



**MEDICAL MALPRACTICE  
TRENDS AND CASE STUDIES**

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**CLINE WILLIAMS**

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## Practice Areas:

- Business Litigation
- Health Care
- Professional Licensing and Liability
- Personal Injury & Wrongful Death



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Cline Williams' Health Care Section serves entities and professionals throughout the health care industry. We represent critical access hospitals and large health care systems, ambulatory surgical centers, dialysis providers, federally qualified health clinics, rehabilitation, long-term-care- and assisted-living facilities, and individual providers and their practices, including medical, dental and behavioral health providers.

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# TODAY'S AGENDA

**Understanding the  
Basics of a Medical  
Malpractice Claim**

**National Litigation  
Trends**

**Nebraska Trends  
and  
Considerations**

**Implications for  
Nebraska  
Hospitals and  
Providers**

**Best Practices for  
Risk Mitigation**

**Questions**

# The Basics of a Medical Malpractice Claim

## B. BURDEN OF PROOF

Before the plaintiff can recover against the defendant, the plaintiff must prove, by the greater weight of the evidence, each and all of the following:

1. That the defendant was negligent in one or more of the ways claimed by the plaintiff;
2. That this negligence was a proximate cause of the (*insert descriptive word such as occurrence, accident, collision, fall, et cetera*);
3. That the (*occurrence, accident, collision, fall, et cetera*) was a proximate cause of some damage to the plaintiff; and
4. The nature and extent of that damage.

# **(1) PROVING THE DEFENDANT'S NEGLIGENCE: DUTY AND BREACH**

Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use **the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or in similar localities**. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a health care provider in a particular community, the test shall be that which health care providers, in the same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances.

Neb. Rev. Stat. 44-2810

# APPLICATION TO HOSPITAL STAFF

- You and your peers establish SOC
- Must keep abreast of new developments and literature
  - Texts and professional articles can be critical!
  - Evidence of SOC
- Must know and follow policies, procedures, and protocols of the hospital
  - Evidence of SOC
  - Difficult to defend violations
- Take advantage of continuing education opportunities
- Risk of personal liability?



## **(2)-(3) PROVING CAUSATION OF BOTH INJURY AND DAMAGES**

- A proximate cause is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred.

NJI2d Civ. 3.41

## (4) PROVING DAMAGES: INJURY

- Reasonable value of:
  - medical care incurred
  - medical care reasonably certain to be needed in the future
  - Lost wages
  - Lost earning capacity
  - Funeral costs
  - Cost of obtaining substitute domestic services
- Reasonable monetary value of past and reasonably certain future:
  - physical, mental, and emotional pain
  - inconvenience
  - lost society/companionship
  - humiliation
- Husband or wife's loss of affection, love, companionship, comfort, assistance, moral support, and intimate relations

## **(4) PROVING DAMAGES: WRONGFUL DEATH**

- All damages on the prior page for the decedent's time from injury to time of death
- Any financial support, services, comfort, or companionship the decedent gave to his/her spouse and next of kin

# INFORMED CONSENT CLAIM

- Informed consent requires that the patient prove:
  - 1) That the defendant failed to obtain the patient's informed consent;
  - 2) That a reasonably prudent provider under similar circumstances in the same or similar community would have obtained consent for the medical care at issue;
  - 3) That a reasonably prudent person in the patient's position would not have undergone the medical care at issue had the patient been properly informed;
  - 4) The lack of informed consent was the proximate cause of damage to the patient; and
  - 5) The nature and extent of the damage.

# MECHANICS OF A MEDICAL MALPRACTICE CASE

# WHAT HAPPENS DURING LITIGATION?

## Stages of Litigation

Pleading

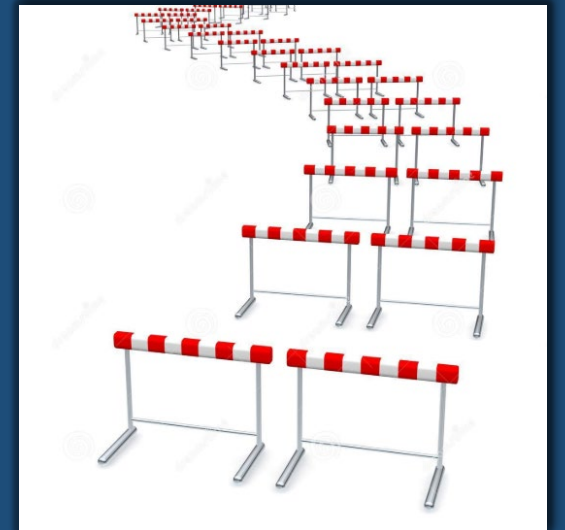
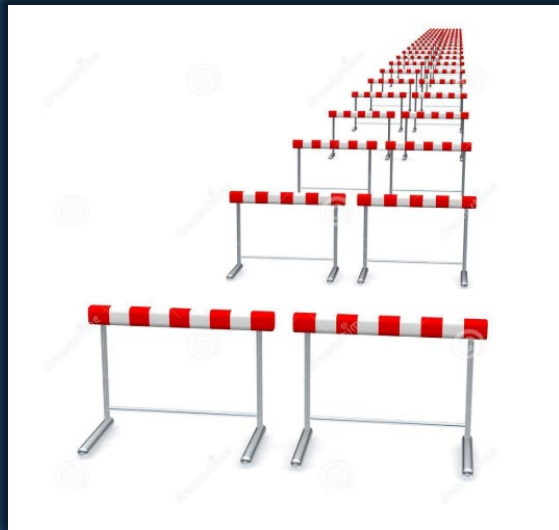
Attorney Investigation

Discovery

Expert discovery

Pretrial Preparation

Trial



# National Litigation Trends

# JURORS

- Skeptical of authority
- Generally less trusting (politics)
- Favor the individual and the underdog (racial, economic, etc.)
- Believe injuries require compensation
- Upset
- 90% of jurors believe the country is going the wrong way
- More willing to believe in conspiracy theories

## Changes in Attitudes Toward Corporate America

In general, in a lawsuit between an individual and a large corporation, which side would you probably tend to lean in favor of?



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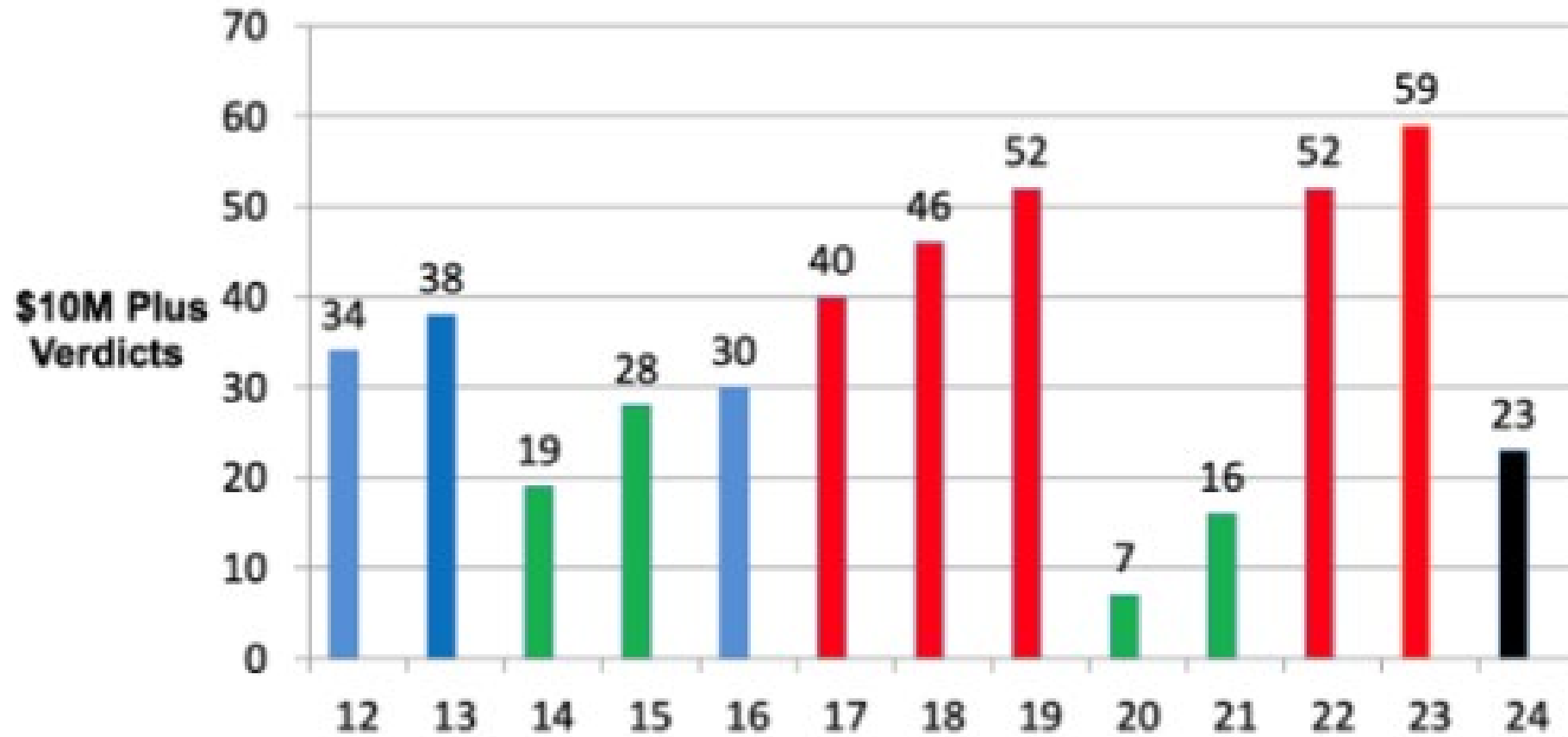


# JURORS

- If a case goes to trial, jurors believe the case has some merit (78%)
- Filing a lawsuit is unnecessarily complicated (39%)
- Willing to ignore jury instructions and judge's admonitions (28%)
- Don't trust the system (17%)
- Have elevated expectations of professionals
- Look to send a message via verdict

# \$10M+ Verdicts, 2012-23

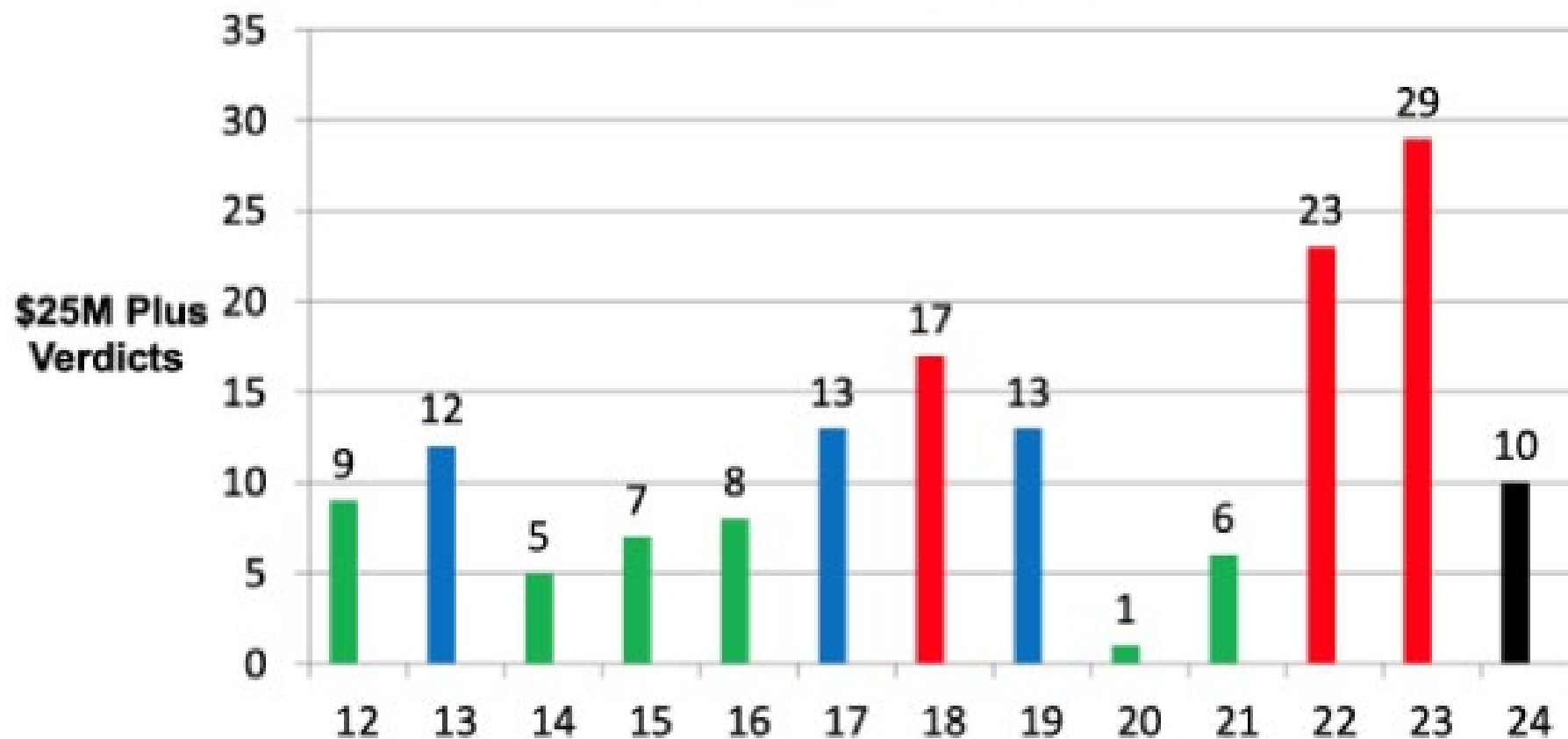
Data known as of 6/30/2024



# Nuclear Verdicts

## \$25M+ Verdicts, 2012-23

Data known as of 6/30/2024



# JURORS: AGGRAVATING FACTORS

- Callousness of defense/unwillingness to admit problems
- Poor documentation and failure to preserve
- Pointing fingers
- Young patients
- Increasing costs of healthcare
- Social Inflation

## Seattle Firm Seeks \$143M In Tunnel Machine Insurance Trial

*By Rachel Riley*

A Seattle construction contractor told a Washington state jury on Wednesday its insurers owe \$143 million for repairs to a massive tunneling machine that sustained "catastrophic damage" when it struck a steel pipe underground in 2013, urging jurors to reject the defense that the claim fell under a "machinery breakdown" exclusion.

[Read full article »](#) | [Save to favorites »](#)

## NY Diocese Reaches \$323M Settlement With Abuse Survivors

*By Hailey Konnath*

Long Island's bankrupt Roman Catholic diocese has agreed to a nearly \$323 million deal with hundreds of survivors of sexual abuse, a historic settlement that will bring to a close after four years the church's Chapter 11 case, according to a statement issued Thursday.

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## **Md. Says Shipowner Liable For \$2B Baltimore Bridge Rebuild**

*By Linda Chiem*

Maryland said the owner and manager of the cargo ship that slammed into Baltimore's Francis Scott Key Bridge must be held liable for the estimated \$1.7 billion cost of rebuilding the bridge, claiming Tuesday that their negligence has caused "grievous impact" to Marylanders, the environment and the regional economy.

 Complaint attached | [Read full article »](#) | [Save to favorites »](#)

## **FilmOn Founder's \$900M Battery Trial Loss Slashed To \$90M**

*By Dorothy Atkins*

A plaintiff who won a \$900 million sexual battery verdict against her former employer, FilmOn founder and Coca-Cola bottling fortune heir Alki David, has agreed to accept a reduced \$90 million verdict rather than face a new damages trial recently ordered by a California state court, according to her counsel.

## **[Exxon Owes \\$816M For Man's Cancer After Judge Ups Verdict](#)**

*By Law360 Staff*

Exxon Mobil Corp. is on the hook for \$816 million to a New York service station mechanic who blames the oil giant for his leukemia diagnosis, after a Philadelphi

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## **[Boeing To Pay Embraer \\$150M To End Failed JV Arbitration](#)**

*By Law360 Staff*

The Boeing Co. will pay Brazilian aircraft manufacturer Embraer SA \$150 million to resolve arbitration proceed

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## **[Black Ex-UPS Driver Scores \\$238M Verdict In Retaliation Suit](#)**

*By Law360 Staff*

A federal jury in Washington state smacked UPS with a \$237.6 million verdict in a lawsuit brought by a Black former driver who said he had faced racist harassment — including a manager who referred to him as "boy" — and had been fired after complaining about the mistreatment.

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## Ohio Train Derailment Plaintiffs Win Final OK Of \$600M Deal

*By Lauren Berg*

An Ohio federal judge on Wednesday gave her final blessing to a \$600 million settlement resolving claims brought by residents and others affected by the Norfolk Southern train derailment and toxic chemical spill in East Palestine, Ohio, last year.

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## Ore. Jury Awards \$21M Over Fatal Shooting At Lowe's

*By Cara Salvatore*

An Oregon jury has awarded a total of \$21.25 million including punitive damages over the fatal shooting of a Lowe's patron by a Cornerstone Security Group private guard after hearing about the security company's "culture of violence."

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## **Yellow Corp.'s Bid To Ax \$7.8B Pension Liability Rejected**

*By Matt Chiappardi*

A Delaware bankruptcy judge sided with the Pension Benefit Guaranty Corp. in its dispute with trucking firm Yellow Corp. over \$7.8 billion in retirement fund with

 [Opinion attached](#) | [Read full article »](#) | [Save to favorites »](#)

## **Samsung Hit With \$192M Verdict In Wireless Charging IP Fight**

A Texas federal jury on Friday found that Samsung owes Mojo Mobility Inc. \$192.1 million for infringing five wireless charging patents with its Samsung Galaxy s

 [Verdict attached](#) | [Read full article »](#) | [Save to favorites »](#)

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Exxon Mobil Corp. is on the hook for \$816 million to a New York service station mechanic who blames the oil giant for his leukemia diagnosis, after a Philadelphia

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## **Walgreens To Pay \$107M To End 3 False Billing Claims Suits**

*By Law360 Staff*

Walgreens has agreed to pay \$106.8 million to settle claims across three lawsuits that it violated the False Claims Act and state laws for billing government health

 [4 documents attached](#) | [Read full article »](#) | [Save to favorites »](#)

## **Sandoz Awarded \$137M In Generic Hypertension Drug Fight**

*By Law360 Staff*

United Therapeutics Corp. owes Sandoz Inc. \$137.2 million for conduct that breached an earlier settlement agreement between the parties and effectively block

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## **\$43.5M Verdict for Ex-Eagles Captain Stands After Appeal**

**A \$43.5 million medical malpractice verdict awarded to a former Philadelphia Eagles team captain has survived an appellate challenge. The plaintiff, who suffered lifelong pain and disability after an improperly handled knee injury, saw the jury's decision upheld, with the court acknowledging the difficulty of pricing lost dreams and careers.**

### **Med Mal Case Is Settled After Scuttled \$111M Verdict in Minn.**

*By Y. Peter Kang*

On the eve of a second trial, a Minnesota-based orthopedic center has settled a suit that previously ended in a \$111 million verdict that was later vacated for being excessive, with federal court records indicating a deal has been reached in principle.

## **Exxon Owes \$816M For Man's Cancer After Judge Ups Verdict**

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## **Boeing To Pay Embraer \$150M To End Failed JV Arbitration**

*By Law360 Staff*

The Boeing Co. will pay Brazilian aircraft manufacturer Embraer SA \$150 million to resolve arbitration proceedings

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# Nebraska Trends, Implications, and Considerations

- **Following National High-Dollar Trends**

- **Cap on Damages:**

- 1976 to 1984: \$500,000

- 1985 to 1992: \$1,000,000

- 1993 to 2003: \$1,250,000

- 2004 to 2014: \$1,750,000

- 2015 to present: \$2,250,000

- **Underlying Limits:**

- 1976 to 2004: \$100,000/\$300,000 for physicians and CRNAs • \$100,000/\$1,000,000 for hospitals

- 2004 to 2025: • \$500,000/\$1,000,000 for physicians and CRNAs •

- Beginning 1/1/2025: • \$800,000/\$3,000,000 for all health

- Audit Trail Issues



# Implications for Nebraska Hospitals and Providers



# Best Practices for Risk Mitigation

## RM practices from your outside counsel during litigation

- **Don't** discuss facts or litigation unnecessarily
- **Don't** alter records or create documents
- **Do** communicate and cooperate with defense counsel

# From your claims professional

## Relevant Considerations

- **Pointing Fingers**
- **Ensure Initial Disclosure of Medical Records is a Complete Set**
- **Patient Portals**
- **Audit Trails?**



# From your claims professional

## Relevant Considerations

- Co-Defendants on the Same Page
- Any Facts to Inflamm the Jury
- Past Experience with Plaintiff's Attorneys
- Motivation of Plaintiff

# RM in Practice

- **Know and strive to meet the SOC**
  - Concentrate
  - Communicate
  - Consult
  - **Document**
  - Listen
  - Be professional
  - **Do not criticize**
  - Be courageous
  - **Be compassionate – Golden Rule**



vs.



# INFORMED CONSENT

- **Not a consent form**
- **It is a process**
- **Forms may be used as part of the process, but dialogue is necessary and RECORDING the dialogue is critically important to RM**

# From your **DEFENSE ATTORNEY**

## Relevant Considerations

- Terms of Release
- Court Approval
  - Wrongful Death
  - NHMLA
- Consent from Insured
- NPDB Reporting Obligations
- Satisfaction of Liens
- Medicare Set-Asides
- Structured Settlements

# From your **INSURED/employee** Relevant Considerations

- NPDB Reporting Obligations and Effect
  - Employment
  - Reputation
  - Personal
- Licensure Actions
- Time Commitment for Trial
- Uncertainty – Risk Tolerance
- Stress vs. Relief

QUESTIONS?



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