

Medical Malpractice

1. Judicial Process
2. Causes of Malpractice
3. Adversary System of Justice
4. Defenses
5. Prevention



Sources of U.S. Law

Four Types of Law in all 50 States:

1. Constitutional Law
2. Executive - Administrative Law
3. Legislative - Statutory Law
4. Judicial - Common Law



Federal Court System

1. U.S. Supreme Court (Petition for a writ of certiorary)
2. U.S. Courts of Appeal (# 13):
DC Circuit Court, Federal Circuit Court, and 11 other Circuit Courts
3. Federal District Courts

State Court System

Three Tiers:

1. Appellate

Supreme Court - Last Resort;

Court of Appeals (Civil & Criminal);

2. District, Superior or Circuit Courts

3. Municipal, City, or Regional Courts



Interaction of Federal & State Courts

1. **Federal Court Jurisdiction**
Diversity of Citizenship &
Substantial Federal Question.
2. **State Court Jurisdiction**
Extensive state & federal
3. **Conflict of Federal & State Law**
Federal Law Governs



The U.S. Judicial Process

1. Adversarial System
2. Fosters Competition between Plaintiff and Defendant
3. Most Lawsuits are either Dismissed or Settled
4. Trial by Jury – <10%



Medical Malpractice Law

1. Constitutional Law
2. Tort Law (Civil wrong)
3. Contract Law
4. Property Law (Real & Personal)
5. Criminal Law (Public wrong)
6. Agency & Administrative Law

Damages and Restitution

I. Compensatory (Restitution):

- **Special (Economic)** – e.g. Medical expenses; Wrongful death; Loss of earning; Funeral expense...
- **General (Non-Economic)** – e.g. Pain and suffering; mental anguish; loss of consortium...

Other Damages & Restitution

- II. Hedonic damages
- III. Nominal Damages
- IV. Punitive damages
- V. Attorneys fees
- VI. Court costs

Negligence

Most Common Cause of Medical Malpractice Claims. Elements:

1. Physician owes ***Duty*** to Patient
2. ***Breach*** of Standard of Care
3. Proximate ***Cause*** (Cause in fact or Foreseeable) of Injury
4. ***Damages***



Other Causes of Action

2. Wrongful Death
3. Loss of a Chance of Recovery or Survival
4. *Res Ipsa Loquitur* (The Thing Speaks for Itself)
5. Battery and Assault
6. Lack of Consent (Battery); Lack of Informed Consent (Negligence)
7. Abandonment
8. Breach of Privacy & Confidentiality
9. Breach of Contract or Warranty to Cure



More Causes of Action

10. Products Liability - Drugs & Medical Devices
11. Vicarious Liability for Acts of Others
12. Negligent Referral or Consult
13. False Imprisonment
14. Defamation
15. Failure to Warn or Control
16. Negligent Infliction of Emotional Distress
17. Outrage
18. Failure to Report
19. Fraud & Misrepresentation (Deceit)
20. Loss of Consortium

Cross v. Guthery (1794)

First appeals court (recorded) case of medical malpractice - **Wrongful death.**

Four *Medical Malpractice Crises:*

1st - 1835-1865

2nd - Early 1970's

3rd - Mid-1980's

4th - Early 2000's



First Medical Malpractice Crisis (1835-1865)

- ◆ Orthopedic malpractice cases.
- ◆ **Attitudes & behaviors** of doctors, patients, lawyers & judges **same as current.**



Abraham Lincoln

Defense Attorney

1855 – Dr. Powers Richey was sued for an improperly healed fracture; plaintiff verdict.

1858 – Defense Attorney Abraham Lincoln appealed the case; lost.

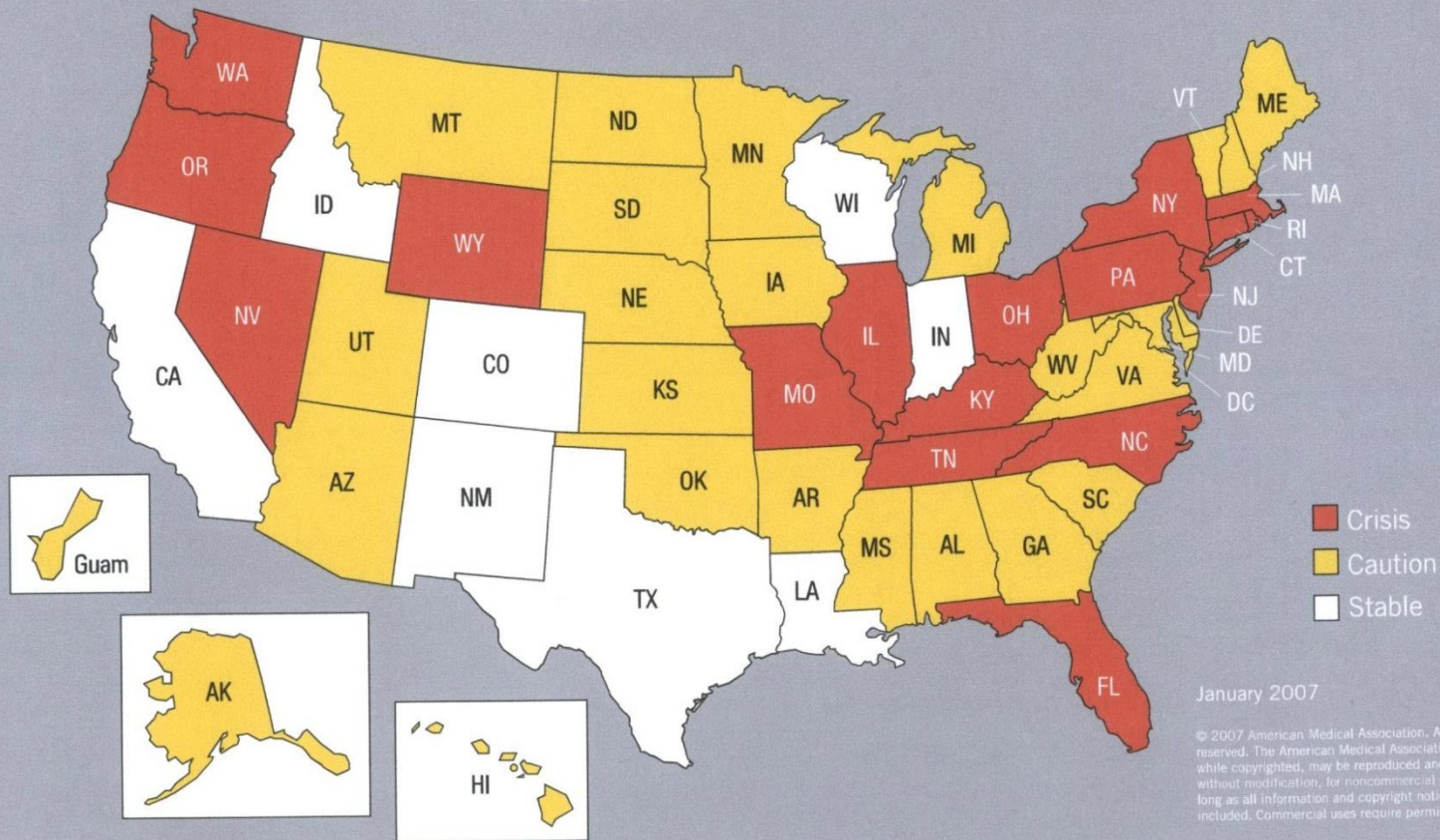


Malpractice Claims per 100 Covered Physicians

- ◆ 1956 – 1.5 claims
- ◆ 1990 – 15 claims
- ◆ 2000 – Flat trend
- ◆ Louisiana – 30 claims

America's medical liability crisis

A national view





Medical Malpractice Crises

1. Availability
 2. Affordability
-

Who Should Be Blamed?

- | | |
|--------------|-----------|
| ● Physicians | Patients |
| ● Attorneys | Juries |
| ● Judges | Insurance |



U.S. Tort System Goals

1. Compensate
 2. Punish
 3. Deter
-

Why Do Patients Sue Doctors?

1. Prevent similar incidents
2. Honest & clear answers
3. Accountability for action
4. Financial motivation

FACTS: Malpractice Cases

- Most powerful predictor of being sued is ***poor communication***.
- Juries & Judges favor physicians, who win 2 out of 3 lawsuits in a jury trial.
- Frequency of malpractice claims correlates with the number of physicians and ***not*** the number of attorneys.
- GAO: >90% of patient injuries are significant.



Medical Malpractice Defenses

1. Statute of limitations has run -
 - Defamation;
 - Negligence Adults v. Children
 - Discovery Rule
2. Deny negligence by proving absence of any of the four essential elements
3. Contributory vs. Comparative Negligence
4. Mistake/Innocent Error

Defenses (Cont'd)

5. Informed consent & Informed Refusal
- Assumption of the risk
6. Failure to Diagnose
 - Alleged inadequate P.E. – Dr. records only abnormal findings.
 - A more timely diagnosis would not have changed the outcome, as in some cancer patients.
 - Unusual medical condition.

Defenses (Cont'd)

7. Good Samaritan Laws

No duty to rescue – Case Law

Ordinary Negligence - Yes

Gross Negligence – NO

8. Government Immunity

9. *Joint and Several Liability*

- Indemnification
- Contribution



Golden Rules

1. Malpractice is mostly preventable.
2. Prophylaxis beats malpractice.
3. Relate well to the patient.
4. Keep detailed medical records.
5. Document informed consent discussions.
6. Participate actively in the defense of lawsuit.
7. Do not trust patient to follow through on referrals.
8. Track test results.

Golden Rules

9. Chart when ordering medications.
10. Avoid diagnosing on the phone.
11. Never “fix” records (**Spoliation**).
12. Spend sufficient time with patients.
13. Listen carefully to the concerns of patients and their families.
14. To be forewarned is to forearm -
 - Prophylactic awareness;
 - Adopting preventative programs.



Victory in Medical Malpractice

is achievable when preventive alertness diminishes the need for an aggressive legal defense.

*"People see things as they are and ask **WHY?** I see things as they **COULD BE** and ask **WHY NOT?**"*

JFK



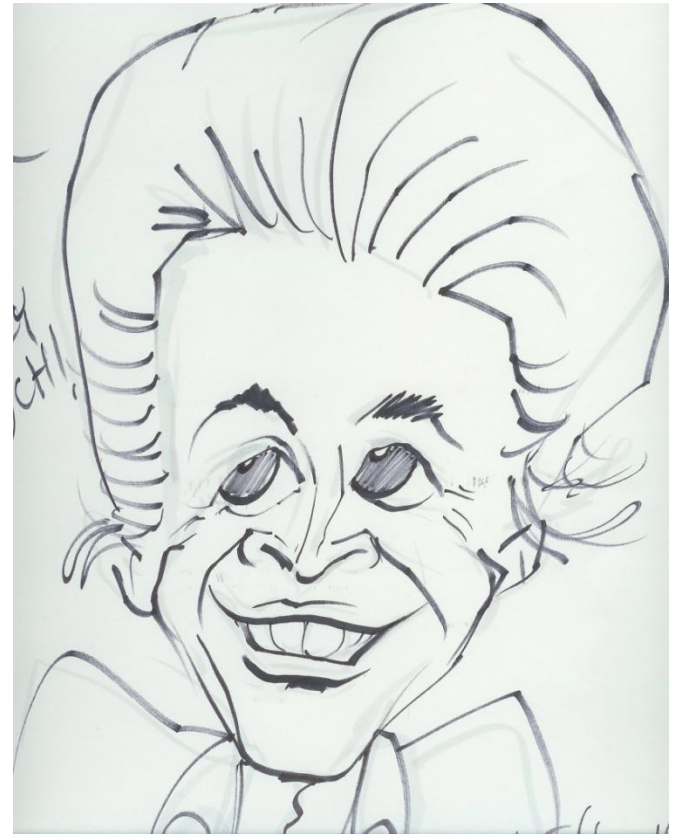
Dr. Albert Schweitzer

“I don’t know what your destiny will be, but I do know:

The only ones among you who will be really happy are those who have sought and found how to serve.”

Serving Patients

is
The Physician's
Business.



Thank You