

ANATOMY OF A MEDICAL MALPRACTICE LAWSUIT



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ANATOMY OF A MEDICAL MALPRACTICE LAWSUIT

Objectives: At the end of the educational session the learner will -

1. Have an Understanding of Medical Malpractice Claims and Litigation.
2. Have an Awareness of the Process and Procedures
3. Know the Cause and Consequences of certain acts.

Event Definitions and Reportable Events

Rebecca Berberian, RN

The Joint Commission (TJC)- Sentinel Events

California Department of Public Health (CDPH)- Adverse Events

No-harm events - a patient safety event that did not reach the patient

Close Call (or “good catch”) - a patient safety event that did not reach the patient

Sentinel Events

Sentinel Event- is a patient safety event (not primarily related to the natural course of the patient's illness or underlying condition) that reaches a patient and results in any of the following:

- a. Death
- b. Permanent Harm
- c. Severe Temporary Harm - which is a critical, potentially life-threatening harm lasting for a limited time with no permanent residual, but requires transfer to a higher level of care/monitoring for a prolonged period of time, transfer to a higher level of care for a life-threatening condition, or additional major surgery, procedure, or treatment to resolve the condition.

Adverse Events

Adverse Event- adverse event should be reported to CDPH no later than five (5) days after the adverse event has been detected, or if that event is an ongoing urgent or emergent threat to the welfare, health, or safety of patients, personnel, or visitors, not later than 24 hours after the adverse event has been detected.

Adverse Events

Adverse Events include

- Surgical Events
- Product or Device Events
- Patient Protection Events
- Care Management Events
- Environmental Events
- Criminal Events: An adverse event or series of adverse events that cause the death or serious disability of a patient, personnel, or visitor.

Role of Risk Management

Immediate

- ▣ Determine if this is a reportable event- SE or AE
- ▣ Meet with care team- MD and hospital employees
- ▣ Review medical record documentation- ensure accuracy and timeliness
 - Consent and Informed Consent discussion, Conditions of Admission
- ▣ Arrange for family meeting if requested
- ▣ Discuss event disclosure both verbal and written

Role of Risk Management

Potential Compensatory Event- PCE

- ▣ Assign to hospital counsel
- ▣ Manage staff interviews
- ▣ Preserve medical record



Role of Risk Management

Litigation phase

- Manage employee pre- deposition interviews
- Oversee document requests
- Attend depositions
- Support for both physician and employees

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Nora Hovsepian, Esq.

THE MYTH OF “BAD” DOCTORS AND “GOOD” SELF-REGULATION

- Less than 5% of doctors commit 54% of the malpractice in the U.S. Yet State Medical Boards are notoriously lax in acting on legitimate patient claims of Medical Malpractice.
- 20 U.S. States have NO medical error reporting mechanisms
- 5 U.S. States have only VOLUNTARY reporting systems
(Required in CA only if \$30,000+ settlement)
- 17 U.S. States (including CA) have systematic adverse-event reporting systems
- 45 U.S. States do not release hospital-specific info to the public

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DISINCENTIVES TO SUE

- Limited Damages:
MICRA (Cal. Civil Code Section 3333.1) enacted in 1975 limiting damages to \$250,000
No Adjustment for Inflation
Present Value: \$1.23 million equivalent to \$50,768 in 1975
- Attorney Fee Limits (Cal. B&P Code, Section 6146)
- Difficulty Finding Expert Witnesses:
(Some Medical Societies prohibit members from acting as expert witnesses for plaintiffs)
- High Costs of Litigation
- Poor Risk to Benefit Ratio
- Trial Outcomes
- Statutes of Limitation (Cal. CCP Section 340.5)
- Malpractice Insurance Not Required

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THE GATEKEEPERS

- Experienced Medical Malpractice Plaintiff Attorneys
 - 90-Day Notice of Intent to Sue Letters (Cal. CCP Section 364)
- Expert Witnesses
- Courts

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STATISTICAL FRAMEWORK

Annual Deaths in the U.S.

All Causes – 2,600,000

LEADING CAUSES

1st Heart Disease (650,000)

2nd Cancer (600,000)

3rd Preventable Medical Errors (251,000 deaths reported)*

4th Motor Vehicles (170,000)

*This number reflects only deaths where the cause of death is determined to be due to medical malpractice either on the death certificate, by autopsy, or internal hospital investigation. It does not include medical malpractice cases which do not result in death. It also does not include medical malpractice cases which go unreported.

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WHAT ARE PREVENTABLE MEDICAL ERRORS?

- Patient harm from medical error can occur at the individual or system level.
 1. Unintended Act (either of omission or commission) that causes harm to the patient.
 2. Error of Execution: the failure of a planned action to be completed as intended.
 3. Error of Planning: the use of a wrong plan to achieve an aim.
 4. Deviation from the process of care that may cause harm to the patient.

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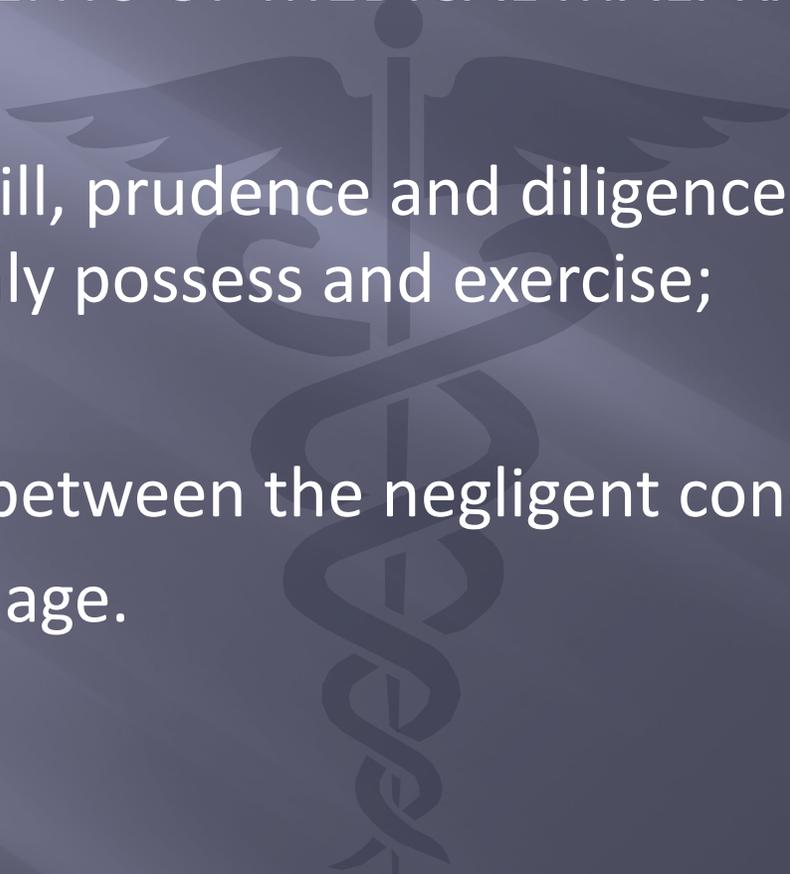
COMMON TYPES OF MEDICAL MALPRACTICE

- Diagnostic Failures
- Surgical Errors
- Birth Injuries
- Medication Errors



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ELEMENTS OF MEDICAL MALPRACTICE

1. A duty to use such skill, prudence and diligence as other members of the profession commonly possess and exercise;
 2. A breach of the duty;
 3. A causal connection between the negligent conduct and the injury; and
 4. Resulting loss or damage.
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DAMAGES

- Economic Damages
- Non-Economic Damages
- Loss of Consortium
- Wrongful Death



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Why Does a Patient/Family Consult a Medical Malpractice Attorney?

- Patient Harm
- Lack of Communication
- Lack of Candor
- Refusal to Provide Medical Records
- Refusal to Assist
- Inconsistent Medical Records



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Maria Hovsepian, Esq.

What is the percentage of winning a Medical Malpractice Lawsuit?

A study of the outcomes of medical malpractice cases spanning 20 years found that physicians win the majority of these cases.

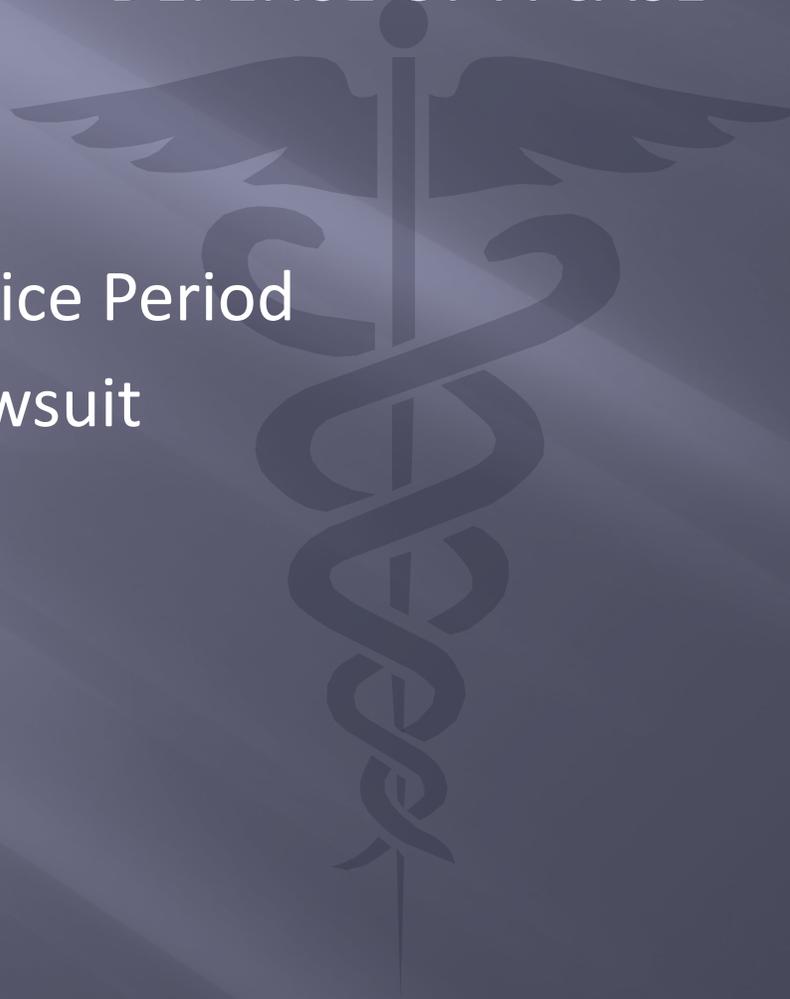
Physicians win 80% to 90% of jury trials with weak evidence, around 70% of cases with borderline evidence, and 50% of trials with strong evidence of medical negligence.

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DEFENSE OF A CASE

Phases of Legal Claims

1. The Presuit Notice Period
2. The Life of a Lawsuit
3. Trial



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PRESUIT NOTICE PERIOD

1. Notice Received: Promptly notify your carrier that you've received Notice of a Potential Lawsuit
2. Preserve the patient's chart: It is imperative that no changes, alterations or deletions be made in the chart
3. Do not discuss with colleagues

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THE LIFE OF A LAWSUIT

After Service of Summons & Complaint

- Immediately Notify the Carrier who will open a formal case, retain defense counsel and start case work-up.
- Forward all case related materials to the carrier

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THE LIFE OF A LAWSUIT

DISCOVERY

- Informal Discovery
- Written Discovery
- Oral Discovery/Deposition



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THE LIFE OF A LAWSUIT

INFORMAL DISCOVERY

- Review Records
- Send Correspondence to meet with key witnesses, physicians and staff
- Meet the Client and review the CV
 - We assess both the individual's credibility as a witness for deposition and before the trier of fact (if the case goes to trial).

Trust your lawyer. The effectiveness of the lawyer client relationship depends on the physician's absolute candidness about the events surrounding the claim.

The Attorney-Client Privilege will protect these communications as confidential to encourage this necessary candidness.

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THE LIFE OF A LAWSUIT

Depositions: Oral, in-person questions under penalty of perjury with the presence of a court reporter and sometimes videotaped where one party asks the questions that the other side has to answer under oath.

Pre Deposition meeting with your attorney to go over rules and facts

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THE LIFE OF A LAWSUIT

Experts

- Almost all medical malpractice cases require testimony from a medical expert.
- A qualified physician practicing medicine at the time of the care and treatment or testimony

What will an Expert help determine?

- Did the doctor follow the standard of care for doctors in the same position?
- Did the doctor's failure to follow the standard of care injure the patient?

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THE LIFE OF A LAWSUIT

Pretrial Modes of Disposition

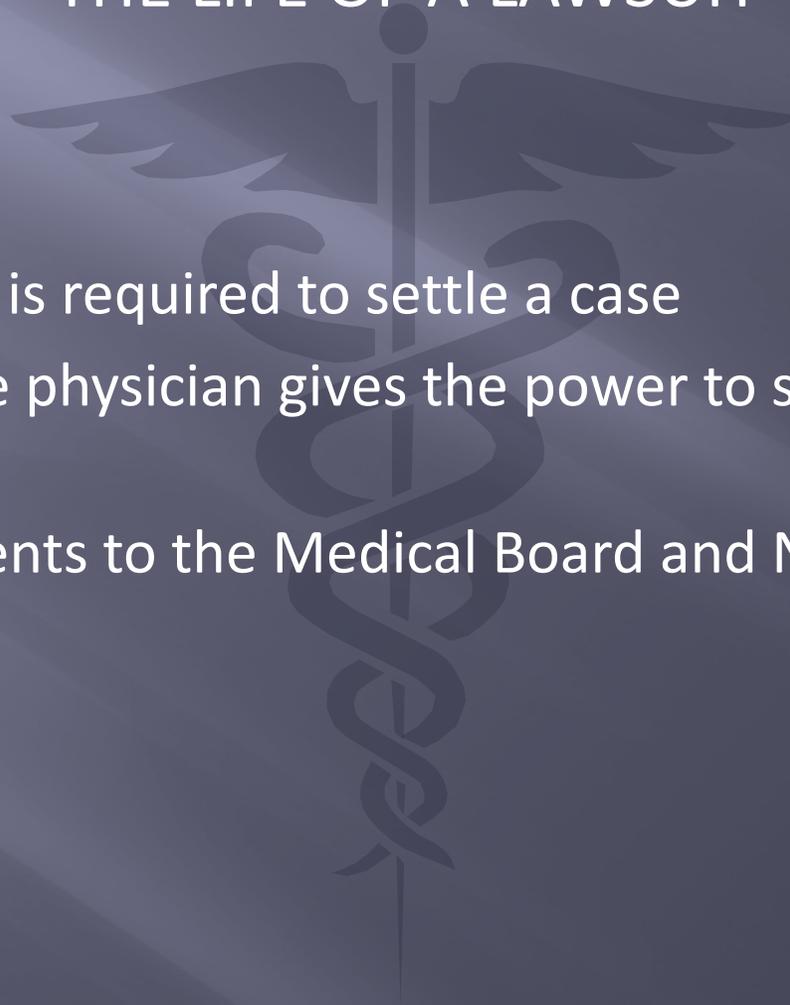
- ▣ Motion for Summary Judgement
- ▣ Settlement discussions/resolution: Consent of the physician is needed!
 1. Informal discussions between the parties
 - a. Dismissal
 - b. Monetary resolution
 - c. Dismissals in exchange for waiver of costs and malicious prosecution
 2. Mandatory Settlement Conference/ADR program
 3. Private Mediation

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THE LIFE OF A LAWSUIT

CONSENT

- A physician's consent is required to settle a case
- By giving consent, the physician gives the power to settle in the hands of the insurance company
- Reporting of settlements to the Medical Board and National Practitioner Data Bank



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TRIAL

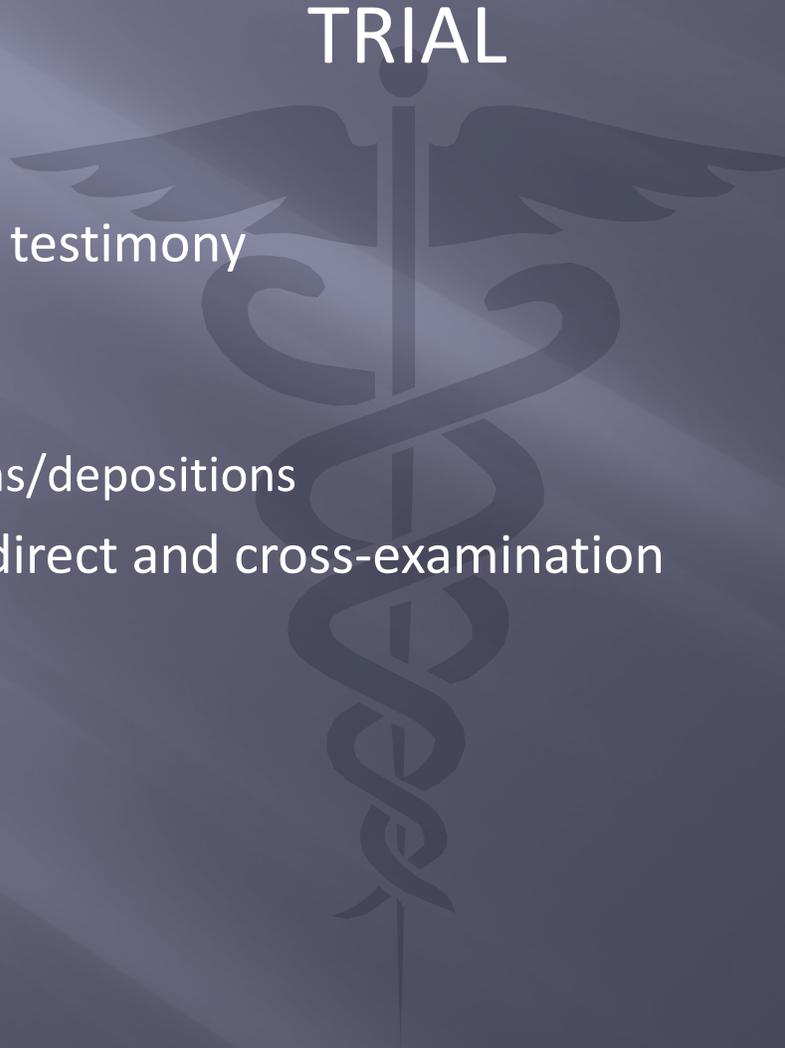
- About 40% of Medical Malpractice Cases that do not settle make it to trial.
- Depending on the complexity of a the case, trials can take anywhere from 5-10 days.
- General Outcomes highly favor the Physician or the Defense (as discussed above)
- Trial Preparation
 - Filing and Lodging applicable Documents
 - Identifying Key Relevant and Admissible Evidence
 - Securing Experts
 - Securing Witnesses

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TRIAL

Physician's Role

- Prepare to provide trial testimony
 - Review records
 - Review deposition
 - Review experts opinions/depositions
- Meet with counsel for direct and cross-examination



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TRIAL

- It is BEST that the physician be present at counsel table during the entire trial
- Trials are lengthy
- Difficult to listen to critical testimony
- Stressful

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QUESTIONS?