

Avoiding The Medical Malpractice Trap: Advice From a Plaintiff's Lawyer



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What is “Malpractice?”

... a difference of perspective as to what it
means

Physician's perspective:



One of persecution

**Being sued for malpractice, a doctor may
perceive being accused of :**

◆ Being an incompetent doctor

◆ **Intentionally harming a patient**

A disaster....



- ◆ Somewhere on par with death and even worse than dreaded taxes

Lawyer's Perspective



- ◆ A malpractice suit is usually about a health care provider...
- ◆ Running a professional “red light”

Legally, What is “malpractice”?

- ◆ It is nothing more than professional negligence...
- ◆ ...an allegation that the physician acted or failed to act in a manner other doctors would have under same/similar circumstances.

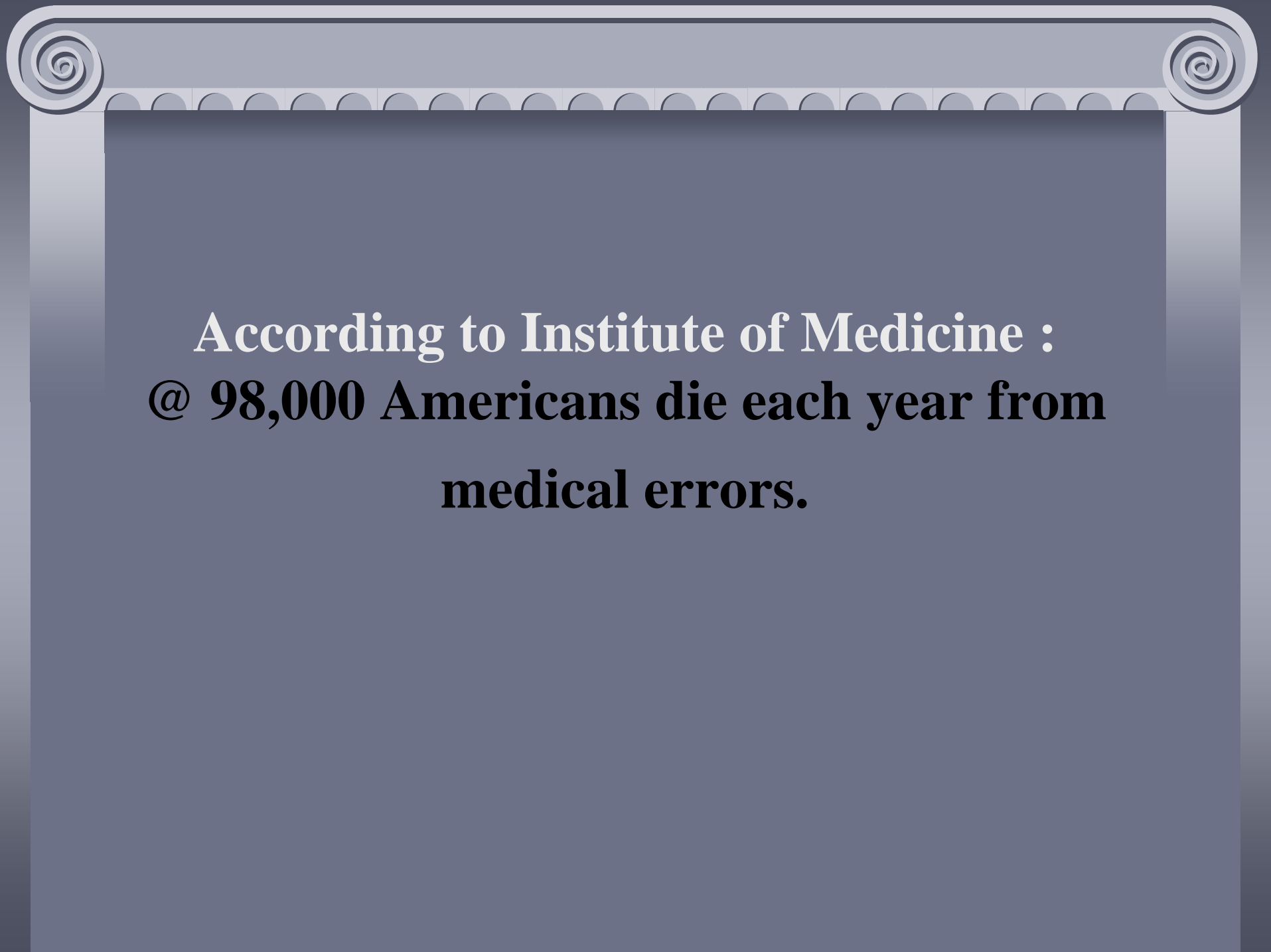
An Avoidable Accident



- ◆ As with running a red light
- ◆ There is liability for negligence if it causes unintended, yet horrific results

How much malpractice is there?

Preventable adverse events are a leading cause of death.



**According to Institute of Medicine :
@ 98,000 Americans die each year from
medical errors.**

Deaths due to preventable adverse events exceed deaths attributable to :

- ◆ Motor vehicle accidents (43,458),
- ◆ Breast cancer (42,297) or
- ◆ Aids (16,516).

◆ *To Err is Human, Building a Safer Health System* Institute of Medicine, National Academy Press, (1999)

Despite prevalence of patients having adverse
events,

Most Patients Subject to Adverse Events Do
Not Sue

The Harvard Medical Practice Study



The NEW ENGLAND
JOURNAL of MEDICINE

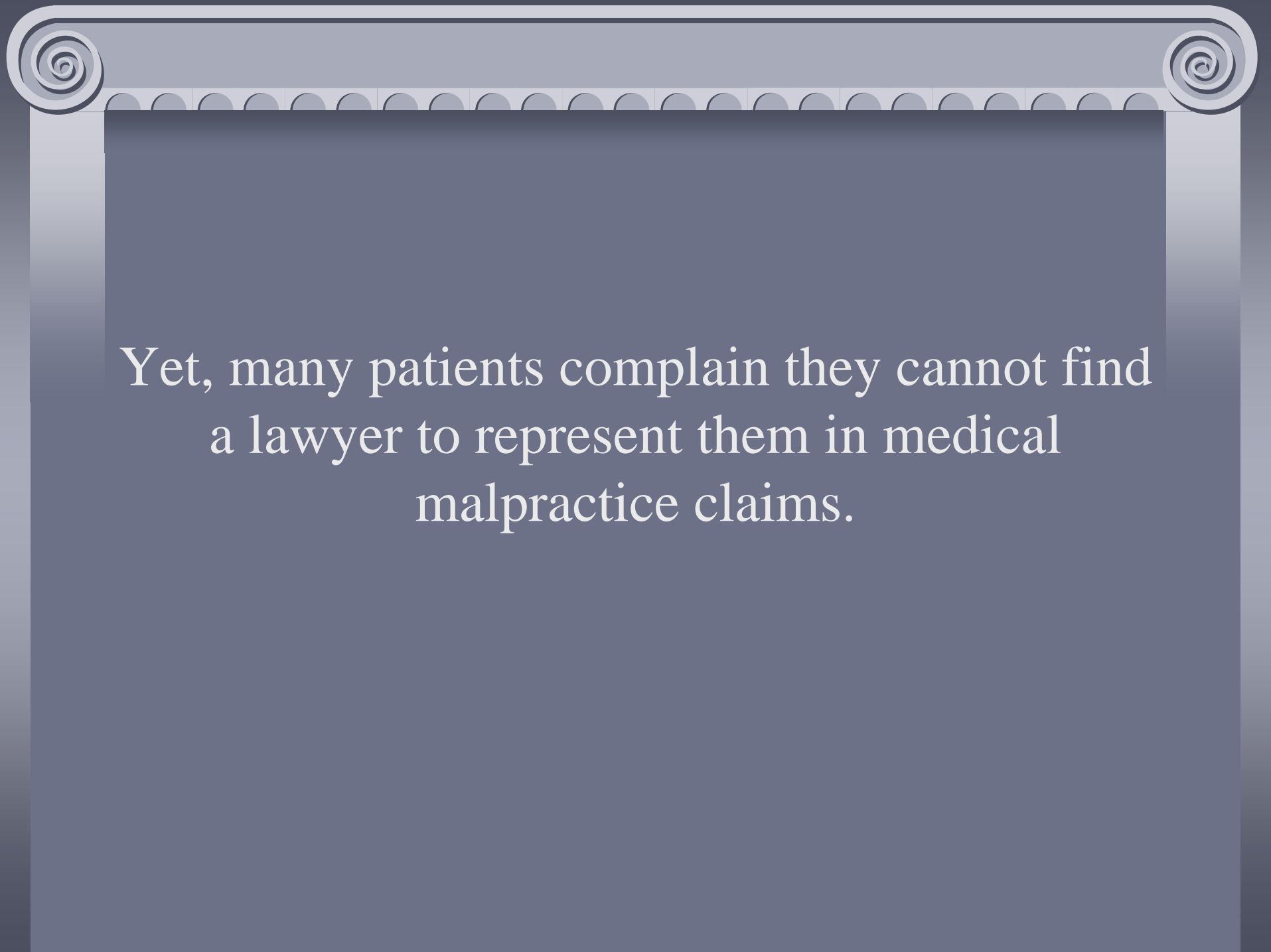
The Harvard Medical Practice Study (HMPS):

Brennan TA, Leape LL, Laird NM, *et al.* ***Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study***, *N Engl J Med* 1991; **324**: 370–7

- ◆ established the standard by which adverse events are measured
- ◆ laid the groundwork for policy discussions on patient safety .

The Harvard Study Concluded:

- ◆ **The vast majority of people injured as a result of substandard care do not file a claim.**
- ◆ **There are ten incidents of medical malpractice for every one malpractice claim in the United States.**



Yet, many patients complain they cannot find
a lawyer to represent them in medical
malpractice claims.

What is the ratio of cases screened to cases accepted?

◆ American Association For Justice :

◆ 100 reviewed potential cases to each 1 taken.

What about unscrupulous lawyers who file frivolous lawsuits?

They exist, and continuing efforts must be made to reign them in.

But there are many things to do to help you successfully navigate the complicated world of medical malpractice lawsuits

**If there are many more adverse events than
there are lawsuits,**

- ◆ **What does a competent plaintiff's attorney look for in deciding which cases to take?**
- ◆ **What can you do to avoid having your mistakes wind up being a monument to legal services?**

First Issue:

**HOW DO ATTORNEYS DECIDE
WHICH MALPRACTICE CASES
TO TAKE?**

Competent lawyers screen cases
carefully pre-filing

◆ Cases expensive because of expert
costs.

◆ **Plaintiff's attorney fees capped.**
(MICRA)

MICRA

- ◆ California's Medical Injury Compensation Reform Act of 1975 (MICRA).
- ◆ **\$250,000.00 cap non-economic damages**
- ◆ Off-set for most benefits received

Other Economic Realities of Case Selection

- ◆ No cap on expert costs.
- ◆ **No cap on defense attorney's fees.**
- ◆ Plaintiff's lawyer on a contingency: No recovery, no fee.
- ◆ **Go broke quickly with frivolous lawsuits.**



◆ **What Increases Your Odds of Being Sued?**

◆ Another way of saying this is...

Lawyers' Analysis of Which Cases to Take:

Two Key Factors:

- ◆ **Nature of Provider's Conduct**
- ◆ **Nature /Extent of Patient's Injuries**

First Step in Analysis:

◆ FOCUS ON THE PROVIDER'S CONDUCT

◆ **Did the Doctor Do More than Just Run a Professional Red Light?**

- ◆ **Has doctor's conduct gone beyond mere "negligence"?**
- ◆ **Anything egregious in the doctor's conduct that will likely increase the jury's anger?**
- ◆ **Nexus between juror anger and increased damages .**

Types of Egregious Conduct Which Increases Odds of Being Sued

◆ **Battery**

◆ **Fraud**

◆ **Alteration of Medical Records**

Battery

- ◆ **Battery = unlawful touching**
- ◆ **Failure to obtain consent for medical procedure.**
- ◆ **Why Important?**
- ◆ **Battery not subject to MICRA damages cap**

Example of Medical Battery:

Perry v. Shaw

Facts in Perry:

- ◆ Post weight loss, Perry asked Dr. Shaw to surgically remove excess skin from her body.
- ◆ She repeatedly declined a breast enlargement procedure.
- ◆ She repeatedly refused to sign a consent that included the breast lifting procedure.
- ◆ The consent form was later signed only ***after she was medicated*** and taken to the operating room

In *Perry*, the jury found the doctor guilty of both negligence *and* battery

- ◆ Awarded the patient \$59,000 for medical expenses
- ◆ **Awarded +\$1 million for pain and suffering.**

How battery finding affected the bottom line:

No cap on damages upon a finding of battery,
so the entire verdict was allowed to stand.

◆ **But for the finding of battery, MICRA
would have reduced the pain and
suffering damages to \$250,000.00**

Why?

**What was there about the doctor's conduct
that so upset the jury ?**

Evidence introduced to jury showed that...

Conduct was egregious:

Dr. Shaw augmented her breasts from a 34B to a 40DD against her express, repeated refusal for the surgery.

Doctor was cavalier and not contrite:

Dr. Shaw later told Shaw that although she might then be upset, she would be happy within a year .



**What to do to prevent this
from happening to you?**

- ◆ Discuss the procedure and significant risks personally with the patient *yourself*.
- ◆ Chart everything about the discussion
- ◆ **DO NOT DO THIS ROTE.**
- ◆ Have consent signed only *after discussion*
- ◆ And, perhaps most important.....



Consent discussion/signing

must take place

before the patient is medicated.

- ◆ **Include *all potential* procedures on the written consent form.**
- ◆ All informed consents should be witnessed and signed by the patient and the witness.
- ◆ **Date *and time* the consents.**

- ◆ Set policy confirming signed consent matches planned procedure, including exact body part to be operated on.
- ◆ In a spinal surgery case, confirm exact level of spine to be operated on.
- ◆ In every case, the surgeon must *independently confirm* this information before beginning the procedure.

Types of Egregious Conduct
Which Increases Odds of Being
Sued:

◆ **Fraud**

Billing Fraud

- ◆ Over-billing (up-coding), cost reporting for services not provided, are forms of fraud and can expose you to:
 - ◆ **damages unprotected by MICRA caps**
 - ◆ **punitive damages**

Seemingly careless billing errors can seem far more sinister than intended.

- ◆ Example : Case of the doctor's sworn testimony he **never saw the patient after the date of admission**, when he handed care over to other physicians.

- ◆ The absence of doctor's progress records consistent with the claim he had not seen the patient
- ◆ **However, physician's office billed, and was paid for, *daily* visits to the patient for each of the 63 days the patient was hospitalized.**
- ◆ An action for fraud was successful against the doctor based on the billing records.

Types of Egregious Conduct Which Increases Odds of Being Sued :

◆ **Alteration of Medical Records**

◆ Why do innocent change to records expose you to potential for malpractice suit?

◆ **Because it looks like an admission of guilt**

◆ ***and* may be evidence of a potential cover-up**

Caveat :

Computerized Records

- ◆ Problem of Carrying Entries to Later Treatment Dates
- ◆ **Problem of Using Template Check-off**
- ◆ Problem of Not Making Personal Notations
- ◆ **Proof of when and who logged into the system.**

Non-egregious conduct that increases odds of being sued:

- ◆ Incompetent Staff
- ◆ Incompetent Colleagues in Medical Group
- ◆ Inadequate Patient Safety Systems
- ◆ Failure to Refer to Specialist
- ◆ Failure to Recommend/Document Second Opinions
- ◆ Oblivious or rude receptionists

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Liability Imputed From Incompetent or Inadequately Supervised Staff.

- ◆ Oblivious or rude receptionists
- ◆ **Incompetent nurses or nurse practitioners**
- ◆ Incompetent and/or unsupervised physician's assistants

Liability Imputed From Incompetent or Inadequately Supervised Staff

- ◆ ...particularly when coupled with a physician who doesn't return calls and patient suffers catastrophic results from delay.**

What to do?

- ◆ Train staff to *listen* to patients, and communicate with you about potential problems.
- ◆ Train yourself to *listen to patients*.
- ◆ Return phone calls.
- .
- ◆ **Don't hide behind your staff with difficult patients.**

Non-egregious conduct that increases odds of being sued:

- ◆ **Incompetent Colleagues in Medical Group**

Liability For Practicing With Incompetent Doctors in your Medical Group.

- ◆ Be wary of partners known to be routinely careless or who have **frequent patient or staff complaints.**
- ◆ **Staff is often the first to know of a doctor who may be at risk.**
- ◆ Encourage staff to share such information *without recourse.*

**Non-egregious conduct that increases odds
of being sued:**

◆ **Systems Errors**

Liability for Systems Errors

- ◆ A physician may be liable for system errors that are the *proximate* cause of injury.

Most Common Systems Errors

(in order of frequency):

- ◆ **Medication-related**
- ◆ **Communication Errors**
- ◆ **Healthcare Associated Infections**
- ◆ **Medical Records Errors**

**Non-egregious conduct that increases odds
of being sued:**

◆ **Failure to Refer to a Specialist**

Failure to refer to a specialist

- ◆ If in doubt, refer the patient to a specialist.
- ◆ If you do not refer the patient to a specialist when the standard of care requires it, ***you will be held to the higher standard***
- ◆ *and presumed to yourself have the education, training and skills required of the specialist.*



**Close Cousin of Duty to Refer to
Specialist....**

**Duty to Recommend
Second Opinions**

When will liability for failure
refer to specialist/recommend
second opinion haunt you
beyond merely running a
professional red light?

\$\$\$ Financial Motive \$\$\$

- ◆ Greater risk of liability when a direct, economic interest in failing to make referral.

\$\$\$\$\$

- ◆ Example: general dentists with **little special training** doing complicated dental implants.
- ◆ Or, a **bonus system** that rewards primary care doctors who refrain from making referrals to specialists .

Lawyers' Analysis of Which Cases to Take:

- ◆ **Nature and Extent of Patient's Injuries**

**Degree of Injury
Doesn't Necessarily Equate
With Most Lucrative Lawsuits**

Different kinds of Damages:

- ◆ Cap of \$250,000 for pain and suffering
(called general damages)
- ◆ **No cap on damages for past and future earnings and medical expenses**
(called special damages)

**The greater the need for
future medical care**

+ lack of ability to work

= greater special damages

- ◆ For this reason **birth injury** cases are the most fiercely litigated.
- ◆ Close second : Catastrophic and permanent **injury to a large wage earner** that will affect future earning capacity

Why fewer lawyers taking cases that have no significant “special damages”

- ◆ No COL increase on cap since 1976
 - ◆ + Strict Cap on plaintiff’s lawyers fees
 - ◆ + No cap on defense attorney’s fees
 - ◆ + No cap on experts costs
-

= AN UNEVEN PLAYING FIELD

Do the math:

- ◆ Attorney's fees on \$250,000 case are @ **\$67,000** (depending on costs).
- ◆ Out of pocket costs of litigating the case, through trial, exceeds **minimum \$100,000**.

- ◆ Would you invest hundreds of hours or more of your own time, pay overhead and invest \$100,000+ of your own money in costs,
- ◆ ...for the *chance* of earning \$67,000 in fees?
- ◆ Neither will many plaintiff's attorneys.



**Which Potential Claims
Does This Impact?**

◆ **Death of a child**

◆ **Death of the elderly (unless Elder Abuse);**

◆ **Death of a low wage earner**

◆ **Serious injuries with no future significant medical care or loss of earning capacity**

◆ **Patients on worker's compensation**



**Exception to the Rule,
Claims Under the ...**

The Elder Abuse and Dependant Adults Civil Protection Act

California Welfare & Institutions Code §15657, et seq.

Potential Claimants Under Elder Abuse Act:

◆ The patient is 65 +

or

◆ Dependent adult (*A dependant adult is +18 and totally disabled*)

and



**The Conduct Must be
More Egregious
than Running a Professional Red
Light:**

A Provider is Liable if There is Clear and Convincing Evidence:

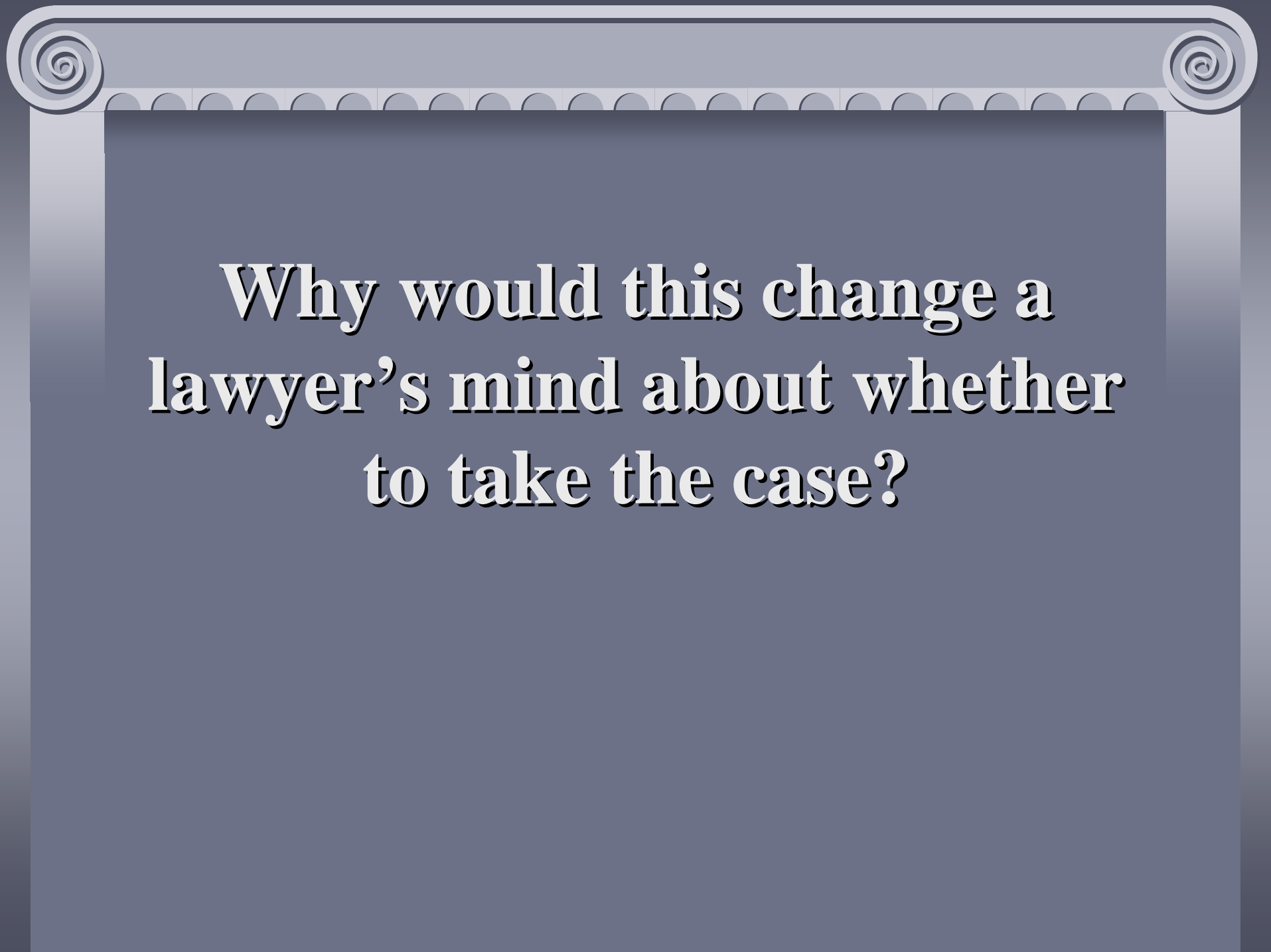
- ✦ Physical abuse,
- ✦ Neglect or
- ✦ Fiduciary abuse
- ✦ And...

... in the commission of the abuse.
the provider is guilty of :

◆ *Recklessness*

◆ **Oppression,**

◆ **Fraud or
malice**



**Why would this change a
lawyer's mind about whether
to take the case?**

Enhanced Damages Recoverable in Elder/Dependent Adult Cases:

- ◆ Including attorney's fees,
- ◆ Damages for pain and suffering that survive the death of the patient (equals **“double cap”**)
- ◆ Punitive damages

Think you are immune from liability for elder abuse because you *don't* practice in a nursing home setting?

◆ Think again.

Physicians and hospitals may be liable under elder abuse statutes:

- ◆ For **under-treatment** of a hospitalized elder with intractable pain. (*Bergman v. Chin*)

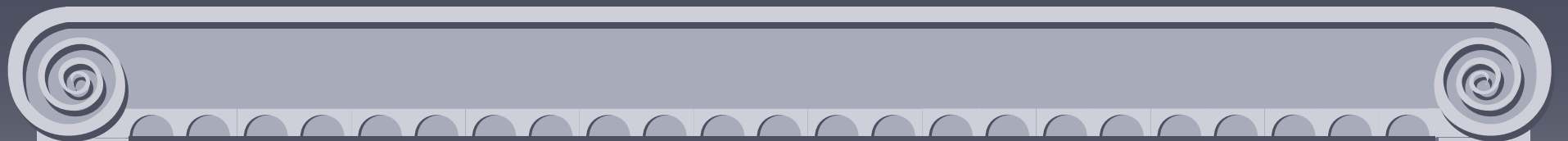
Jury **verdict** in Bergman v.Chin :

- ◆ **\$1.5 million** for pain and suffering because of a **a *pattern* of repeated** failure to adequately treat pain, constituting reckless conduct.
- ◆ Award was **reduced to \$250,000.00** because it exceeded the MICRA cap statute,
- ◆ **No punitive damages,**
- ◆ +\$100,000s in attorney's fees (which are often split between client and lawyer)

Bergman v. Chin not a unique case:

- ◆ Liability for neglect of 44 year old patient with sepsis who died following a biopsy.
- ◆ Found to be an abuse case because of a *pattern* of recklessness in caring for patient's declining health, failure to assist in personal hygiene and protracted pain up to her death.

(This latter is a UCSD case, Marron v. Superior Court)




**What to do to avoid similar problems
with elder abuse claims?**

Treat all patients, but particularly elderly and dependent adults with respect .

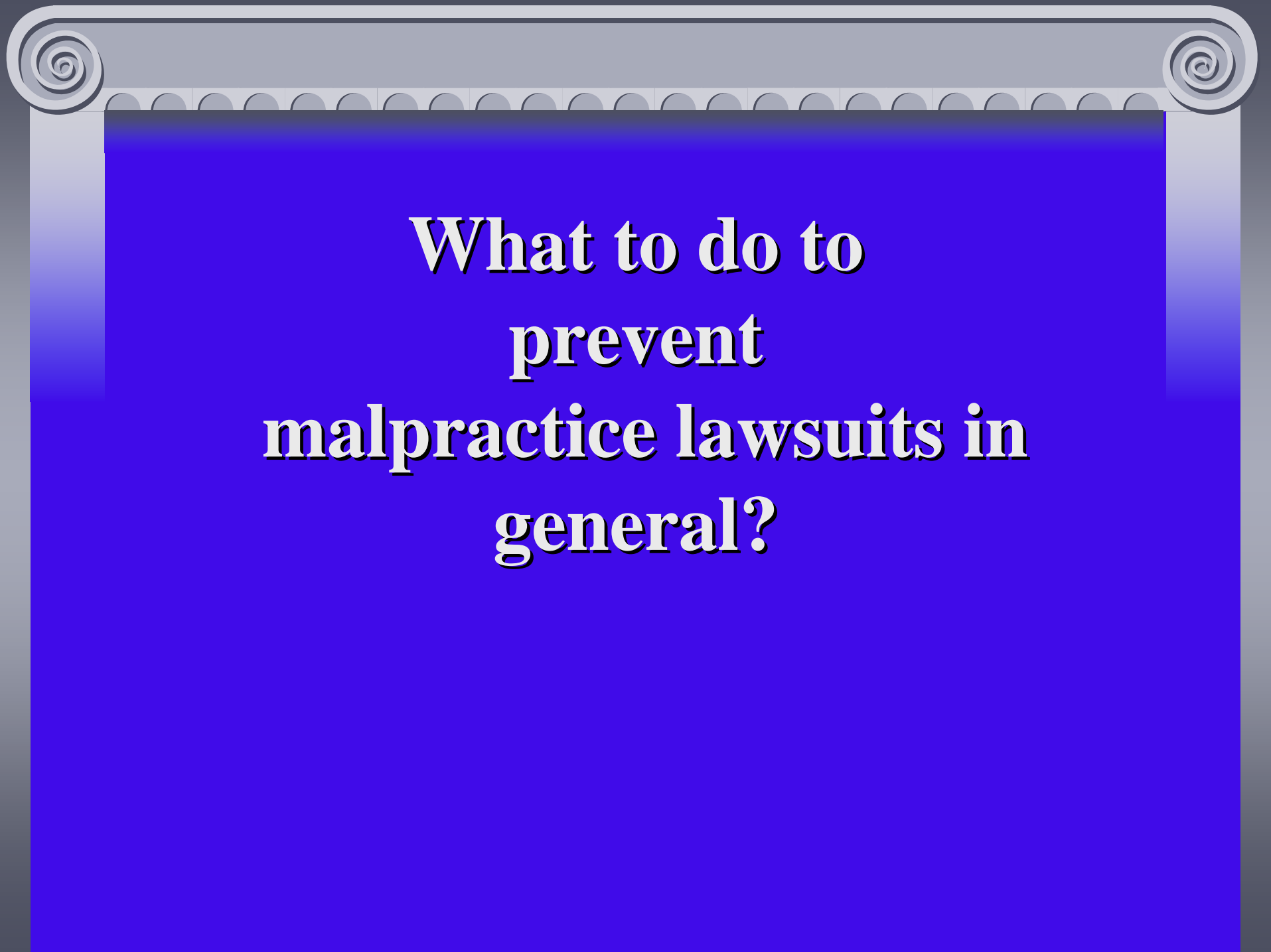
◆ **Listen to them.**

◆ **If patient can't make own medical decisions, have family member/ partner sign medical power of attorney.**

◆ **Document communications regarding treatment choices.**



**REFER TO
PAIN MANAGEMENT SPECIALIST
FOR UNRELENTING OR
CHRONIC PAIN**



**What to do to
prevent
malpractice lawsuits in
general?**



◆ **Practice good medicine**

◆ Be patient advocate with HMOs

◆ **Document chart carefully**

- ◆ **Notify Risk Management re depositions**
- ◆ **Develop good “bedside manner” and communicate effectively with patients.**
- ◆ **Use apologies effectively**

Caveat re Apologies:

- ◆ **Benevolent gestures expressing sympathy help avoid lawsuits but...**
- ◆ **Admissions of fault can be used against you in court**
- ◆ **Before apologizing, seek legal counsel/ speak to risk management.**

What Can Institutions Do to Help You Avoid Malpractice Claims:

- ◆ Institute More Patient Safety Programs

Patient safety systems based
on assumption that cause of
majority of accidents:

**“is not careless people but faulty
systems.”**

Lucian Leape, Arnold Epstein & Mary Beth Hamel, A
Series on Patient Safety (Editorial), Oct. 17, 2002,
NEW ENG. J. MED. 1272

Not all Studies Agree

- ◆ 2007 study by Doctors Company found :
- ◆ **only 1 percent of malpractice lawsuits arose out of isolated system errors.**
- ◆ 63% of claims arose from provider error only.
- ◆ **Systems errors combined with provider error represented 28.7 % of all claims.**

Who is Doctors Company?

- ◆ Largest physician owned professional liability insurance company in U.S.
- ◆ **Doctors represents +32,000 physicians in every specialty /every state.**
- ◆ Doctors Company's study representative of all medical malpractice claims occurring throughout healthcare system.

- ◆ More reliable data needed on cause of adverse events
- ◆ M & M Committees/Peer Review not large sampling, not enough shared info.
- ◆ **California mandatory reporting step right direction**
- ◆ Only helpful if data analyzed and disseminated.



Evolving Area of Potential
Litigation:

Cybermedicine:

**The Blessing and the Curse
of Email and Internet**

E-MAIL

- ◆ E-Mail a dangerous trap for the unwary in communications between doctors and patients

- ◆ One study reported when a *fictitious* patient solicited e-mail advice from physicians about a dermatological problem,
- ◆ **50% responded, and the majority explicitly referenced a “diagnosis” in their response.**

Unsolicited Patient E-mail Requests for Medical Advice on the World Wide Web. Eysenbach and Diepgen JAMA. 1998 Oct.21; 280 (15) 1333.

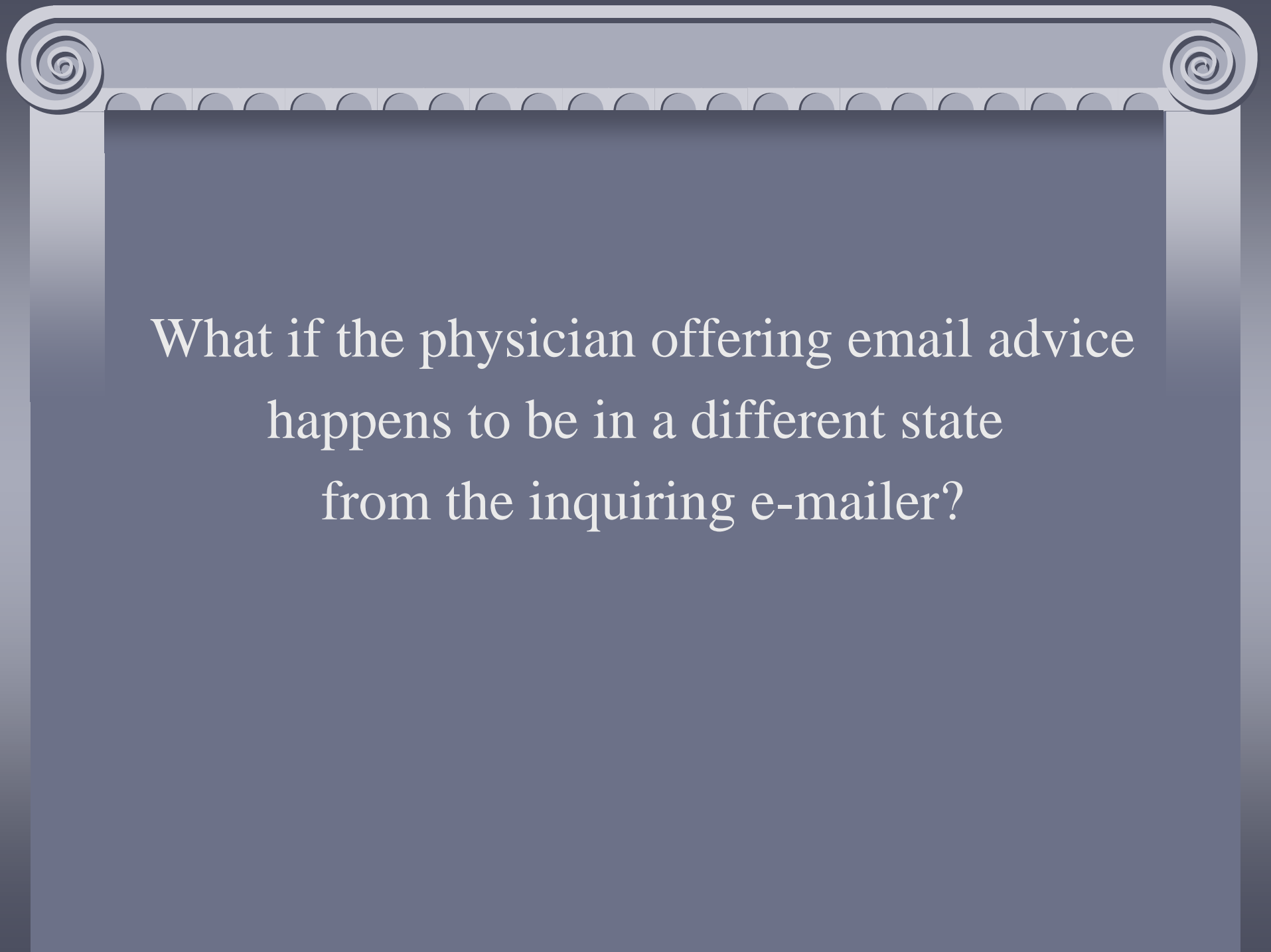
Physicians who use Internet to treat patients
with no prior relationship tread on thin ice
of potential liability



Beware - thin ice

◆ The physicians who offered advice to patients via e-mail may be liable if:

- ◆ these were real individuals
- ◆ who had relied on that advice, and
- ◆ the advice caused harm.



What if the physician offering email advice happens to be in a different state from the inquiring e-mailer?

- ◆ The Federation of State Medical Boards has promulgated *Model Guidelines for the Appropriate Use of the Internet in Medical Practice*.

<http://www.fsmb.org/>

Under these Model Guidelines, a physician-patient relationship :

- ◆ “tends to begin when an individual seeks assistance from a physician with a health-related matter...
- ◆ The relationship is clearly established when the physician agrees to undertake and diagnose....
- ◆ **Whether or not there has been a personal encounter between the physician and patient.”**

- ◆ It is often unclear where an e-mail sender resides.
- ◆ E-mails may come from patients in states where the physician is not licensed to practice medicine.
- ◆ Under the Model Guidelines, there is the risk of being sued in the patient's home state.

There is far more at stake than the inconvenience of being sued out of state:

- ◆ **No malpractice insurance** covers the doctor in a state where he/she is unlicensed.

- ◆ **No cap on damage protection** for health care providers unlicensed in the state where they are found to have practiced medicine.

What to do?

- ◆ Have a provider agreement with written policies and procedures in place for the use of patient-physician e-mail.

Such written policies should cover the following areas:

- ◆ 1. Which health care personnel will actually process the messages and how frequently;
- ◆ 2. Hours of operation (so that there is no expectation of immediate response in an emergency situation);

3. Limits to the types of transactions that will be permitted electronically

- ◆ for example, use only for prescriptions refills;

- ◆ under what circumstances the patient must call office or make an appointment;

- ◆ security measures;

- ◆ hold harmless clauses if a technical failure.

- ◆ 4. Required patient information to be included in the e-mail communication;
- ◆ 5. *Archival and retrieval policies;*
- ◆ 6. Quality oversight mechanisms;
- ◆ 7. *Informed consent.*

- ◆ Policies should be on the provider's website .
- ◆ Policies should be in disclaimers, automatically published with any responsive e-mail.
- ◆ All patient-related e-mail should be downloaded, printed and made part of the patient's chart.

What to do to **Minimize Your Exposure if
You are Sued?**

- ◆ Have adequate insurance.
- ◆ Report claim to risk management ASAP
- ◆ Have a good attorney and confide in attorney.
- ◆ Cooperate with your defense.
- ◆ Consent to settle if advised you were wrong.

Have Adequate Insurance

- ◆ Caps on damages *only* limit recovery of damages for pain and suffering.
- ◆ Judgment against you may still be **several millions of dollars**

Why care about malpractice insurance if you are at UCSD?

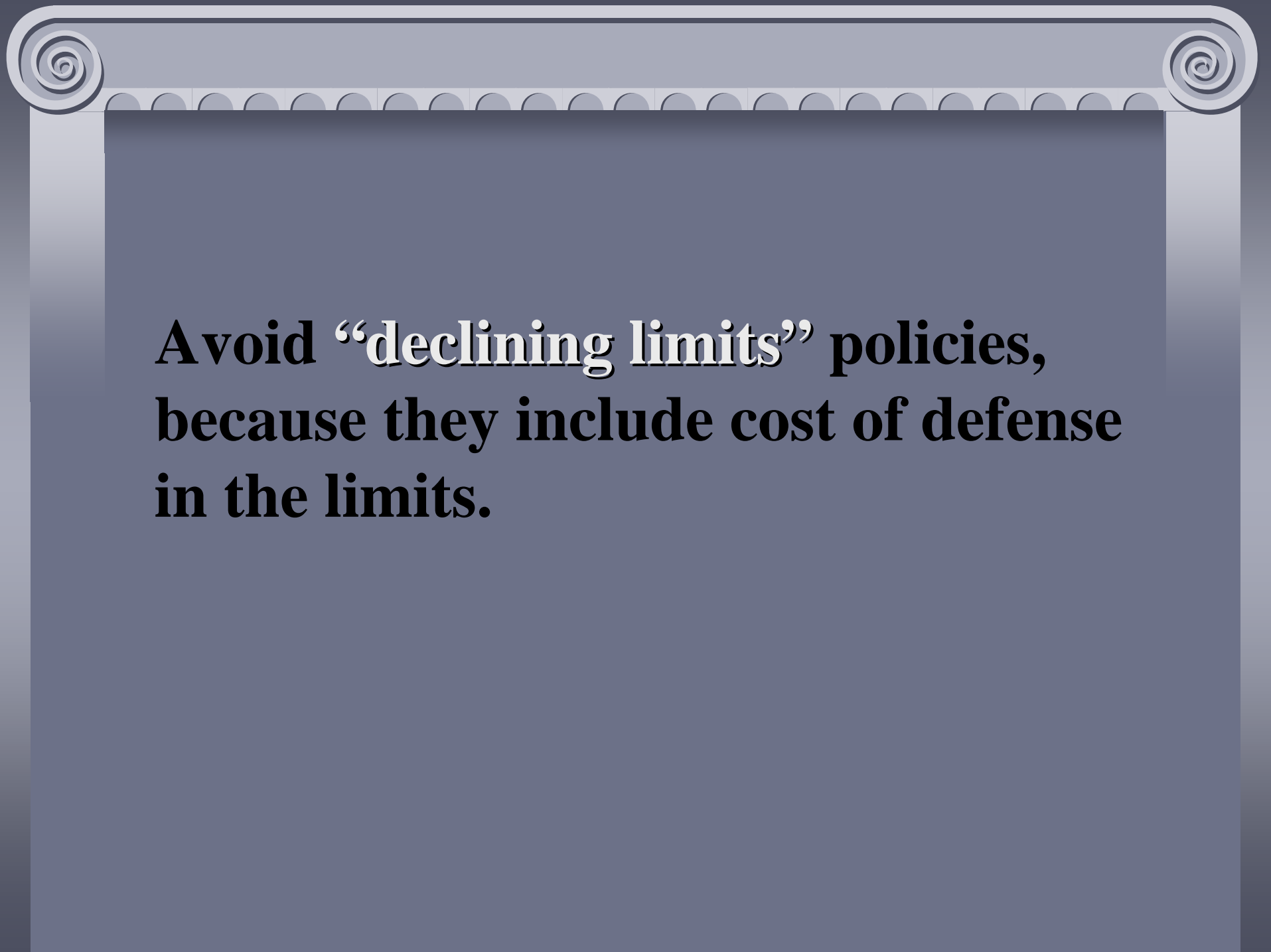
◆ Maybe not important...

◆ **Unless you moonlight or have practice outside the University.**

◆ If you do, you should know....

If you do need malpractice insurance:

- ◆ Have the right “kind” of policy
- ◆ Have sufficient policy limits



**Avoid “declining limits” policies,
because they include cost of defense
in the limits.**

- ◆ **Attorney's fees/costs often total *hundreds of thousands of dollars***
- ◆ **If insufficient policy limits to pay judgment, you may be *personally liable*.**
- ◆ **Declining limits policies create conflict of interest between you and your attorney.**
- ◆ **The more aggressive the defense/ more policy eaten/ more exposure for you.**

Watch out for “claims made policies”

- ◆ Unless notices of claims are during the policy period, there is **no coverage**.
- ◆ Not good if you change practices/retire and then claim made for *prior* care.
- ◆ Statute of limitations doesn't start running until patient knows, or reasonably should know, malpractice occurred.

Carry “**Occurrence**” Insurance or Get “**Tail Coverage**”

- ◆ “**Occurrence coverage**” insures for all claims arising from time policy is in force, regardless of when the claim is filed (*which may be years later*).

Tail Coverage

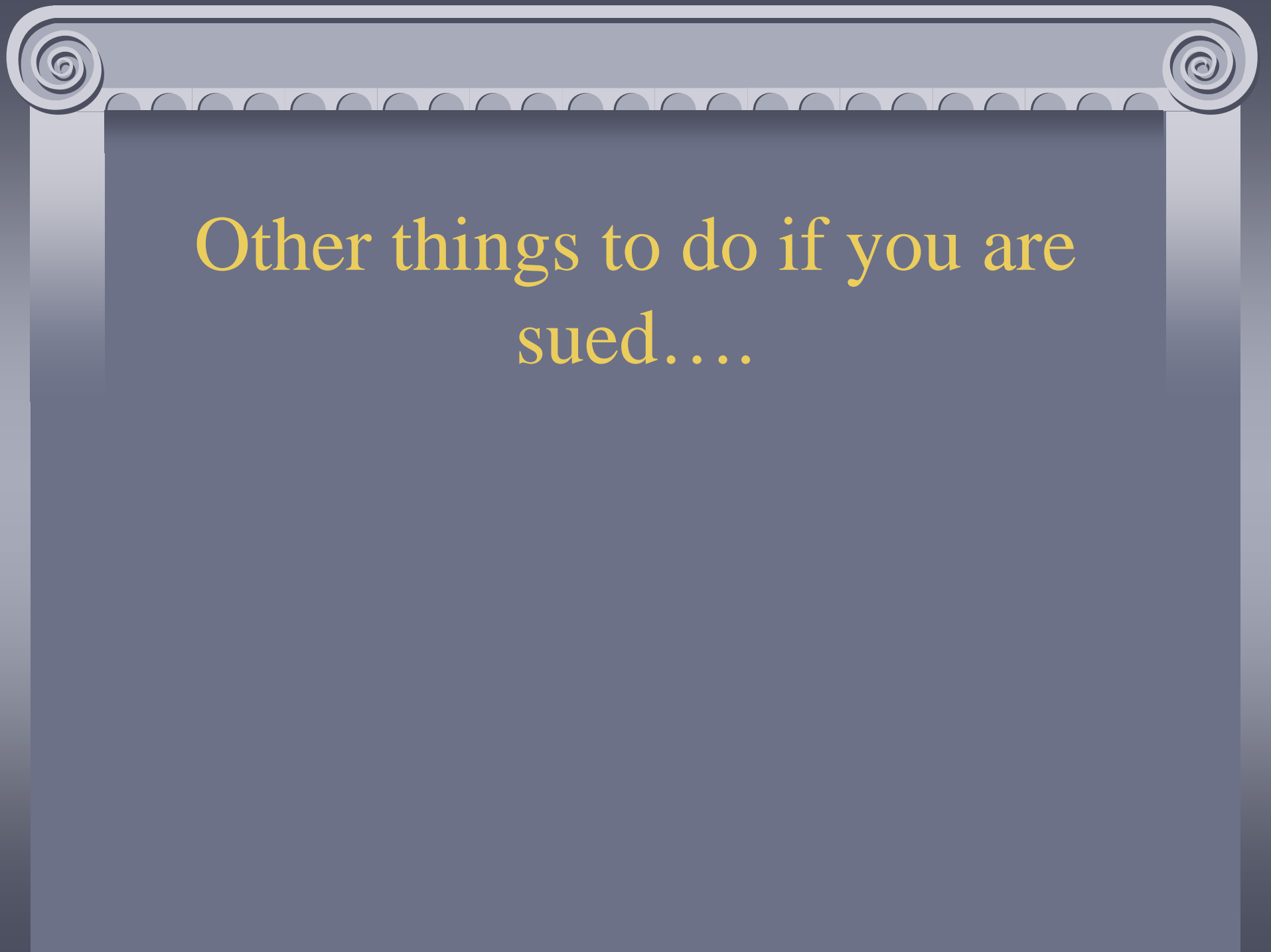
- ◆ “Tail coverage” insurance protects you if claims are later brought arising out of past treatment.

Example:

- ◆ Aortic aneurysm missed on MRI
- ◆ **Aneurysm burst years later/patient lost both of legs**
- ◆ Statute of limitations didn't start to run until aneurysm discovered (when it burst.)

◆ If physician retired /changed practices and didn't have tail coverage or occurrence policies, *their own assets would be at risk.*

◆ **NOT APPLY TO UCSD-RELATED WORK IF UCSD INDEMNIFIES YOU.**



Other things to do if you are
sued....

Report All Claims Promptly To Risk Management

- ◆ **Do not try to explain yourself to the patient or call the plaintiff's attorney**
- ◆ **Any statements you make can be used against you.**

Have a Good Attorney

◆ **How do you know if you have a good attorney?**

◆ If the attorney listens to you.

◆ Talk to other doctors who have been by the same attorney .

What to do if you don't have confidence in your attorney?

- ◆ Meet with attorney and address your concerns.
- ◆ **If still concerned, communicate your concerns to Risk Management.**
- ◆ Last resort, at your own expense, hire own lawyer to monitor lawsuit and protect your interests.

Give consent to settle if a demand is made on a case where you were wrong.

- ◆ If advised that expert retained to review your case finds you at fault,
- ◆ or if the attorney representing you recommends you give consent to settle,
- ◆ think twice before rejecting such an opinion.

Reasons to consider giving consent to settle include:

- ◆ If you consent to settle within policy limit and insurance refuses to pay, you may have to pay the carrier may be responsible for entire judgment, *even if the judgment is in excess of your policy limits.*
- ◆ This protects your personal assets .

Settlement can be confidential

- ◆ Aside from licensing and NPDB, no one need know about the terms of the settlement or that your conduct was called into question.
- ◆ **Seldom does the licensing board take action on single civil lawsuit.**
- ◆ If you lose the case, you will *not* be able to keep the details of the case confidential.
- ◆ **The Internet and newspaper are filled with details of malpractice cases.**

Asset Protection?

- ◆ Many believe revocable living trusts a bankruptcy may shield them from potential exposure.
- ◆ **Get a second legal opinion.**
- ◆ The expected protection may not be available in all cases.

Aren't the vast majority of malpractice suits
are defended at trial?

- ◆ Most cases settle *before* trial or by arbitration.
- ◆ **This doesn't mean settle any case. Listen to your expert and your attorney.**
- ◆ **If necessary, get a second legal opinion if you are unsure how to proceed.**