Medical Professional Liability Issues: The Basics of Medical Malpractice Insurance and Litigation

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Objectives

(1) how the law defines "medical malpractice" and its legal elements,

(2) the economic costs of the malpractice tort system and drivers of those costs, and

(3) a basic understanding of professional liability insurance and questions to pose as physicians leave residency and embark on their careers.

1. Medical Malpractice Insurance (Professional Liability Coverage)

Medical Malpractice: The Big Picture

- Medical malpractice insurance premiums = 1% of national health care costs (Congressional Budget Office)

- But malpractice insurance premiums are the 3rd largest cost for physicians, after payroll and space costs

Odds of Getting Sued?

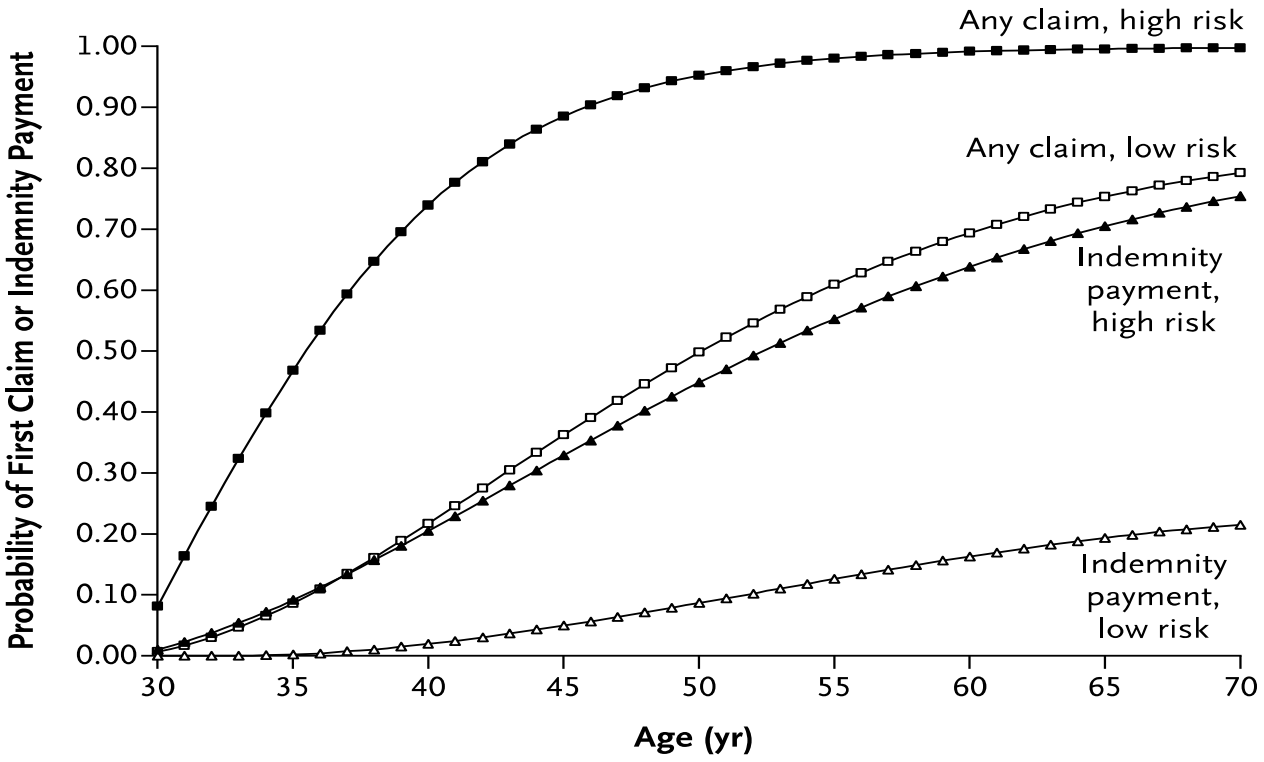
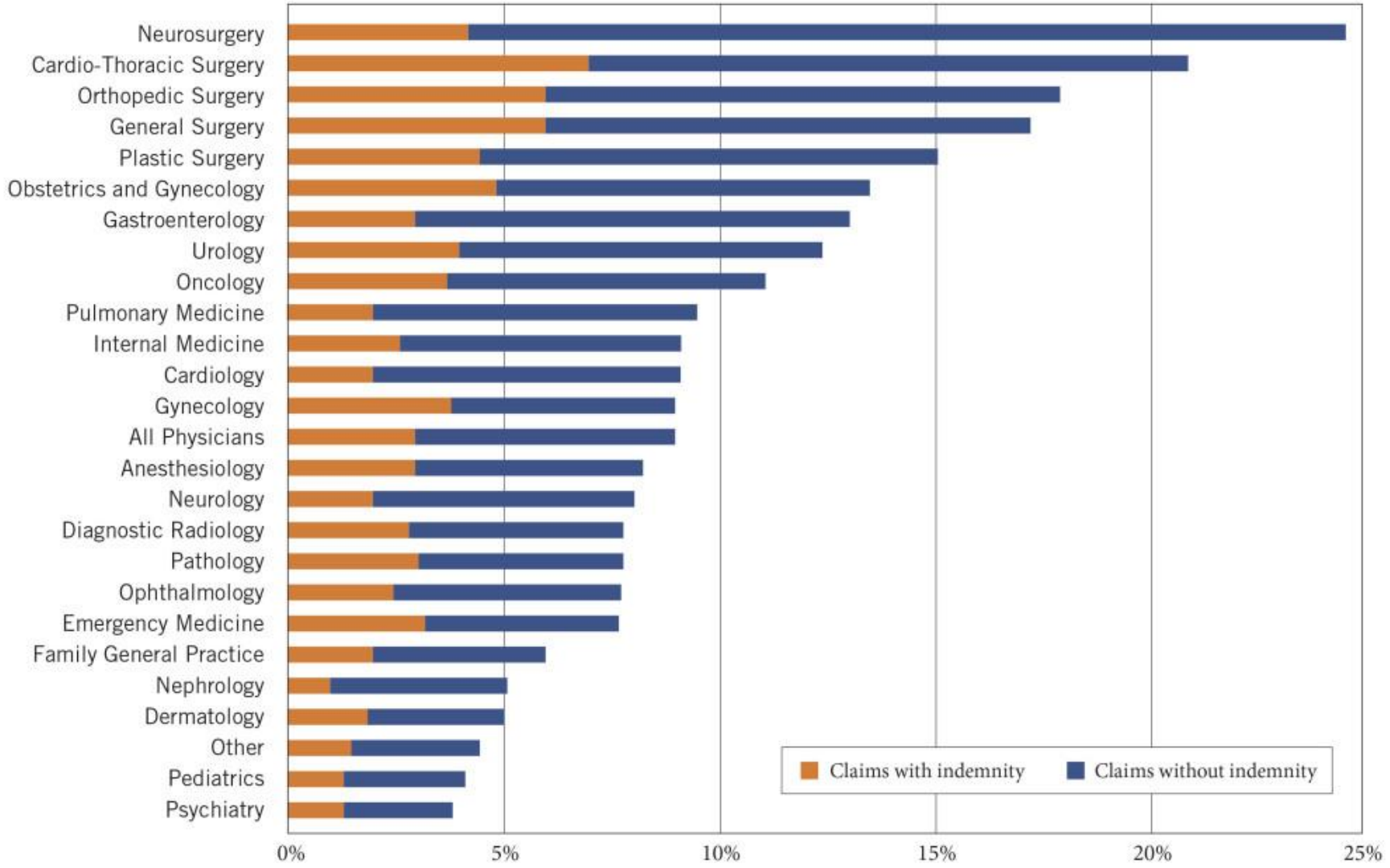


Figure 4. Cumulative Career Probability of Facing a Malpractice Claim or Indemnity Payment, According to Risk of Specialty and Age of Physician.

Cumulative probabilities were estimated from a multivariate linear regression model with adjustment for physician random effects, physician specialty, state of practice, and county demographic characteristics.

The Doctors Company—RAND Results

Percent of Physicians' Careers Consumed with Pending Claim



Medical Malpractice Insurance
Two Types

- 1. Occurrence Coverage - provides funding for all claims which arise out of a given policy period, regardless of when the claim is actually made

  (no tail required)

- "Policy Period," the duration of the policy
  - From the day the contract starts until the policy cancels; usually at end of employment term.

Occurrence Coverage

- DR joins faculty at UVA on 1/1/16
- DR orders improper antibiotic for patient on 12/1/16 and patient dies.
- DR leaves UVA on 12/31/16.
  - (Policy period is thus 1/1/16-12/31/16)
- Patient's family files suit on 12/1/17
  - DR has left medicine and is working at post office.
- DR is covered under the "occurrence" coverage he has with PLT
  - No "tail" coverage necessary
  - DR is covered for all events that "occur" during the policy period, regardless of when the claim is made

Medical Malpractice Insurance
Two Types

- 2. Claims Made Coverage - provides funding for claims actually made during a given policy year
  - (tail required)
- Both “incident” and claim must be made within the “policy period”

Claims-Made Coverage

- DR joins faculty at UVA on 1/1/16
- DR orders improper antibiotic for patient on 12/1/16 and patient dies.
- DR leaves UVA on 12/31/16.
  - (Policy period is thus 1/1/16-12/31/16)
- Patient's family files suit on 12/1/17
  - DR has left medicine and is working at post office.
- DR is NOT covered under "claims-made" coverage unless DR had purchased a "tail"
  - Although event occurred during policy period, the claim was made outside of the policy period

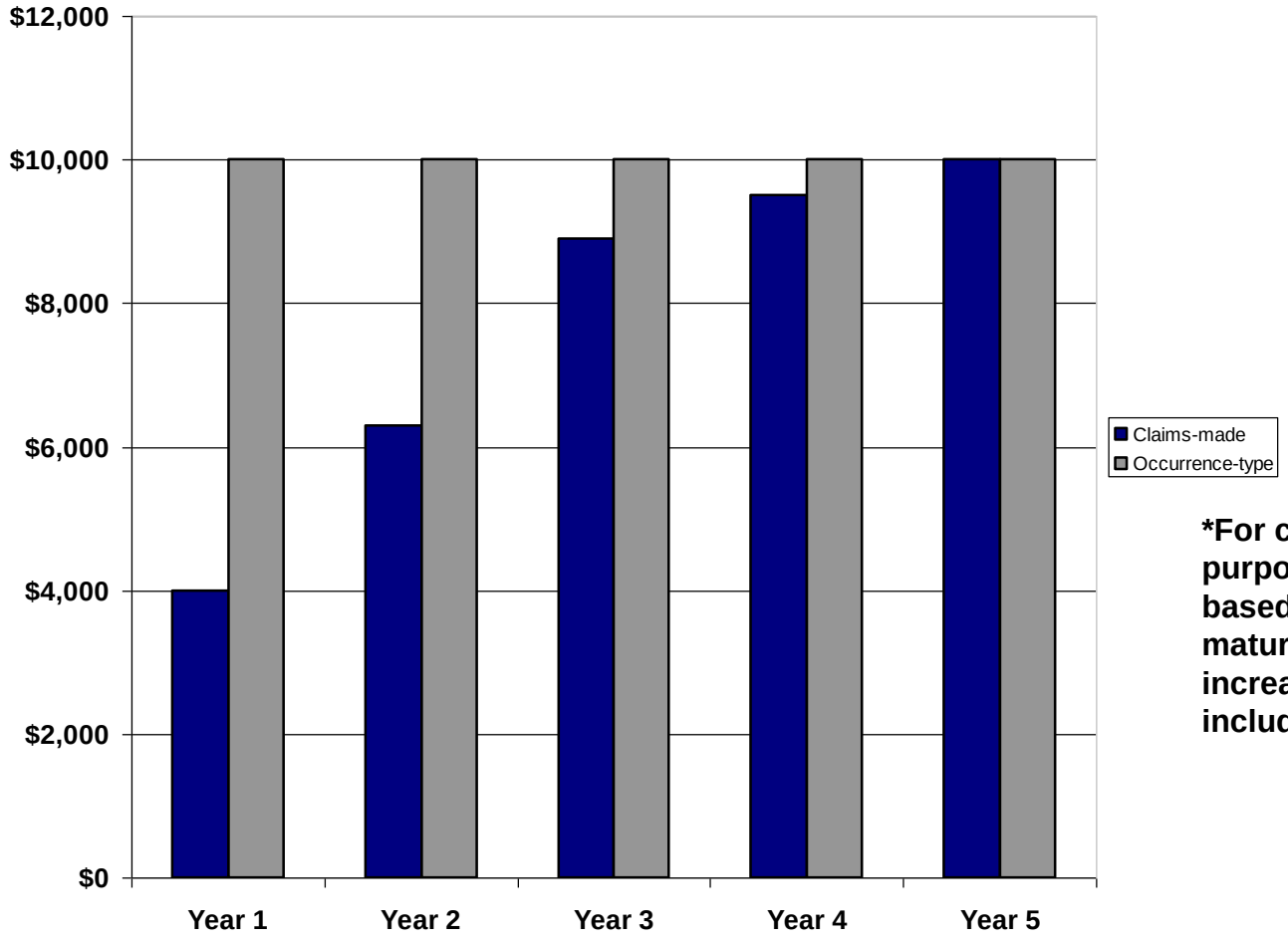
Medical Malpractice Insurance Cont…

- Definitions cont...
  - Tail or Prior Acts Coverage - incidents which have occurred but for which a claim has not yet been made; claims not funded under a claims made policy; coverage purchased whenever terminate employment, retire or switch insurance carriers
  - Purchase of “tail” coverage essentially converts your claims-made policy into an occurrence policy.

MEDICAL MALPRACTICE INSURANCE CONT…

- Occurrence
  - Pros - today's physicians in a group are paying for all their insurance and no liabilities are unfunded so no costs if change practices
  - Cons - less accurate prediction of losses so more expensive
- Claims Made
  - Pros - more accurate prediction of losses/less costly
  - Cons - tomorrow's physicians may pay for losses of today's physicians

Cost Comparison: Claims-made v. Occurrence



***For comparison purposes only; based on a $10K mature rate; rate increases are not included.**

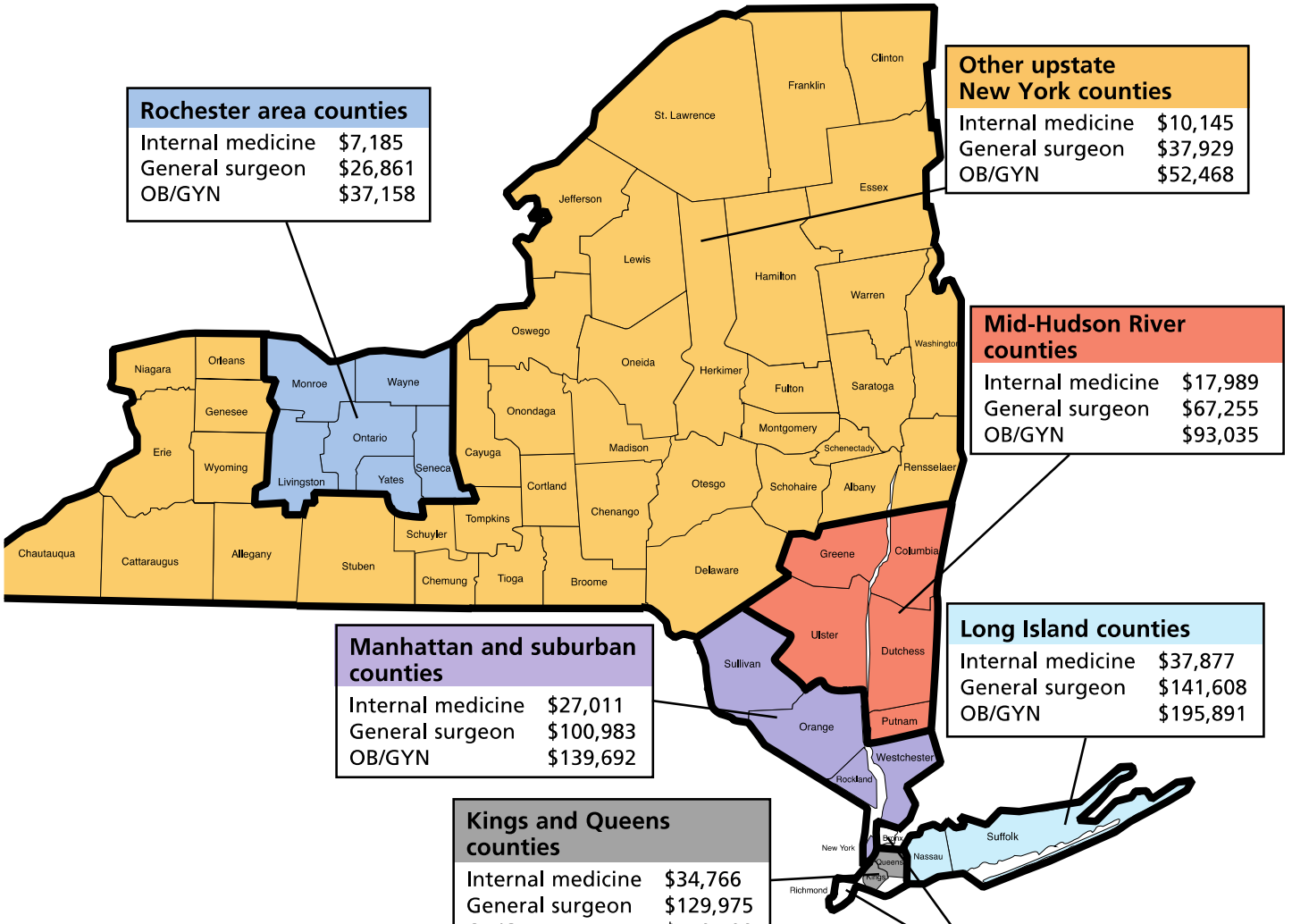
Piedmont Liability Trust

Rates for 2016/2017

Code	Rate
0	2,058
0A	1,286
0B	645
1	2,575
1A	2,316
1AX	1,568
2	3,861
3	5,662
4	8,234
5	10,807
6	13,638
7	16,725
8	20,072

New York state medical malpractice coverage premiums

2013-2014 standard medical malpractice premium rates



Source: Medical Liability Mutual Insurance Company.
"Physician - What's My Premium?"
http://www.mlmic.com/portal/pages/QuickHelp/wmp.jsp

Standard Policy Exclusions

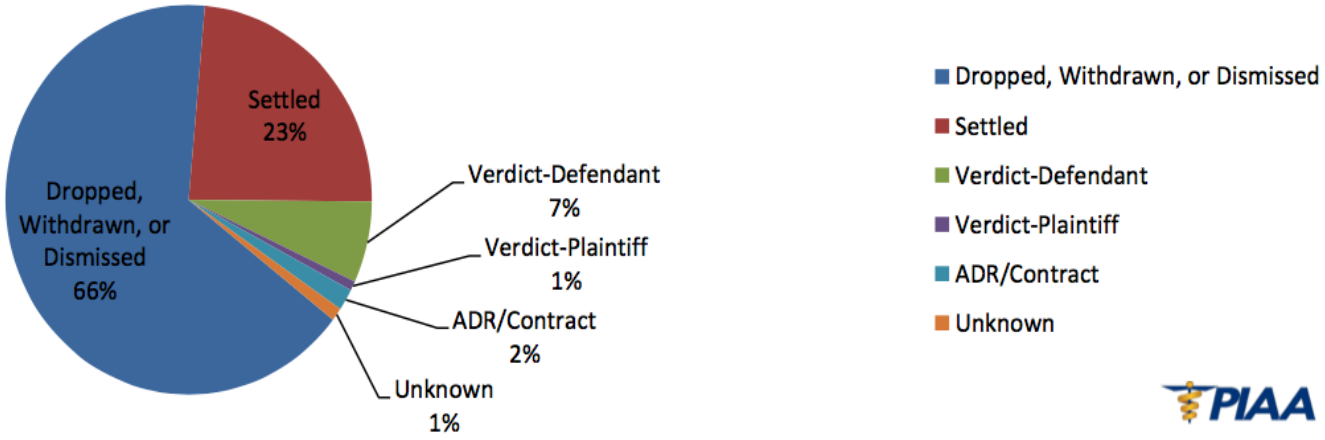
- Willful, wanton misconduct
- Unlicensed practice or practice outside the scope of any restrictions
- Libel and slander
- Moonlighting in some instances
- You practice despite knowingly being impaired physically or mentally
- Expert witness work (e.g. IMEs)
- Sexual misconduct (may defend but not indemnify)

MEDICAL MALPRACTICE INSURANCE CONT…

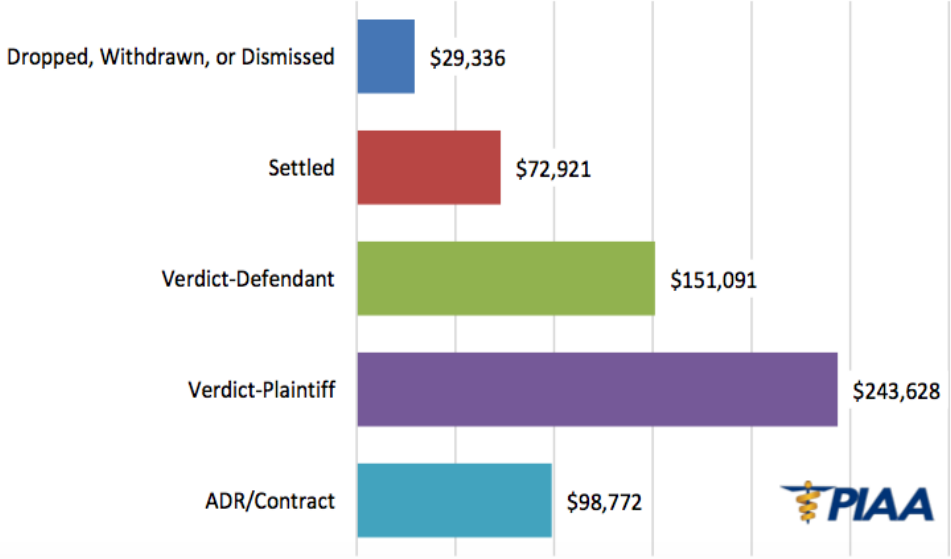
- Questions to pose:
  - What are the coverage $ limits (per occurrence and annual aggregate)
  - Who pays the coverage premium
  - If claims made coverage, who pays for the tail coverage
  - Do I have the right to approve any settlement
  - Do I have a right to select defense counsel
  - Am I being provided tail coverage and who pays for it
    - Is this contingent on whether I am terminated “for cause?”

2. Costs of the Med/Mal System

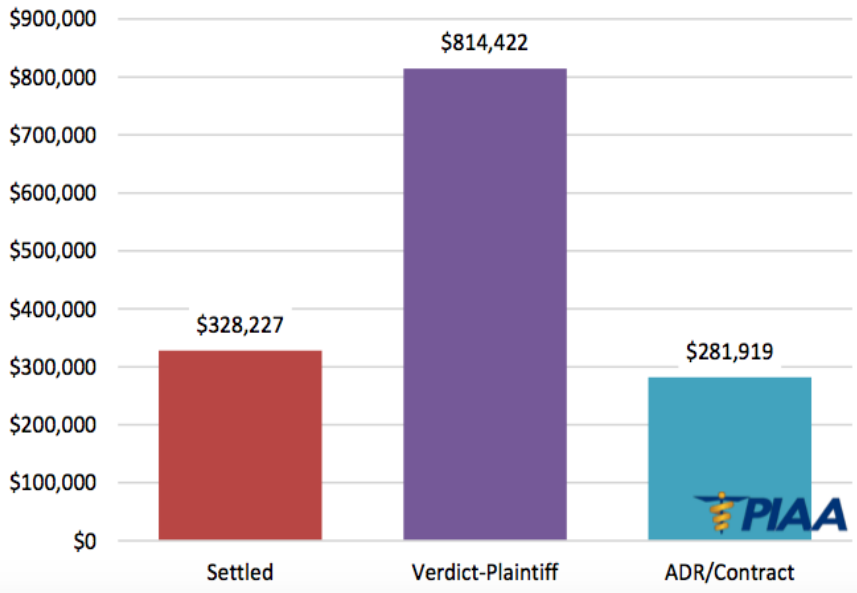
PERCENTAGE OF CLOSED CLAIMS BY DISPOSITION (2011-2015)



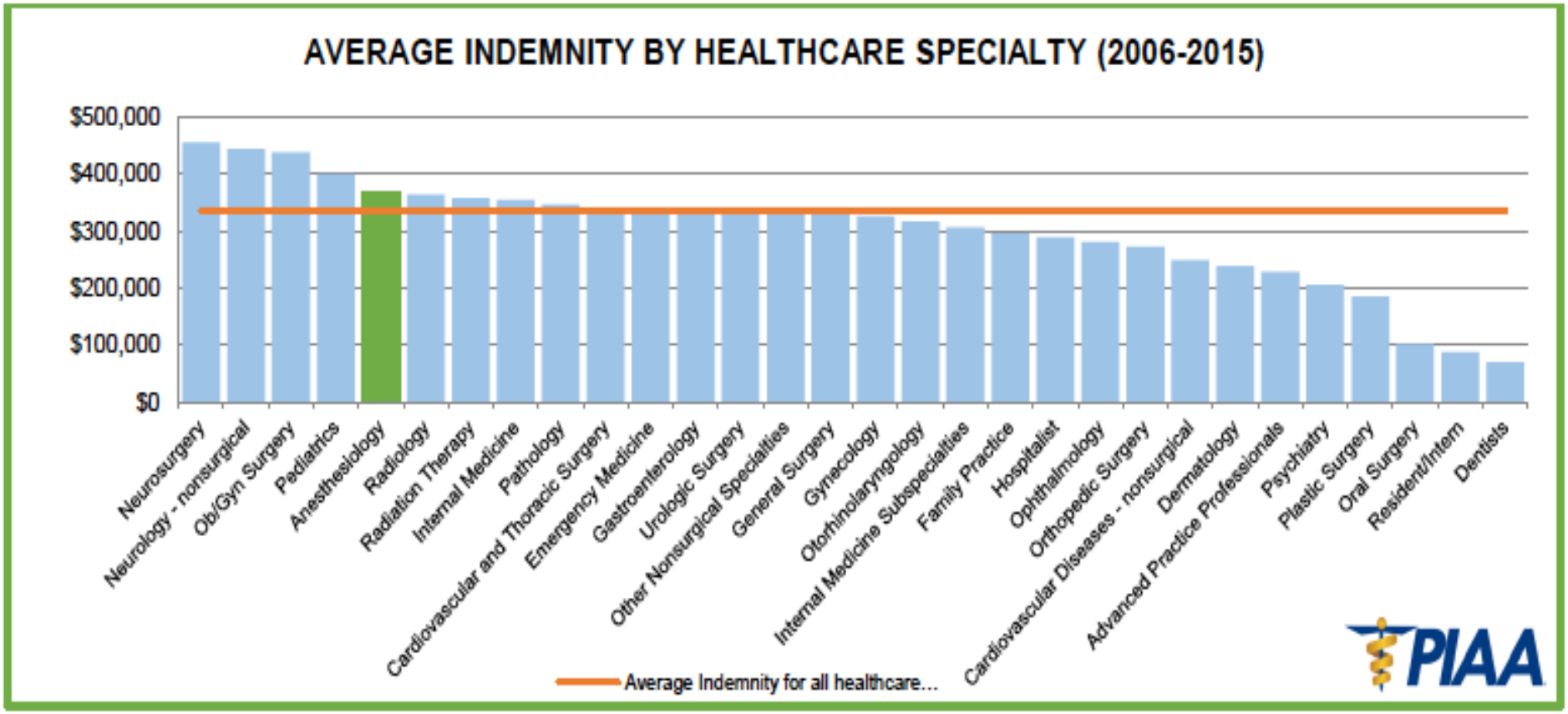
AVERAGE ALAE BY DISPOSITION (2011-2015)



AVERAGE INDEMNITY BY DISPOSITION (2011-2015)



Specialty Comparison



Who is Getting Sued?

Specialty	Percentage of Physicians			Number of Claims per 100 Physicians
	Ever Sued	Sued 2+ Times	Sued in Last 12 Months	
	(1)	(2)	(3)	(4)
Anesthesiology	36.3%	17.9%	1.3%	64
Emergency medicine	51.7%	25.7%	3.0%	108
Family practice	33.4%	13.8%	1.1%	55
General surgery	63.2%	50.1%	8.0%	205
Internal medicine	31.7%	14.8%	3.1%	57
Internal medicine sub-specialties	25.5%	11.0%	1.0%	44
Obstetrics/Gynecology	63.6%	44.1%	6.7%	162
Pediatrics	17.8%	6.0%	1.0%	28
Psychiatry	16.1%	5.9%	1.9%	25
Radiology	37.6%	21.4%	0.4%	82
Surgical sub-specialties	47.4%	25.0%	3.3%	110
Other specialties	19.5%	5.8%	2.5%	29
Observations	3211	3145	3147	3145

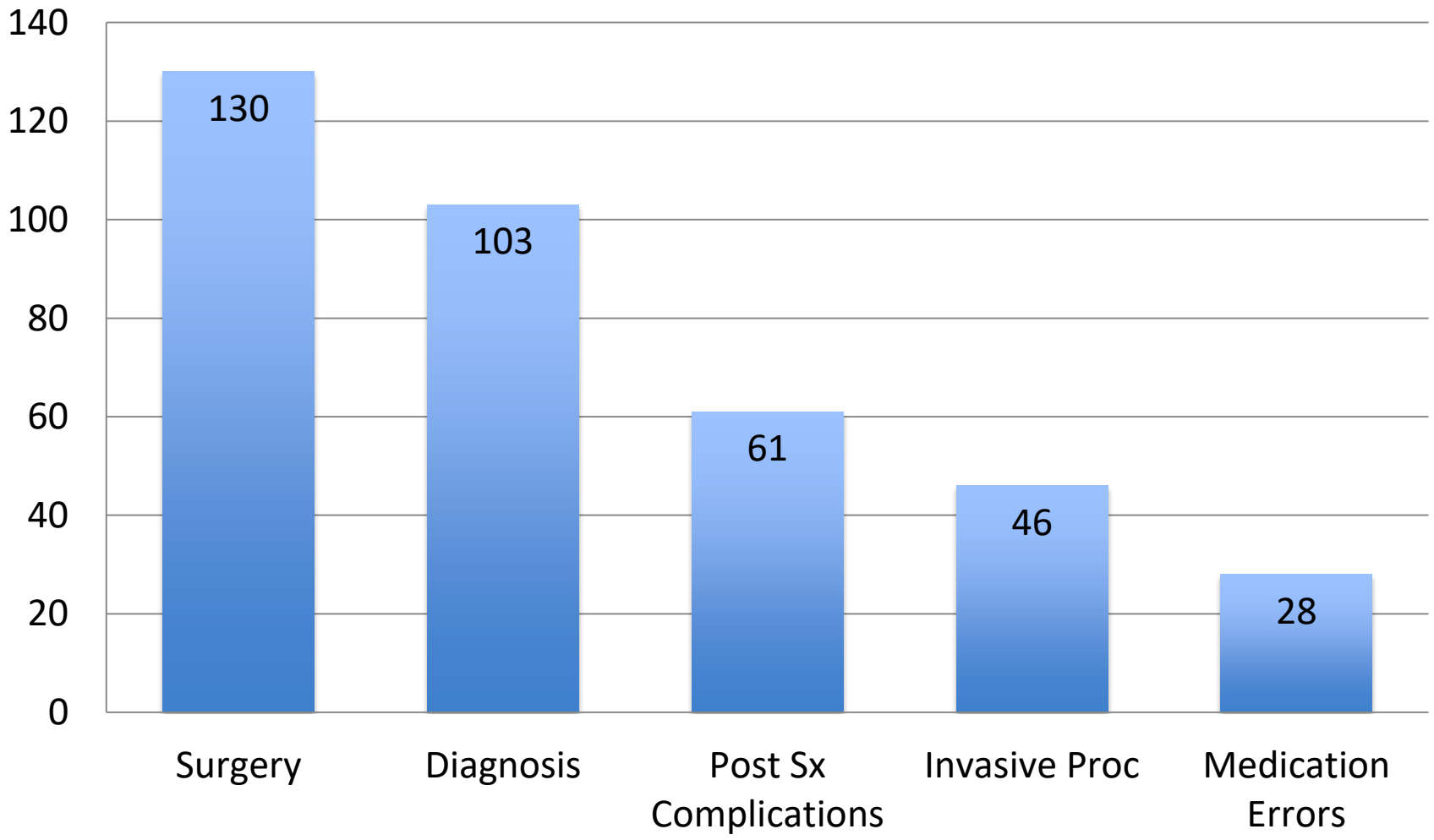
Source: Author's tabulation of data from the AMA's 2016 Benchmark Survey.

Chief Medical Factors-National

Claims Closed Between 2006 and 2015 — **Exhibit 3.4**

Chief Medical Factor	Closed Claims	Paid Claims	% Paid-to-Closed	Indemnity Payments			ALAE - Closed Claims	
				Total	Average	Median	Total	Average
2006-2010	**44,297**	**12,075**	**27.3**	**$3,993,404,890**	**$330,717**	**$200,000**	**$1,849,017,609**	**$41,741**
Improper performance	11,418	3,624	31.7	$1,085,677,161	$299,580	$15,000	$432,146,740	$37,848
No medical misadventure	8,857	623	7.0	$189,062,287	$303,471	$160,000	$319,453,617	$36,068
Errors in diagnosis	8,681	2,942	33.9	$1,156,994,740	$393,268	$250,000	$390,056,218	$44,932
Failure to supervise or monitor case	3,119	911	29.2	$308,857,714	$339,032	$29,999	$147,913,176	$47,423
Failure to recognize a complication of treatment	2,775	942	33.9	$337,185,895	$357,947	$125,000	$121,614,244	$43,825
2011-2015	**46,446**	**12,031**	**25.9**	**$4,096,026,801**	**$340,456**	**$199,500**	**$2,360,618,891**	**$50,825**
Improper performance	13,739	4,122	30.0	$1,406,084,673	$341,117	$375,000	$654,278,064	$47,622
Errors in diagnosis	9,290	3,008	32.4	$1,202,122,287	$399,642	$250,000	$510,328,507	$54,933
No medical misadventure	7,796	339	4.3	$79,770,439	$235,311	$100,000	$311,310,824	$39,932
Failure to supervise or monitor case	3,292	772	23.5	$260,164,707	$337,001	$200,000	$183,154,569	$55,636
Medication errors	2,271	618	27.2	$161,612,110	$261,508	$25,000	$121,111,221	$53,329
2006-2015	**90,743**	**24,106**	**26.6**	**$8,089,431,691**	**$335,578**	**$213,200**	**$4,209,636,500**	**$46,391**
Improper performance	25,157	7,746	30.8	$2,491,761,834	$321,684	$1,000,000	$1,086,424,804	$43,186
Errors in diagnosis	17,971	5,950	33.1	$2,359,117,027	$396,490	$250,000	$900,384,725	$50,102
No medical misadventure	16,653	962	5.8	$268,832,726	$279,452	$146,788	$630,764,441	$37,877
Failure to supervise or monitor case	6,411	1,683	26.3	$569,022,421	$338,100	$25,000	$331,067,745	$51,641
Failure to recognize a complication of treatment	5,042	1,621	32.1	$596,983,557	$368,281	$99,750	$265,996,589	$52,756

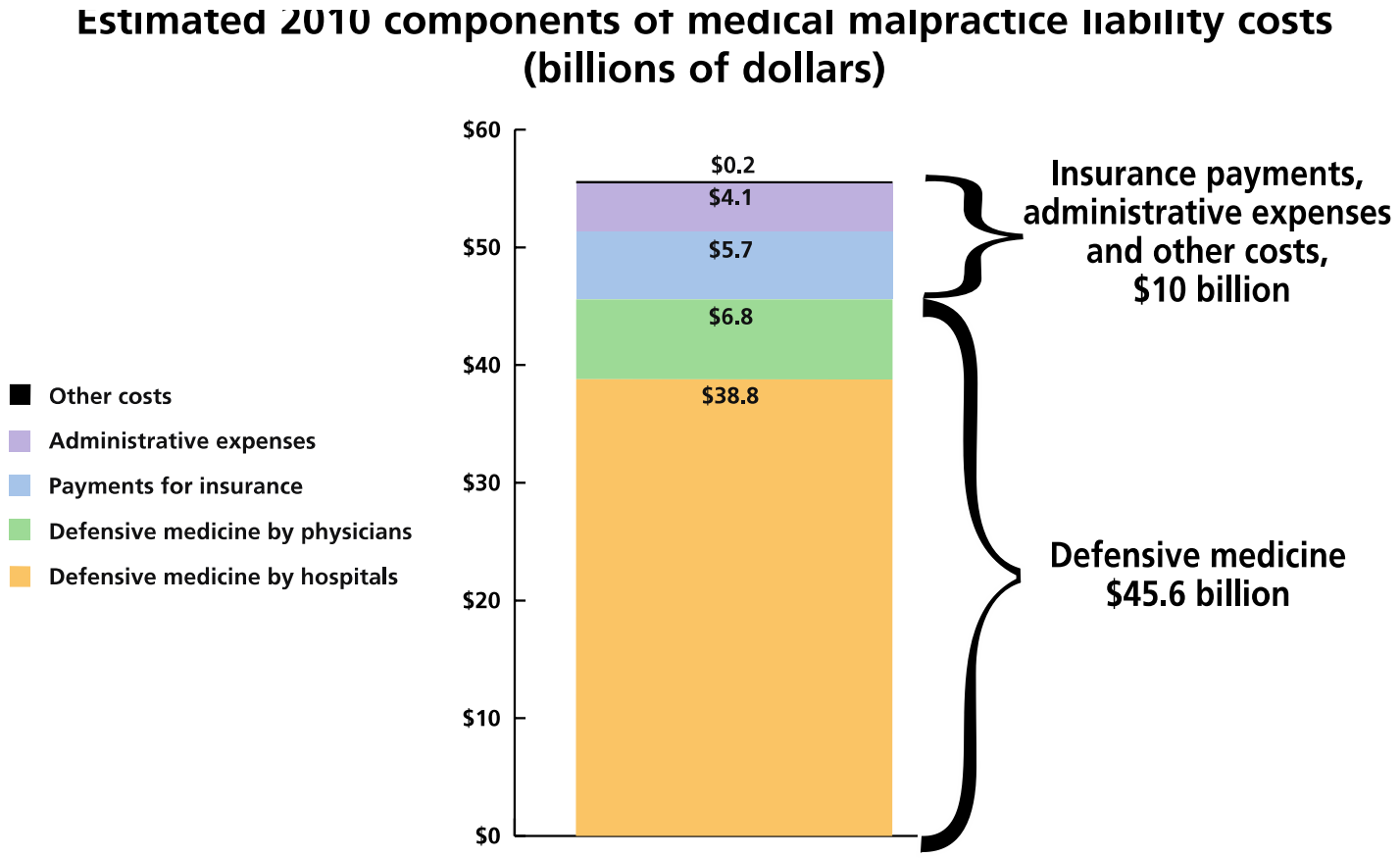
PLT Chief Medical Factors in Claims



How Long Do These Claims Last? Claims Closed 2006-15 (PIAA Data)

Resolution	Incident to Claim Made	Report to Close	Incident to Close
Plaintiff Verdict	1.5 Years	4.9 Years	6.4 Years
Defense Verdict	1.7 Years	4.1 Years	5.8 Years
Settlement	1.6 Years	3.0 Years	4.6 Years
Dropped, Withdrawn or Dismissed	1.8 Years	2.4 Years	4.2 Years

What Are Some Hidden Costs?



Source: Mello, MM, et. al. "National Costs of the Medical Liability System." Health Affairs, Vol. 29 , No. 9, September 2010, pages 1-2.
http://health.burgess.house.gov/UploadedFiles/Malpractice-Health_Affairs.pdf

3. Medical Malpractice Lawsuits

Definition of Medical Malpractice

- An abrogation of a duty owed by a health care provider to the patient; the failure to exercise the degree of care used by reasonably careful practitioners of like qualifications in the same or similar circumstances.

Legal Elements of Med/Mal

Plaintiff has to prove by "preponderance of the evidence"

1. Duty
   - Dr/Pt relationship
2. Breach
   - Did not treat within "standard of care"
3. Causation
   - The failure to treat within standard of care caused…
4. Damages
   - Harm

STATUTE OF LIMITATIONS

- GENERAL RULE: State law governs – most states allow 2 or 3 years from event of claimed negligence
- CONTINUING CARE: The statute of limitations does not begin to run until the last visit or procedure related to the claim of negligence
- DISCOVERY RULE: statute of limitations in many states does not begin to run until the negligence is discovered (Note: In Va. – only applies to discovery of retained non-therapeutic foreign object or failure to dx cancer)

Statutes of Limitations

- Vary state to state, e.g.:
  - 1 year: Kentucky, Tennessee
  - **2 years:Virginia**, Georgia, West Virginia
  - 3 years: North Carolina, D.C.
  - 5 years or 3 years from discovery: Maryland

STATUTE OF LIMITATIONS for MINORS

- MINORS: In all states a person is a child until the age of 18. In most states the Statute of limitations does not begin to run until the age of majority, 18. (Note: In Va. There is a reduced statute of limitations for minors; one has maximum of up until the injured party is 10 years old – that is the child's 8th birthday + 2 year statute of limitations)

WHAT IF YOU ARE SUED?

- Lawsuit may be served on you at home or at work, usually by a sheriff
- The lawsuit is the first legal notice you get a lawsuit is coming
- A response must be filed w/ the court w/in 21 days of the lawsuit being served
- As soon as you receive legal papers, you should turn them over to your insurer immediately
- Your insurer will assign you defense counsel
- You should not discuss the lawsuit with anyone other than your defense counsel or as counsel approves (discovery concerns)

Discovery

- Period between filing and trial
  - Written Discovery
  - Depositions
  - Expert Witnesses
  - Theory is “no surprises” and will lead to resolution

Expert Witnesses

- Different “expert qualification” rules state to state
  - Virginia-same area of medicine within one year of occurrence
  - North Carolina-”community” standard of care
  - Kentucky-”national” standard of care
  - Tennessee-”contiguous state” requirement

Damages

- Economic v. Non-Economic
- Damages Caps
    - Virginia: $2,250,000 total (+50k/year until $3M in 2032)
    - Maryland: $650,000 (non-economic damages only)
    - West Virginia: $250,000-$500,000 (non-economic damages only)
    - North Carolina, D.C., Georgia, NY, Florida, Kentucky, Tennessee: none
- Joint and Several Liability
    - Yes: Virginia, Maryland, North Carolina, D.C., New York
    - No: Georgia, Florida, Kentucky, Tennessee
    - Hybrid: West Virginia (if <25% at fault only resp. for degree of fault)

Resolution

- Settlement or Trial
  - Whose decision
  - Consequences
    - NPDB
    - Licensure
    - Provider Networks
    - Insurance Coverage

4. Risk Management Tips

Prior to Suit/Claim

1. Express Empathy
2. Disclose Facts (not speculation)
   - Maintain Communication
3. Do Not Admit Fault Unless
   - There has been time to investigate and be sure that what happened
   - You have a clear understanding of the consequences (don't make any promises you can't keep)
   - If serious harm occurred, talk to your legal representatives
   - Apology is not a "magic bullet"
4. Follow-up

Avoiding Suit

1. People do not sue people they like and respect.
2. People like and respect people they trust.
3. Establish trust, and you are unlikely to be sued.

How do you establish trust?

1997 Study (Wendy Levinson, MD)

- Levinson observed and recorded hundreds of doctors and their patient interactions.
- Half of the doctors had never been sued, and the other half had been sued at least twice.
- No difference in the amount or quality of information doctors gave their patients; the never-sued doctors didn't provide more details about medication or the patient's condition.

Physician-Patient CommunicationThe Relationship With Malpractice Claims Among Primary Care Physicians and Surgeons

Wendy Levinson, MD; Debra L. Roter, DrPH; John P. Mullooly, PhD; Valerie T. Dull, PhD; Richard M. Frankel, PhD

JAMA. 1997;277(7):553-559. doi:10.1001/jama.1997.03540310051034

Communication

- The doctors who had never been sued spent more time; more than three minutes longer with each patient than those who had been sued did (18.3 minutes versus 15 minutes).
- They were more likely to make "orienting" comments, such as "First I'll examine you, and then we will talk the problem over" or "I will leave time for your questions."
- They were more likely to engage in active listening, saying things such as "Go on, tell me more about that."
- They were far more likely to laugh and be funny during the visit.
- ***The difference was entirely in how they talked to their patients.***

Questions?

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