - Consultation



- One of the most common problems we see is lack of communication between physicians.
- Vertical and horizontal.
- Everyone has to be on the same page.
- The patient is a lousy conduit of information.

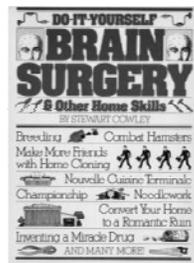
## Avoiding Litigation – HMO Directed Medicine



- Realistic or not, patients view medical care as an unlimited resource.
- They resent HMO's telling them, "NO!"
- You must inform of alternatives, even if not covered by insurance.

## Avoiding Litigation - Misinformation

- Patients are bombarded with misinformation.
- The "final cure for diabetes" is a combination of bitter melon, cayenne pepper, and licorice extract.
- Your patients are scared.
- You have to correct misinformation.



## Avoiding Litigation – Take Responsibility

- Acknowledge when a complication occurs.
- Minimize the consequences.
- Apologize for the situation, not the care.
- "I'm sorry" can't be held against you, in most states.
- But, even if admissible, why not?



### Avoiding Litigation - Integrity



- Patients expect doctors to do the right thing.
- So do jurors.
- Don't give someone a reason to question your integrity.
- Bad facts = bad law. *Moore v. UCLA*

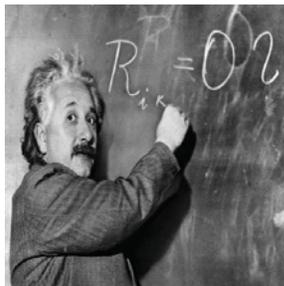
### Winning Litigation - Engage



- Getting sued sucks.
- The lawsuit will not go away if you ignore it.
- You have two choices:
  - Help your lawyer win the case.
  - Help yourself lose the case.

### Winning Litigation - Teach

- You know more about medicine than your lawyer ever will.
- We've never had to care for a patient.
- Teach us what doesn't appear in the textbooks.



### Winning Litigation - Select



"Testifying against another doctor would violate my ethics, so I'll have to charge double."

- We've seen the significance of expert witnesses.
- You know the leaders in your field.
- Help us recruit the leaders to support your care.

### Winning Litigation - Prepare

- Your deposition is the most important day of the lawsuit.
- The other lawyer is going to be prepared.
- Are you?



### Winning Litigation - Attend

- The only thing you "have" to attend is your own deposition.
- You can attend every proceeding.
- Don't you want to hear what the patient is saying?
- Don't you want to look the other expert in the eye?



## Winning Litigation - Demonstrate



- Boring!
- Jurors watch CSI.
- If you don't entertain them as you educate them, you're in trouble.

## Winning Litigation - Defend

- The opposing lawyer is attacking you.
- The jury needs to hear you defend yourself.
- If you won't stand up for yourself, why should anyone else?



## Winning Litigation - Relax

- You can't let a lawsuit get in the way of practicing good medicine.
- We get paid to worry on your behalf.
- Get help if you need it.

