



Perioperative Medicine Summit

Evidence Based Perioperative Medical Care

Sources of Risk in Perioperative Period & Reducing your Risk for getting Sued

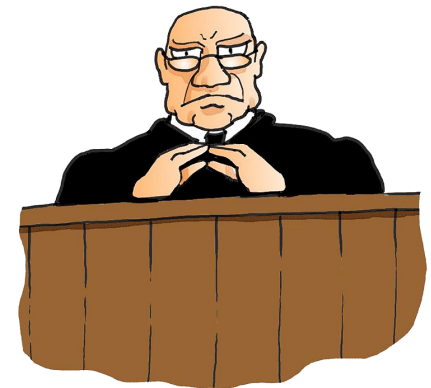
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Objectives

- Nuts and bolts of a medical malpractice lawsuit
- Sources of risk in the perioperative period
- Closed claims experience
- Learn ways to minimize your risk for medico-legal exposure
- Steps to take if you are named as a defendant in a medical malpractice case

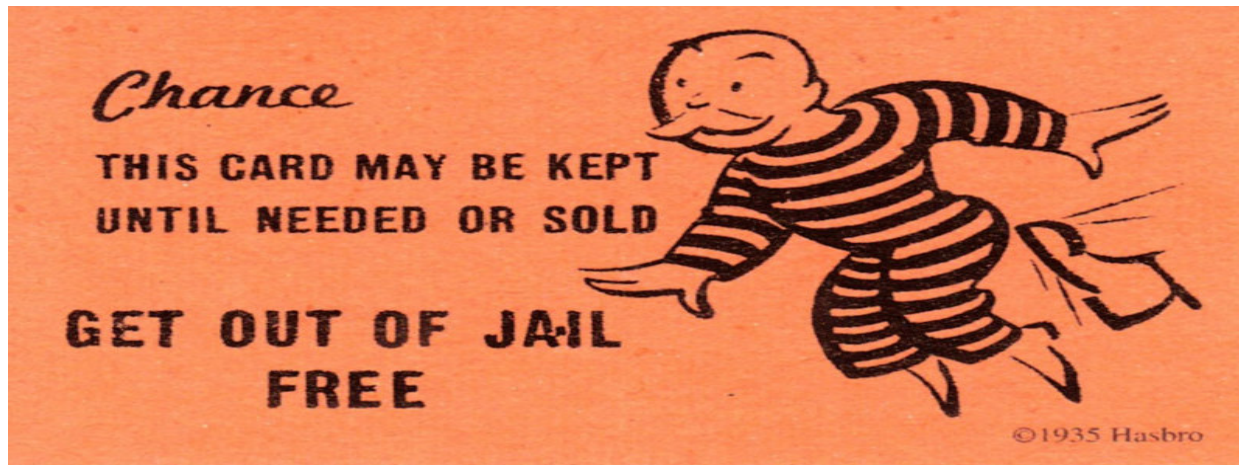


**BECAUSE YOU ARE LIKELY TO GET SUED
(despite being awesome at what you do)
IT IS IMPORTANT TO KNOW...**

1. What to expect if sued
2. How to minimize your risk for getting sued
3. What to do if sued

What is a Medical Malpractice Lawsuit?

- A lawsuit against a healthcare provider based on principles of professional negligence.
- Civil court, not Criminal court.
- Remedy is monetary compensation, not jail time.



Stages of a Medical Malpractice Lawsuit

- Initial pleadings (Complaint, Answer or Motion to Dismiss)
- Written Discovery (Interrogatories, Requests to Produce, Requests to Admit)
- Oral Discovery (Depositions – lay witnesses, treaters, expert witnesses)
- Settlement negotiations, if indicated
- Trial
- Appeal

Plaintiff's Burden of Proof



- Plaintiff must prove by a preponderance of the evidence that:
 1. There was a professional duty
 2. The health care provider breached the standard of care
 3. The patient suffered injury; and,
 4. The injury was caused or contributed to by the breach of the standard of care.

How Does a Jury Know the Standard of Care?

- Defendant's testimony
- Testimony of experts retained by both sides

The jury is vested with the power of evaluating the credibility of the witnesses.

Who Determines the Applicable Standard of Care? The Expert Reviewer

- Typically retained by plaintiff's attorney pre-suit and by defense attorney in early stages of case
- Asked to comment on standard of care, strengths, and weaknesses of case
- Was there a breach?
- Did the breach cause the alleged injury?
- Can the expert support the defendant in a written report and at deposition or trial.



1. True or False: If a doctor gets sued, that always means the doctor must have done something wrong.
2. True or False: If a doctor is confident that he or she did everything correctly, a jury will always find the doctor “not guilty.”
3. True or False: If a bad outcome occurred, that means the defendant doctor will always be found liable.

What Happens to Most Lawsuits?



- 65% of lawsuits are dropped, dismissed, or withdrawn
- 24% settle
- 7% go to trial
- Of those that go to trial, 88% are won by physicians/hospitals

Plaintiffs' Reasons for Settlement

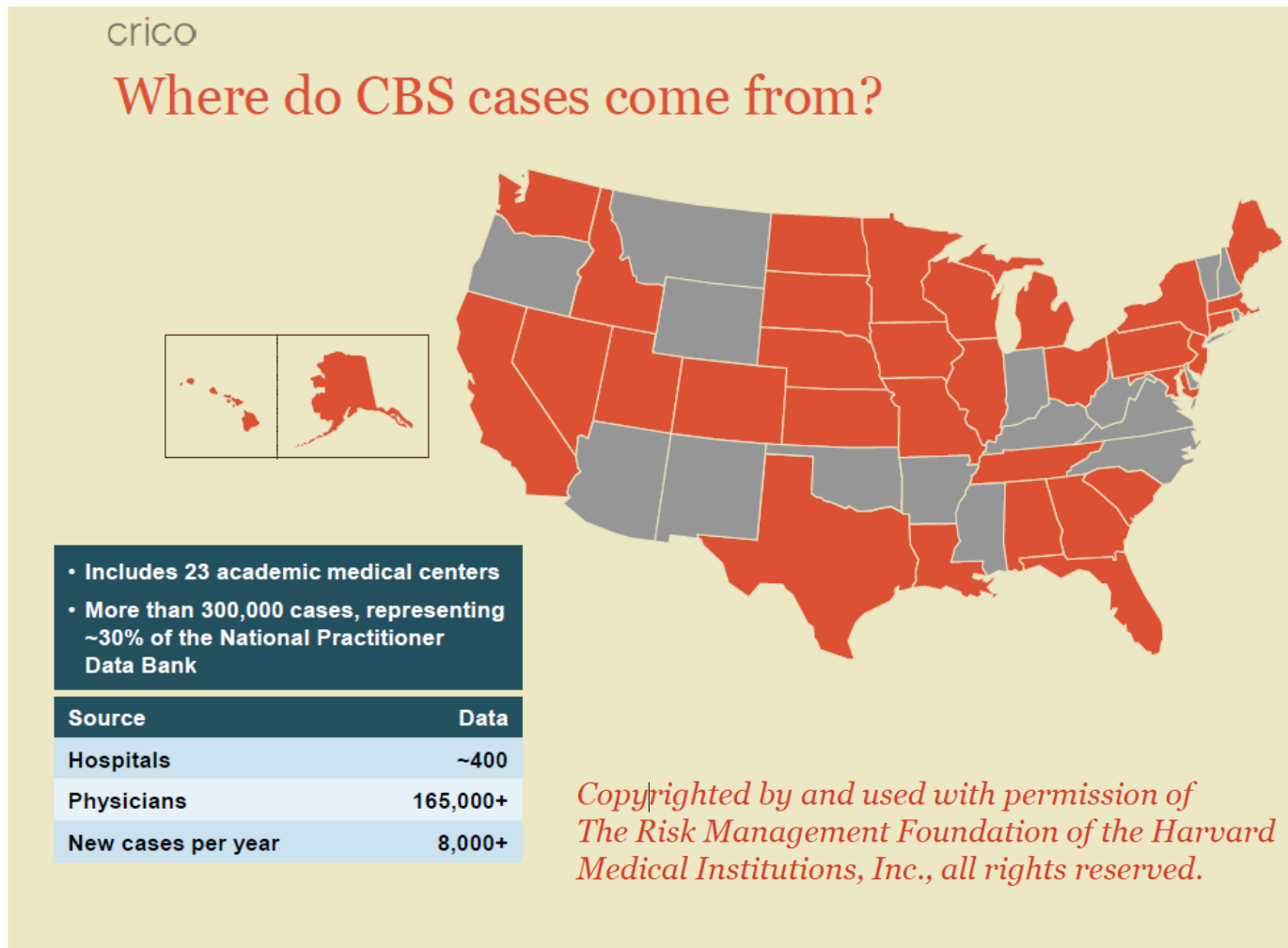
- For plaintiffs, it's money in their pockets without the risk and costs associated with jury trials.
- The vast majority of medical malpractice trials result in verdicts for the healthcare providers.
- Medical malpractice lawsuits typically cost hundreds of thousands of dollars through trial.
- Post-trial appeals process is lengthy and also costly.



Defendants' Reasons for Settlement

- It eliminates risk.
- Doctors do not have to worry about plaintiffs pursuing their personal assets.
- Physicians do not have to endure trial, which can be emotionally taxing and burdensome
- Insurers and hospitals tend to make good business decisions...settlement within policy limits is safer than the cost of defense and the risk of an adverse verdict.

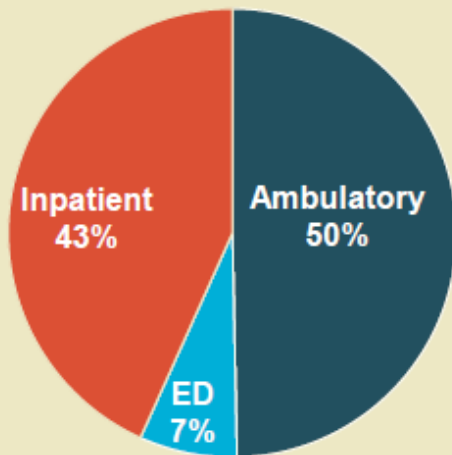
National Data on Closed and Open Malpractice Suits: CRICO Comparative Benchmark System



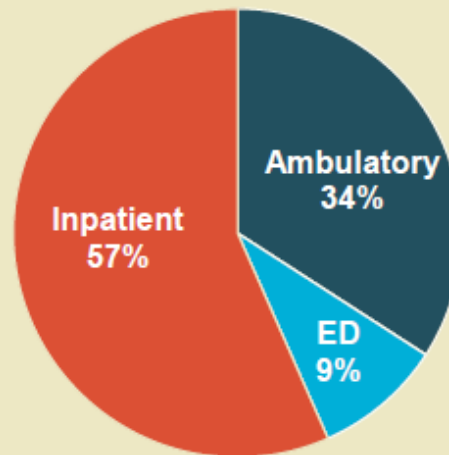
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40% of All Claims and 60% of all Payouts Occur in Inpatient Setting

PERCENT OF CASES by LOCATION



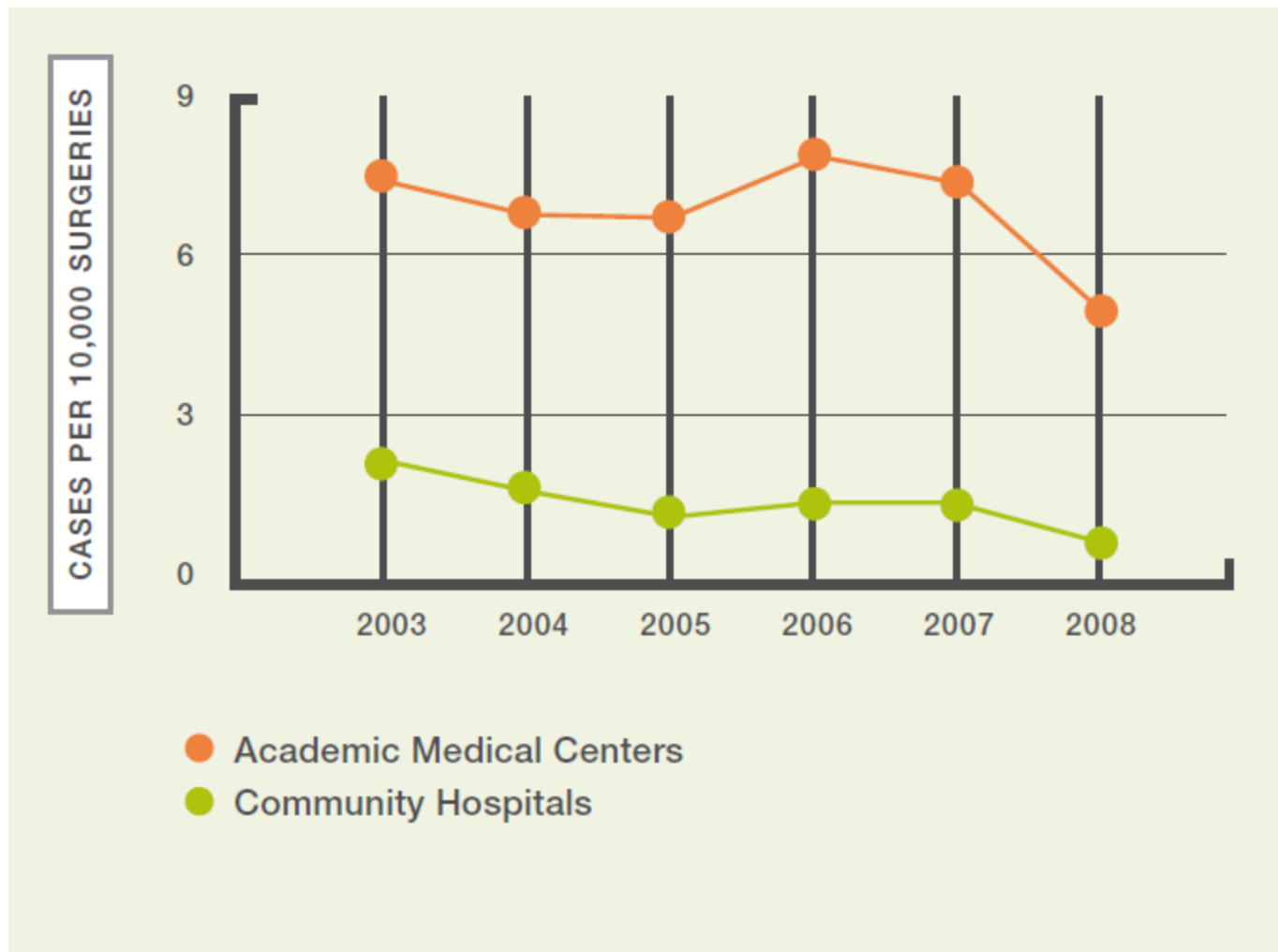
PERCENT OF TOTAL INCURRED



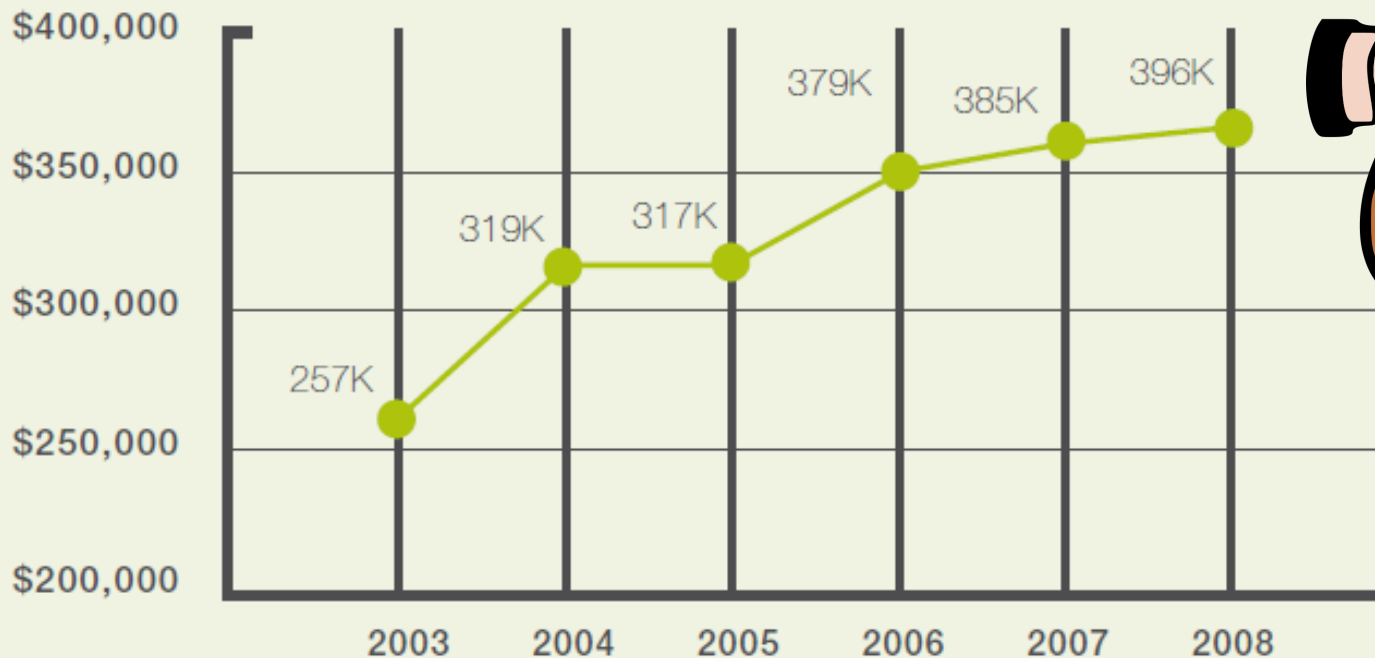
CLAIMANT TYPE	AVG. TOTAL INCURRED
Ambulatory	\$118,062
Emergency	\$225,530
Inpatient	\$224,860

N=21,184 MPL cases asserted 1/1/09–12/31/13.

Patients More Likely to Sue for Surgeries in Academic Medical Centers



Average Payments for Surgical Cases Increased by 50% in 5 Years

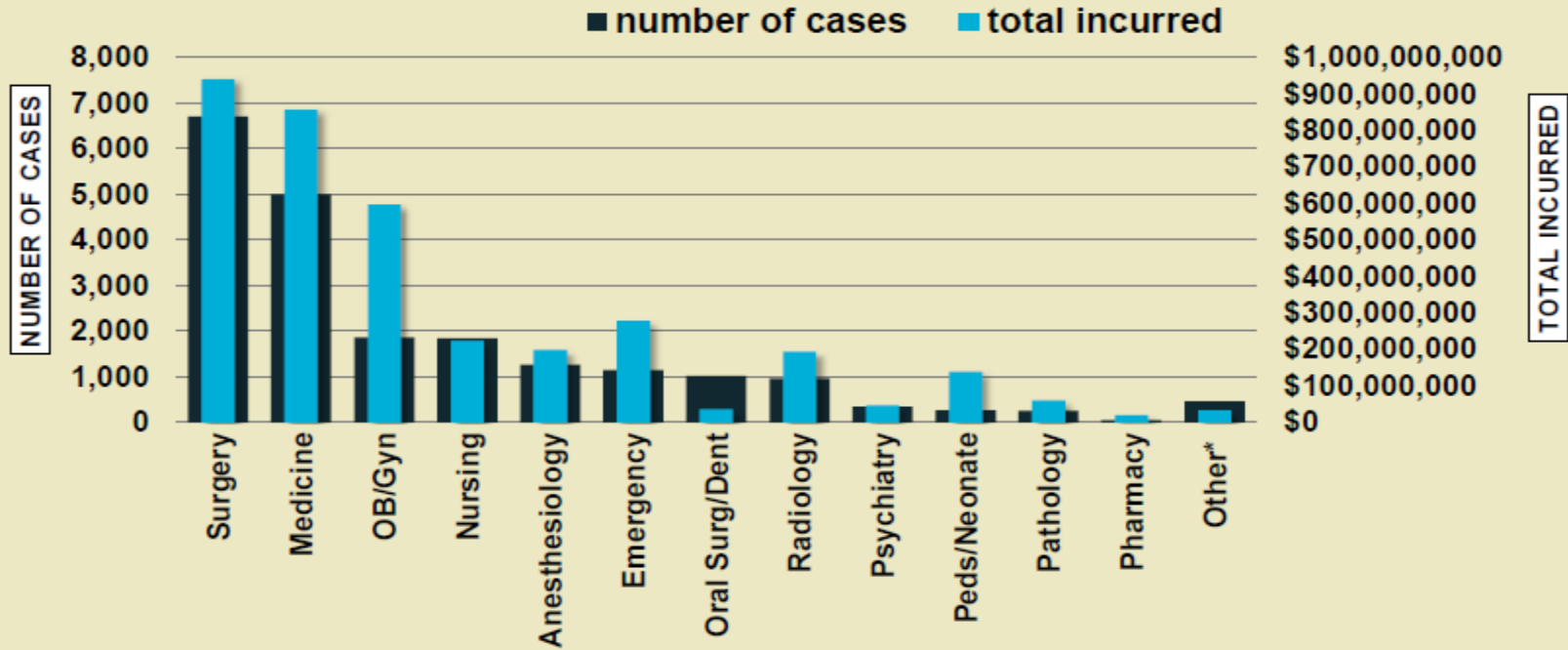


● Average indemnity paid
(excessive payments capped at \$2M)



Surgery and Medicine are identified as the primary clinical service in more than 50% of the cases.

Responsible service categorizes cases by the primary clinical service.

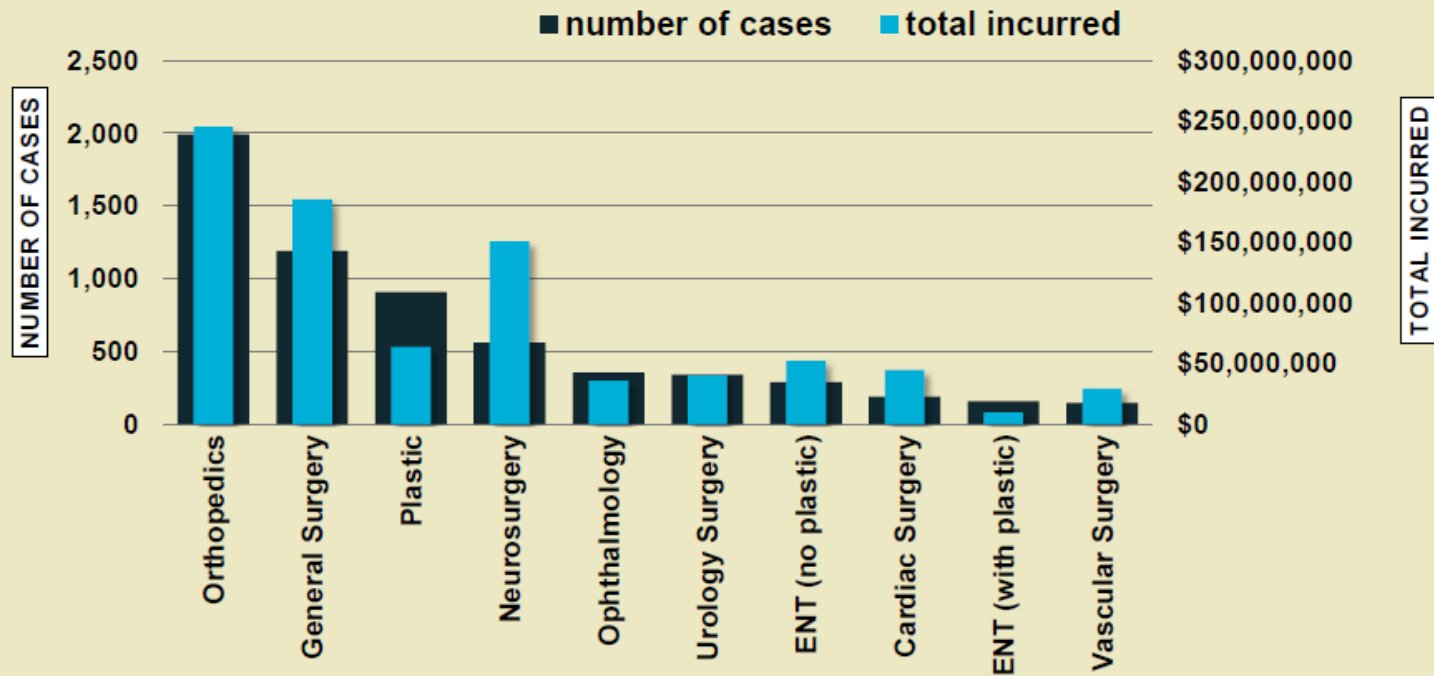


*Other includes Allied Health and non-clinical.

Surgery includes General Surgery and all surgical subspecialties. | Medicine includes General Medicine and all medical subspecialties.

Orthopedics and General Surgery account for 47% of cases and 46% of dollars.

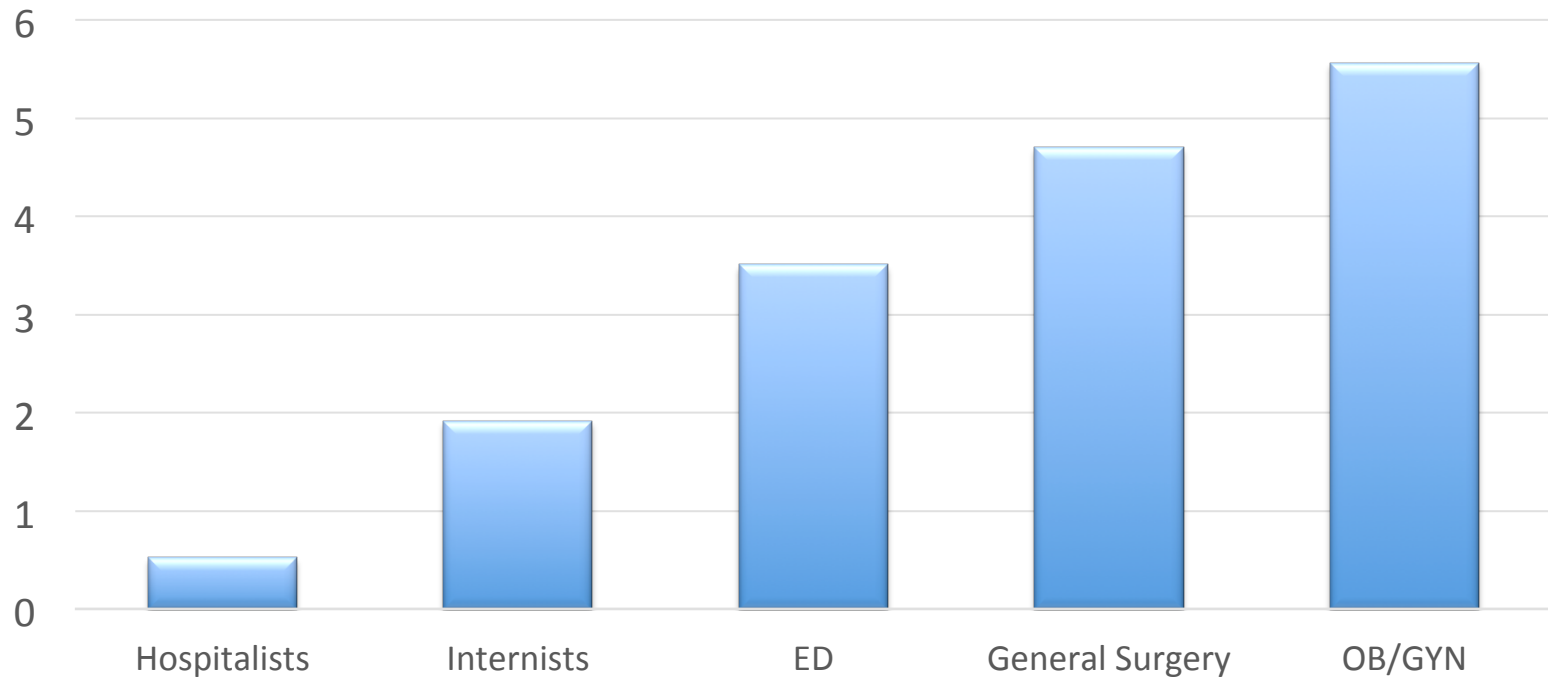
National Landscape: Top Surgical Responsible Services



N=6,712 MPL cases asserted 1/1/09–12/31/13 with a surgical specialty as the primary responsible service.

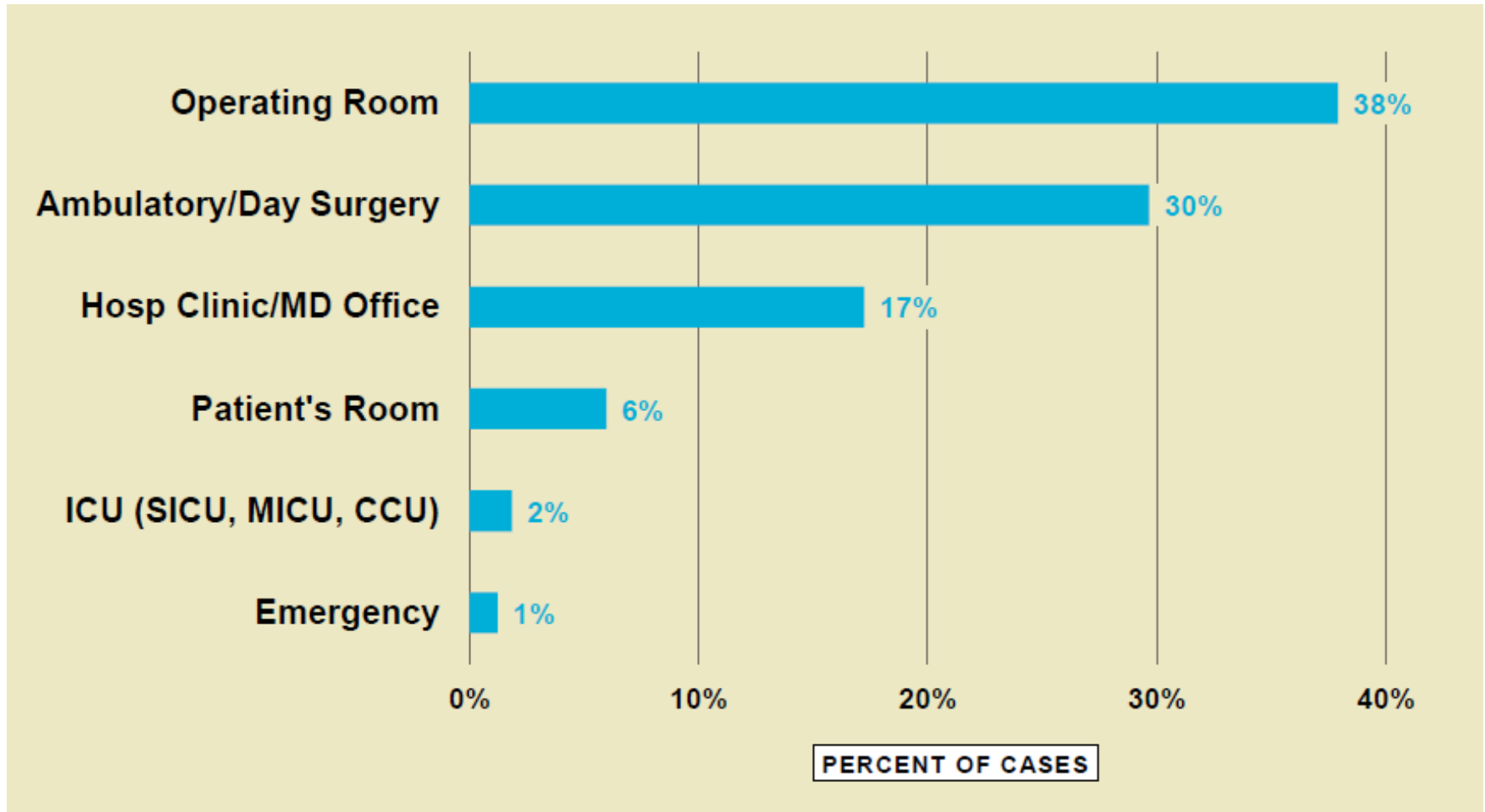
Hospitalists are Sued Less Often than Office Based Internists

Claims per 100 MD Coverage Years



Data from > 52,000 Malpractice Claims in the U.S.

Allegations Occur in Many Perioperative Care Settings



Main Categories of Allegations Brought Against Hospitalists

Category	% of all Cases
Medical treatment	41%
Diagnosis Related	36%
• History and Physical	12%
• Ordering of diagnostic tests & labs	16%
• Interpretation of tests	8%
Referral management	9%
Medication related	10%
Patient monitoring	4%

Contributing Factors in Malpractice Claims Against Hospitalists

Factor	% of cases
Clinical Judgment	54%
Failure to order a test	13%
Failure to obtain a consult	13%
Too narrow of diagnostic focus	12%
Communication	36%
Inadequate communication among providers	22%
Poor rapport with patient/family	6%
Documentation	20%
Clinical systems	16%

Potential Risks in the Perioperative Period

Preoperative

Has surgeon recommended an inappropriate type of surgery?

Can patient tolerate proposed surgery?

Is informed consent adequate?

Does patient have unrealistic expectations for surgery?

Intraoperative

Technical errors?

Poor communication among staff or fear of speaking up?

Is surgeon properly trained and credentialed for type of surgery?

Postoperative

Handoff issues?

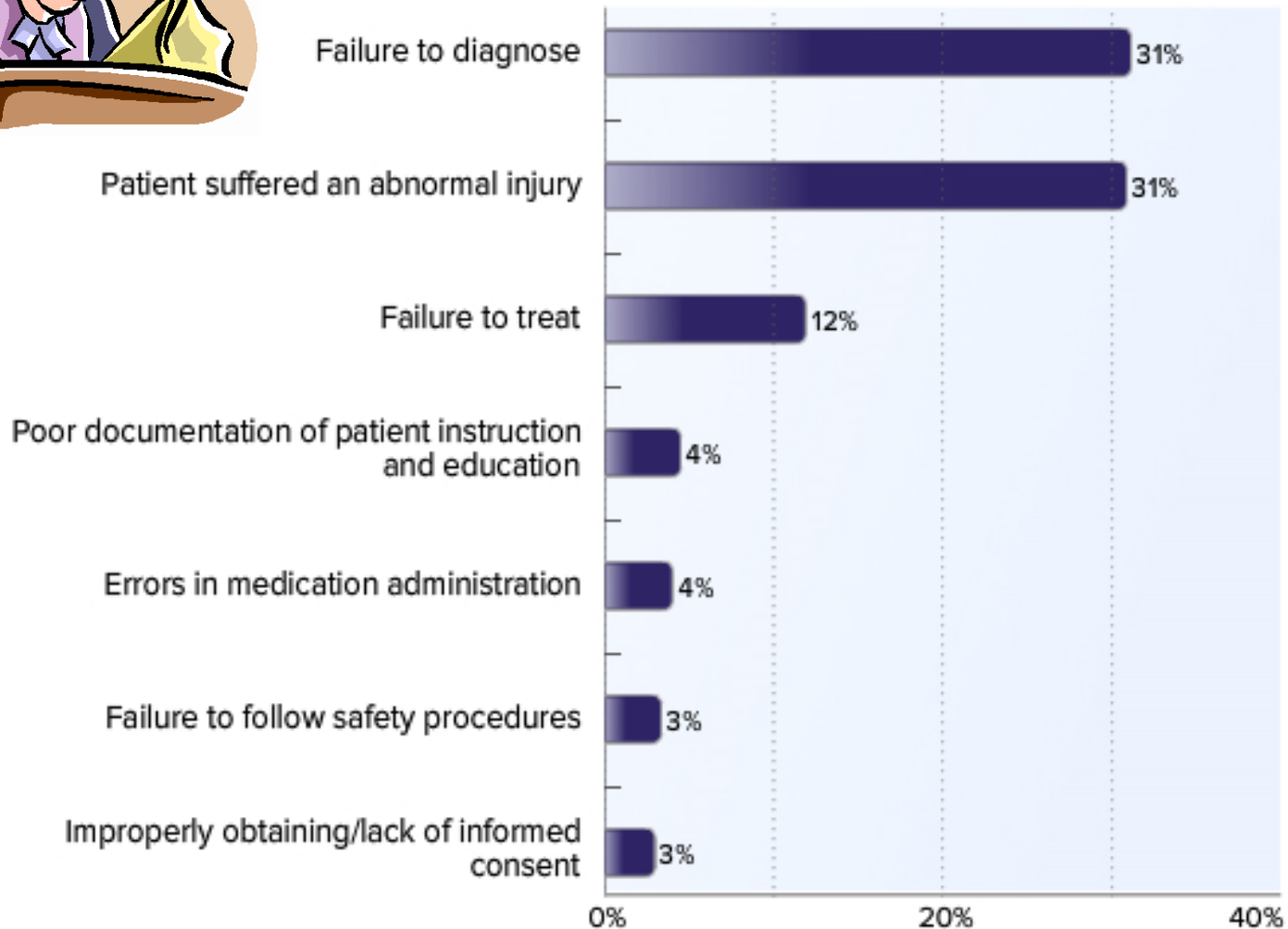
Inadequate monitoring or postop care setting?



Most Common Allegations



Nature of the Lawsuits



Errors in Diagnostic Process

Step	Percent of cases %	
	CRICO (Harvard)	CBS (U.S. Data)
History and physical	8	7
Evaluation of symptoms	39	26
Order of diagnostic test / lab	43	31
Interpretation of tests	32	23
Receipt of result & transmit result to patient	3	5
Physician follow up with patient	26	18
Referral management	11	19
Provider to provider communication	13	12
Patient compliance with follow up plan	8	15

Technical skill and clinical judgment factors are most prevalent in surgery-related cases.

	CONTRIBUTING FACTOR CATEGORY	% CASES*
1	Technical Skill	53%
2	Clinical Judgment	41%
3	Behavior-related	28%
4	Communication	23%
5	Documentation	12%
6	Administration	10%

TOP TECHNICAL SKILL FACTORS		% CASES*
Technical performance—possible technical problem		35%
Technical performance—poor technique		7%
Retained foreign body(material/instruments)		4%
Technical performance—misidentification of an anatomical structure		3%
TOP CLINICAL JUDGMENT FACTORS		% CASES*
Selection/management therapy—surgical/invasive procedures		13%
Pt assess—failure/delay in ordering diagnostic test		8%
Pt assessment—narrow dx focus—failure to establish differential diagnosis		5%
TOP BEHAVIORAL FACTORS		% CASES*
Patient factors—seeking other providers due to dissatisfaction w/care		14%
Patient factors—noncompliance with treatment regimen		6%
Patient factors—noncompliance with follow up call/appointment		4%

*A case will often have multiple factors identified.

N=6,712 MPL cases asserted 1/1/09–12/31/13 with a surgical specialty as the primary responsible service.

Closed Claims Experience



Strategies to Minimize Your Risk



Important to know the common causes of lawsuits...

Strategies to Minimize Your Risk

- Document, document, document.....
 - If it's not documented, it didn't happen.
 - Doctor's independent recollection of the actual events in a case
 - If not, what is the doctor's usual custom and practice?

Strategies to Minimize Your Risk

- Avoid “COPYING and PASTING” in your notes
- Minimize use of templated notes
- Sign off on your notes in a timely manner



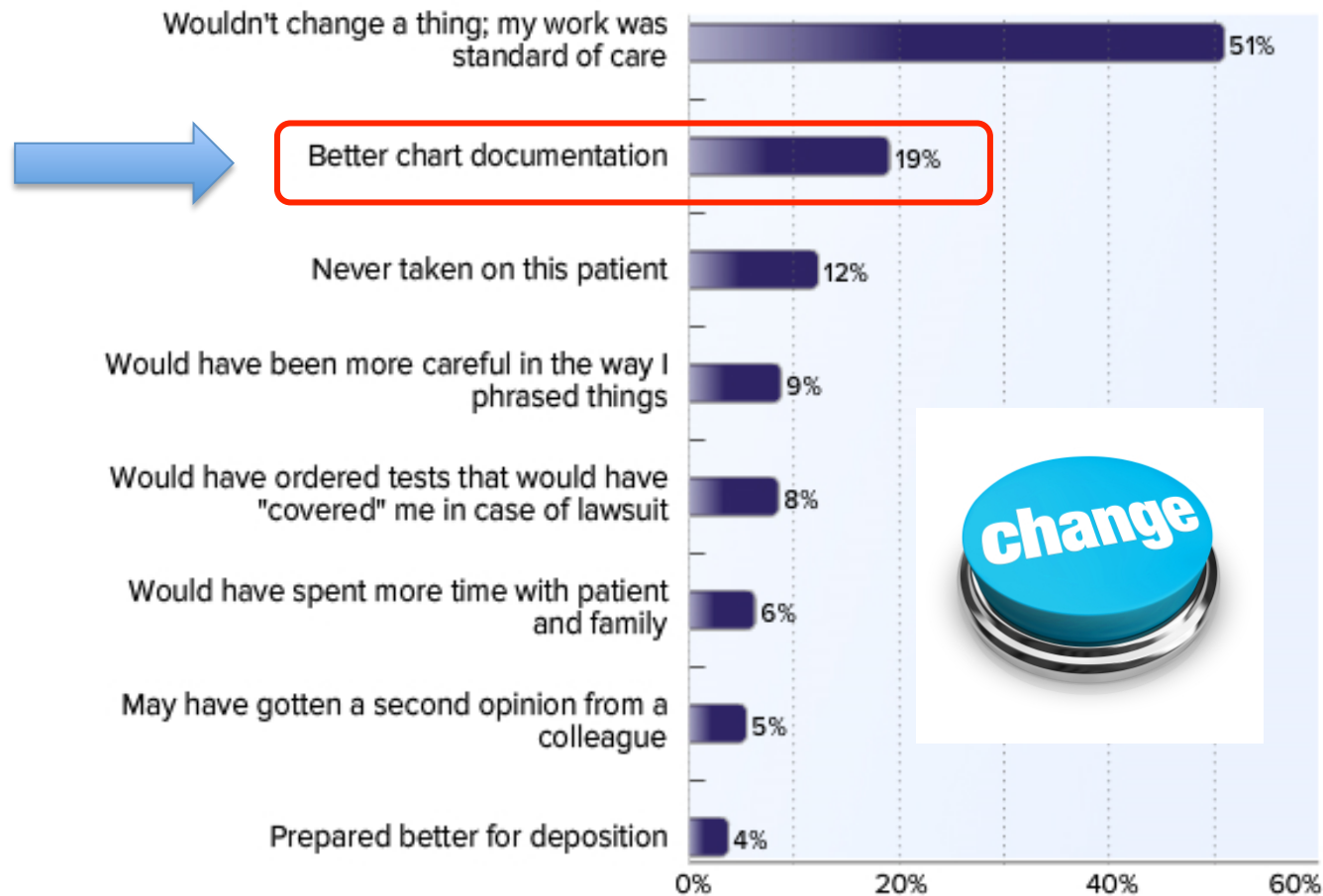
Strategies to Minimize Your Risk

- NEVER go back and alter the record
- Remember that computers can be audited
- Can subject you to criminal liability



The Most Common Plan to Change After Being Sued?

What Would You Have Done Differently?



Is Your Hospital at Risk for Surgical Claims?

1

- Have you had adverse events where trainees failed to make properly call for assistance?

2

- Are you vulnerable to inaccurate postoperative count?
- Wrong site near-misses?

3

- Are some postop issues due to technical problems in the OR?

4

- Poor communication that you can improve with teamwork training or checklists?

A Lawsuit is Filed Against You - Now What?





**KEEP
CALM
AND
CALL
YOUR LAWYER**

What Should You Do if Sued?

- Notify the appropriate people and develop your legal team.
 - Hospital risk management/claims departments
 - Insurer
 - Play a role in choosing your attorney
- Do not discuss your case with anyone other than your legal team.

What Should You Do if Sued?

- You can and should play an active role in your defense.
 - Know the facts inside and out.
 - Make sure your attorney understands the medicine.
 - Identify experts, attend depositions
 - Help your attorney prepare for expert depositions, generate ideas for trial exhibits, assist with jury selection

Summary

- Hospitalists are sued less often than office based internists but dollars per claim is higher
- Only 7% of lawsuits go to trial, 88% of these are won by doctors
- Errors can occur throughout the periop period
- A settlement is not an admission of liability but will be reported to state and national databanks
- Plaintiffs must prove case by a preponderance of evidence (not beyond reasonable doubt)

If You Are Sued:

1. Don't panic
2. Notify insurer, hospital risk management
3. Do not discuss case with anyone other than legal team
4. Help your attorney defend the case