



Claims Management 103: Elements of a Tort Claim

FTCA University, June 2, 2017
Louisiana Primary Care Associates
12:30 - 1:45 p.m.

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Overview

- This session will focus on the elements of various types of medical malpractice cases and what has to occur for a claim to be successful or appropriately defended against



Polling Questions

- 1. Have you or your organization been sued for medical malpractice?**
 - ☐ Yes
 - ☐ No
- 2. If yes, did you think the allegations of the suit had merit?**
 - ☐ Yes
 - ☐ No
- 3. Did you think the process was fair?**
 - ☐ Yes
 - ☐ No

Why Do Patients Sue?

- **\$\$\$\$**
 - Lottery
 - Contingency Fees
 - Tax Code
- **Anger**
- **Surprise**
- **Distrust**
- **Lack of Information**
- **\$\$\$\$**
 - FTCA coverage is the best you can get

Liability



Torts

- Unintentional (negligence)

Elements of a Medical Malpractice Case

1. The existence of a legal duty on the part of the healthcare provider to provide care or treatment to the patient
2. A breach of this duty by a failure of the healthcare provider to adhere to the standards of the profession
3. A causal relationship between such breach of duty and injury to the patient
4. The existence of damages that flow from the injury such that the legal system can provide redress

When does a legal duty to provide care arise?

- When a physician affirmatively acts in a patient's case by examining, diagnosing or treating a patient, or agreeing to do so, a physician-patient relationship is created
- When the relationship is formed, the physician owes the patient the care that a reasonably competent physician would render

Standard of Care

- **Standard established by expert opinion testimony**
 - Books, journals, clinical guidelines, laws, accreditation
 - Performance measured at time of event
 - Holding out to a higher standard – must meet it
 - More than one acceptable standard – no negligence

Causation

1. When the relationship between the sub-standard conduct and injury is such that no intervening causes exist between the conduct and the resulting harm, direct causation is said to exist. In other words, the conduct directly caused the alleged injury
2. A second way of proving causation is that of proximate causes. This theory seeks to find out if an event is sufficiently related to an alleged injury so that it can be held to be a cause of that injury

Special Damages

Recoverable Special Damages

- Medical expenses – reasonable and necessary
- Past and future lost wages and future loss of earning capacity
- Reduction to present value/income taxes
- Lost services:
 - Minor child-recovery by the parent
 - Parent-recovery by the child
 - Spouse-loss of consortium

General Damages

- **Physical Damages**
 - Permanency
 - Aggravation
 - The “susceptible” plaintiff
- **Pain and Suffering**



Loss of Chance

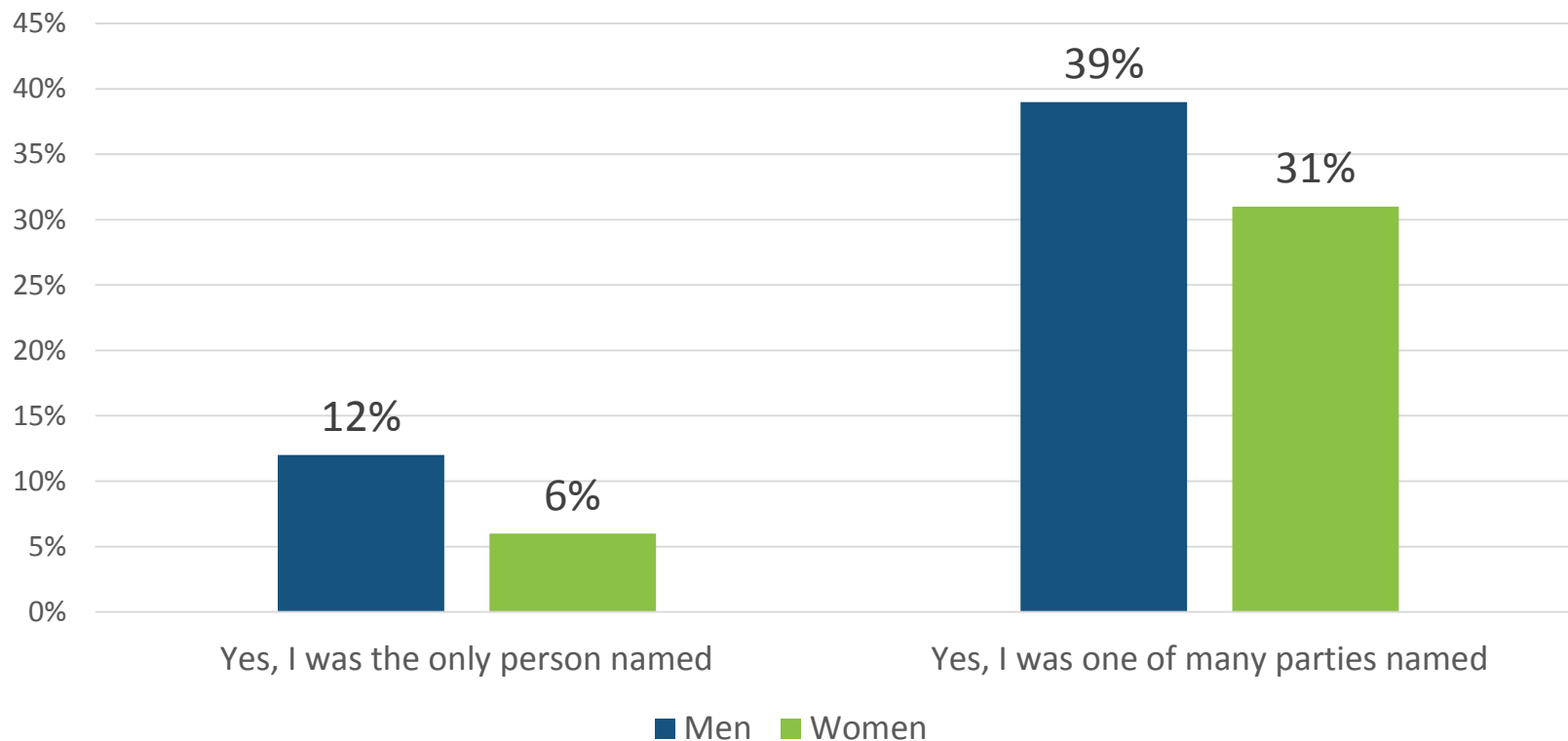
- **Loss of Chance is a type of medical malpractice claim available when the negligence of a health care provider reduces or eliminates the odds of a positive outcome for the patient. Rather than suing for physical harm, the patient sues for the value of the lost opportunity for recovery**
- **Damages are only a portion of what typically could be recovered**

Key Advice

1. Document
2. Be thoroughly prepared
3. Get legal advice early – and listen to it
4. Be sure that your actions are well thought out and your defense is reasoned
5. Keep your cool and tell the truth
6. Share only what you can remember or document
7. You can never win at a deposition, but you can lose the case

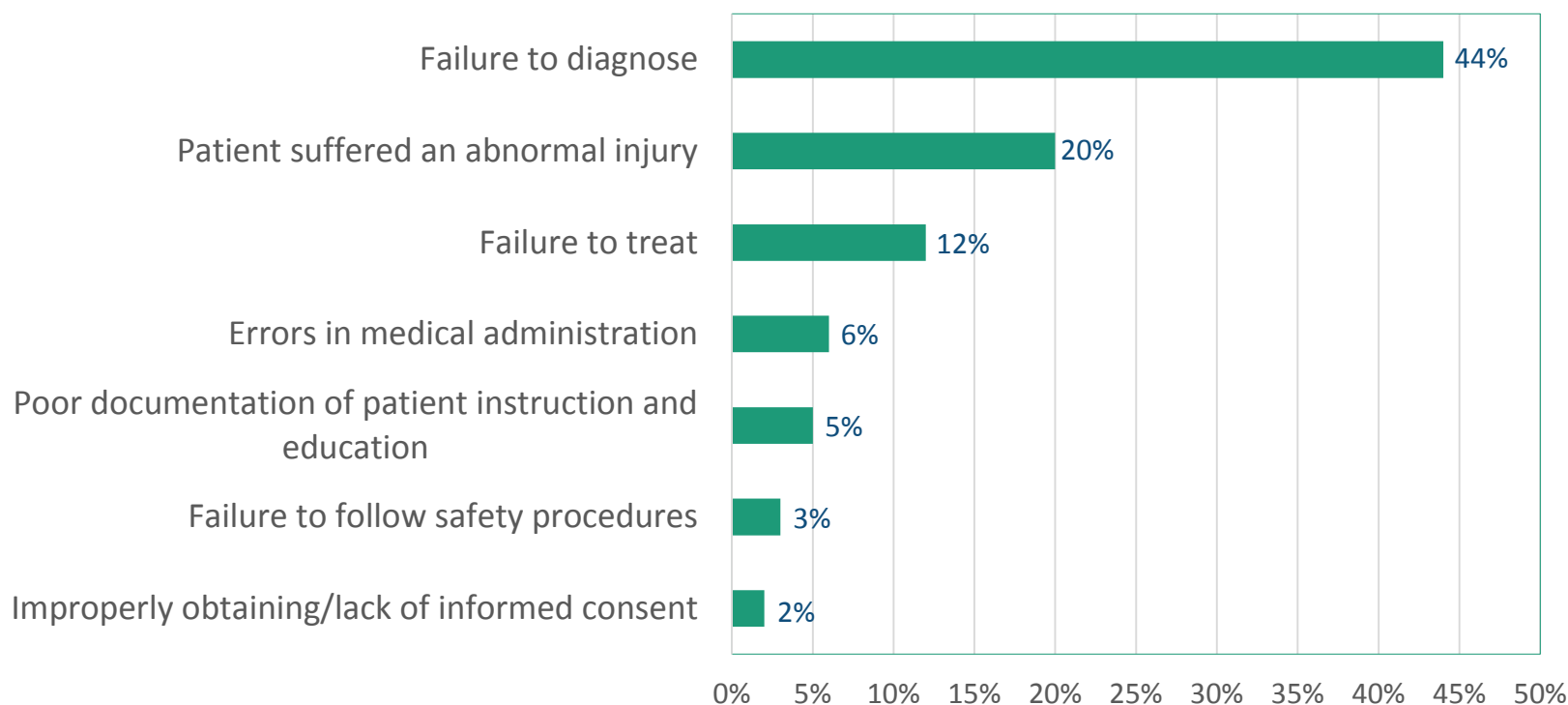


Percentage of Primary Care Physicians Sued



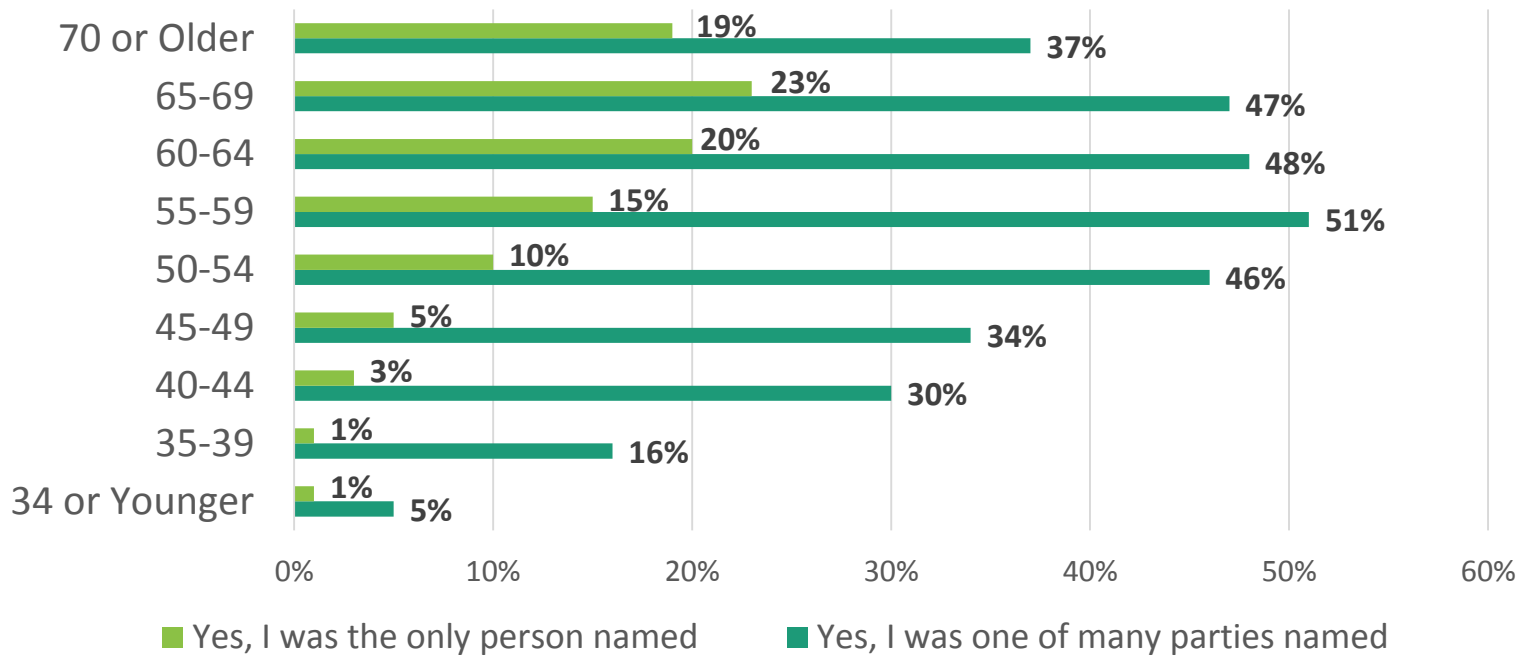
Across specialties, male physicians are more likely to be sued than female physicians.

Nature of Lawsuits Against Primary Care Physicians



Failure to make a proper diagnosis is the leading cause of lawsuits against primary care physicians.

How likely are primary care physicians to be sued by the end of their career?



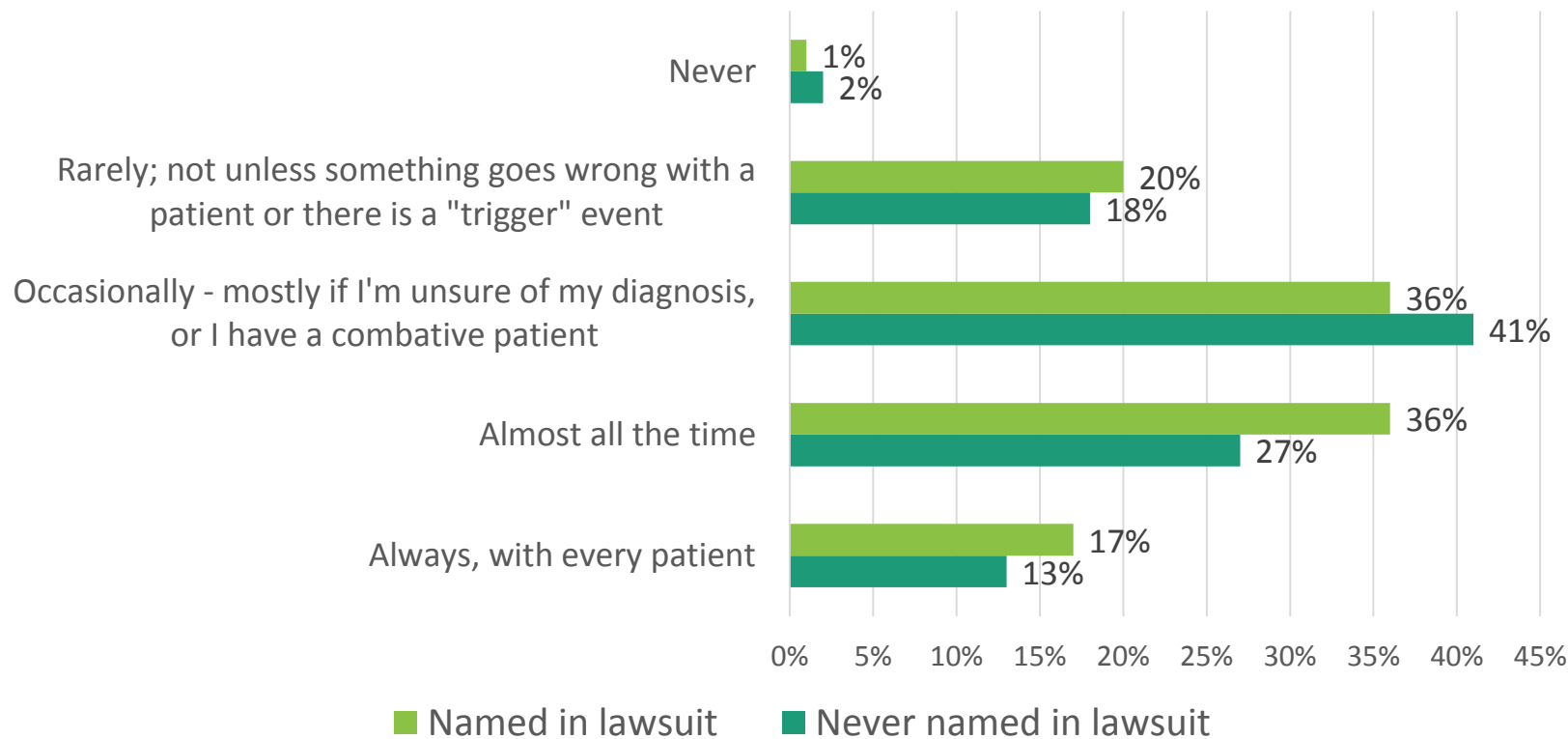
An analysis by the American College of Physicians shows that all older physicians, with 60% over the age of 55, are likely to experience a lawsuit.

Polling Question

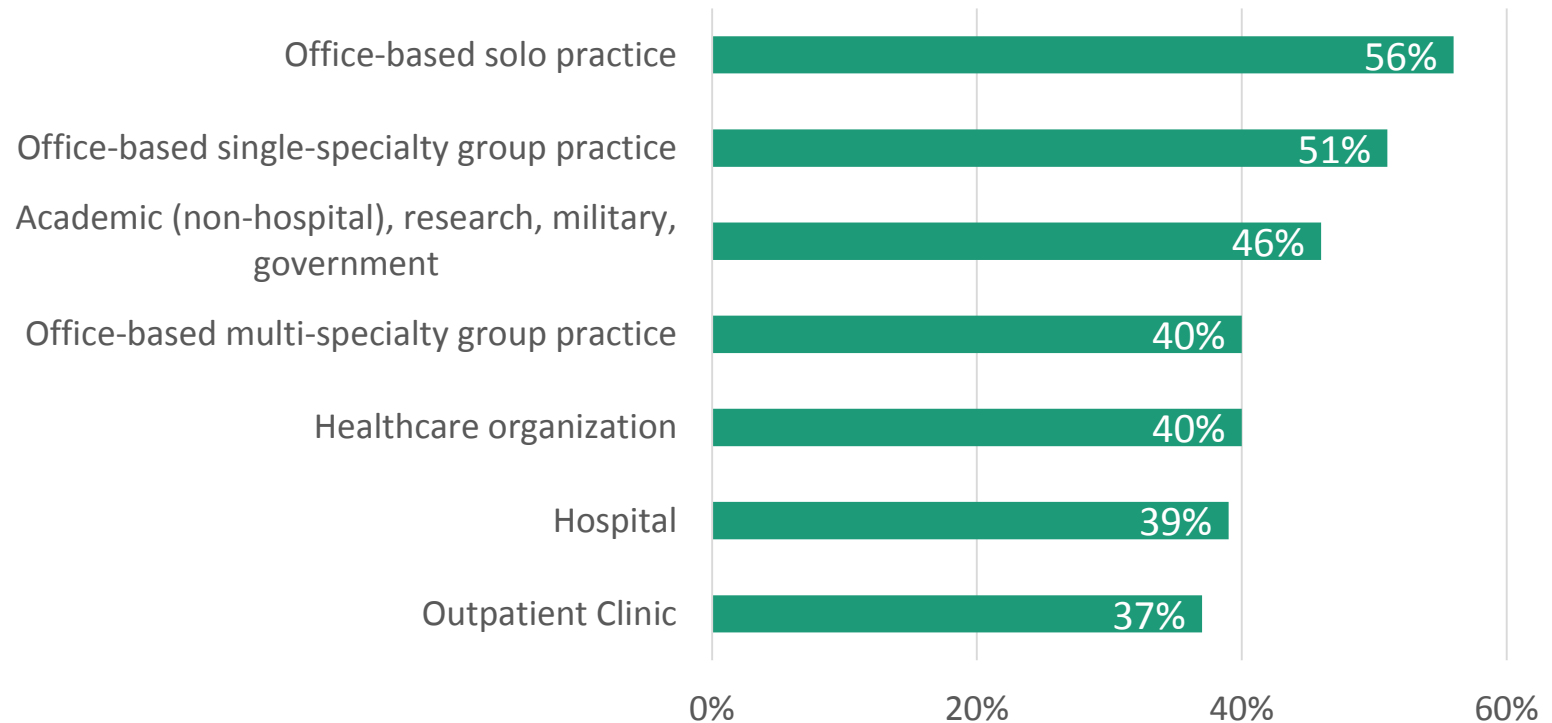
Does the threat of a malpractice suit affect the way your physicians practice medicine?

- Rarely
- Occasionally
- Always

Does malpractice threat influence primary care physicians' thinking or action?



Primary Care Physicians' Work Settings and Risk for Lawsuit



A 2011 study published in JAMA reported that 48% of malpractice claims were for events in inpatient settings, 43% in outpatient settings, and 9% in both.

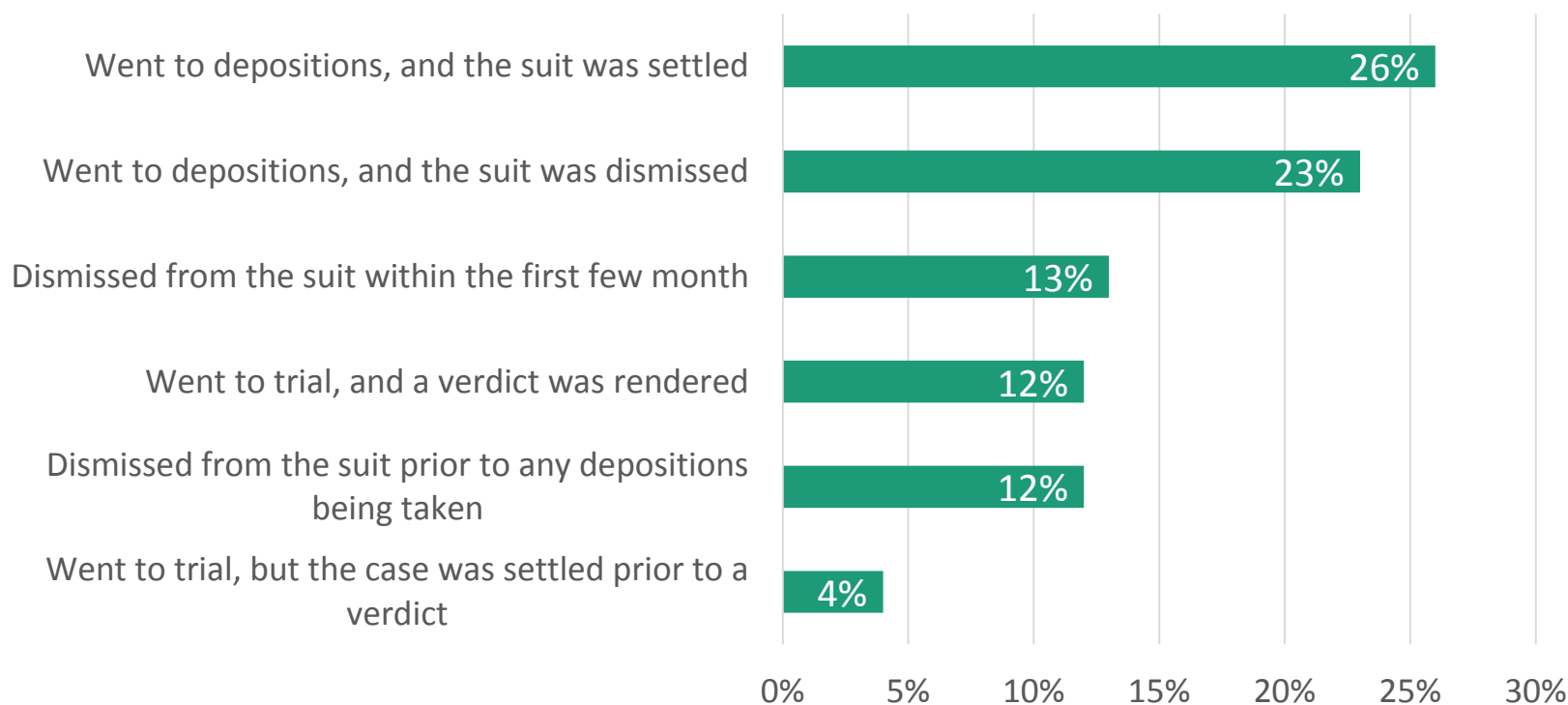


Preparation

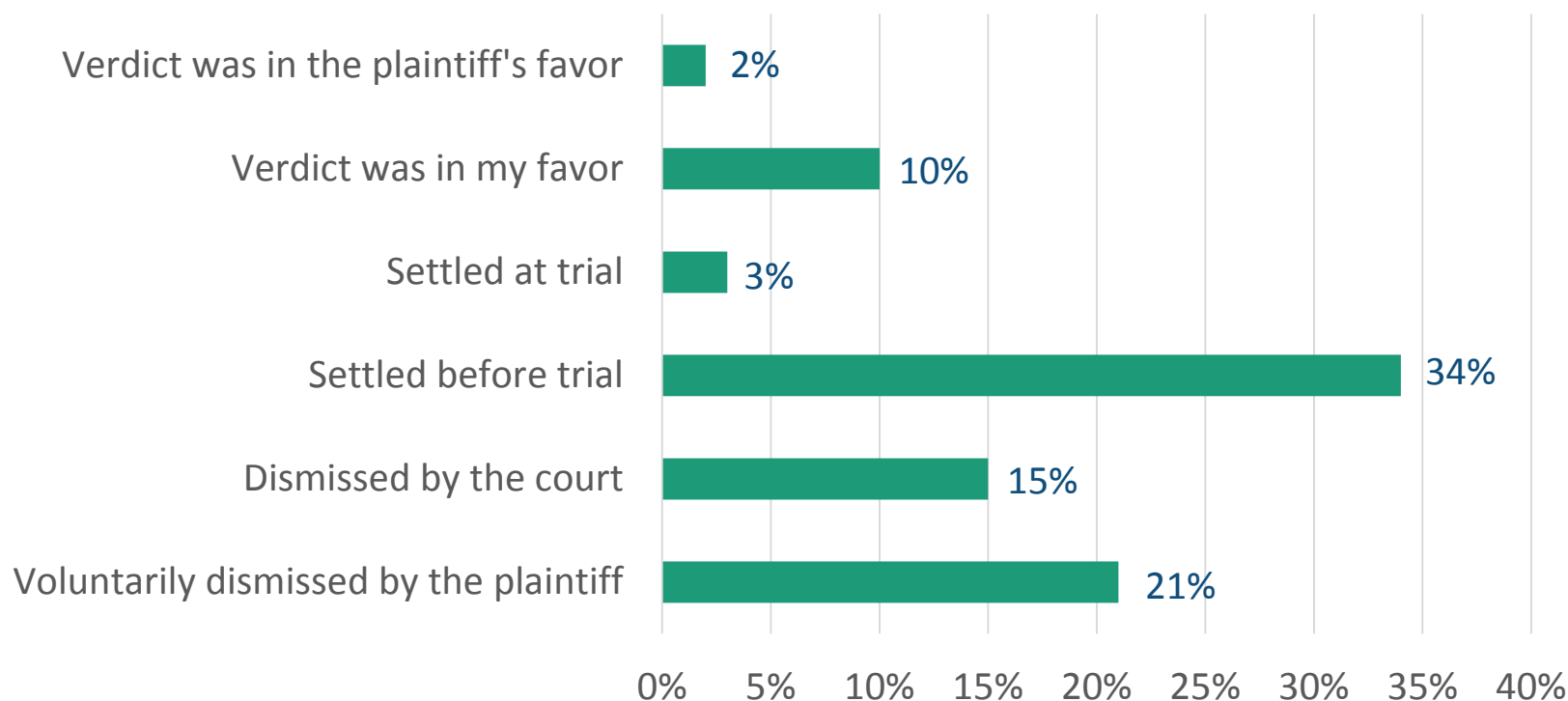
- In a survey of over 4,000 primary care physicians, one third of them spent over 40 hours in preparation of their defense



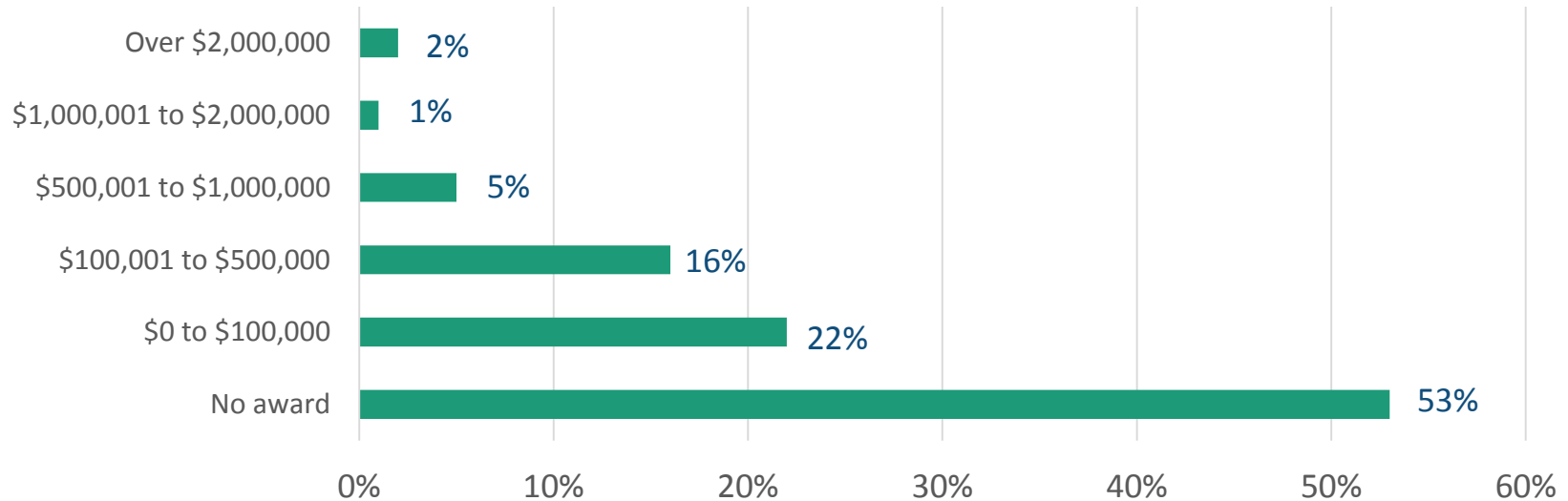
How far do primary care physicians' lawsuits progress?



How do primary care physicians' lawsuits turn out?

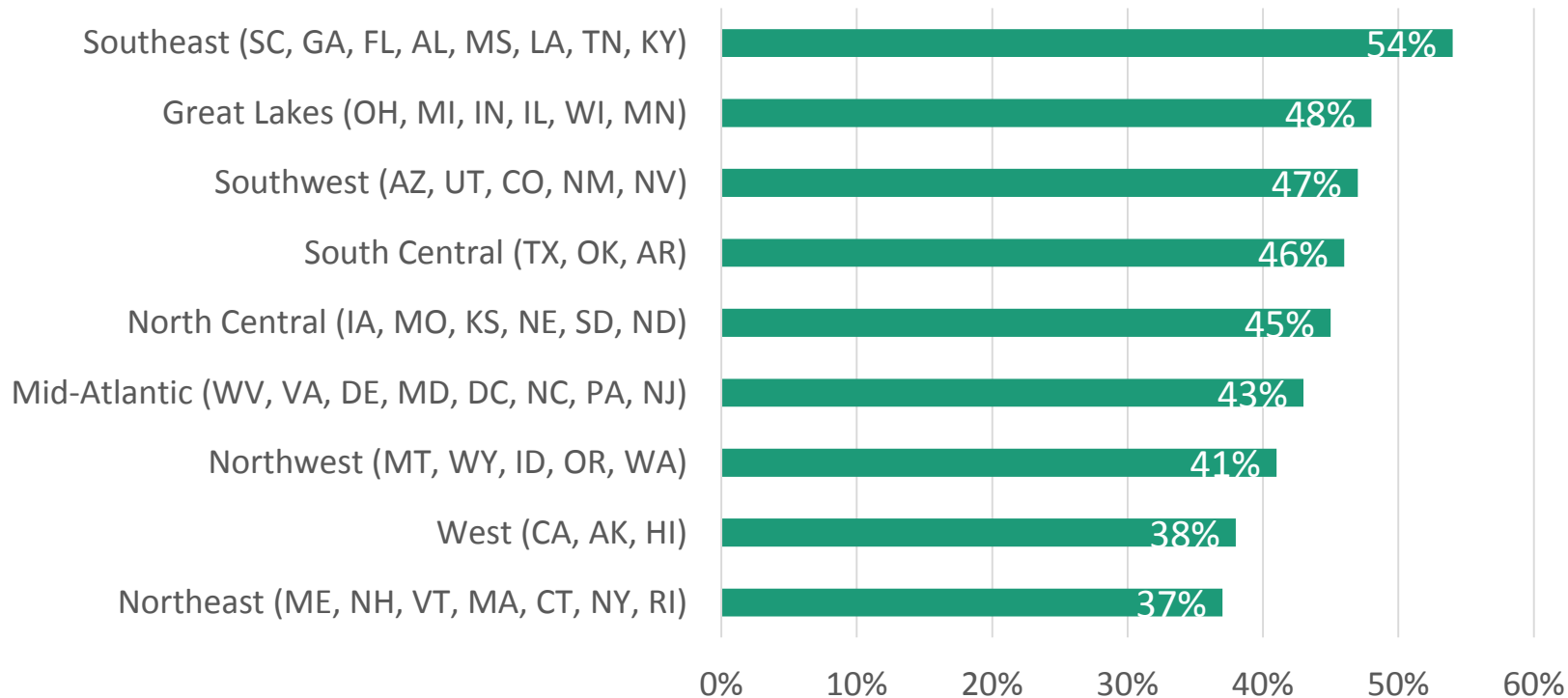


Plaintiff's Monetary Award



- Primary care physician payouts are lower than average
- Highest payouts were against pediatricians, although they were the least likely to be sued
- Neurosurgeons, pathologists, and OB/GYNs follow in that order

Regional Percentages of Primary Care Physicians Sued, or (by Region)



Practice Case 1

A 42-year-old female goes to see her internist.

She presents with the following complaints:

- 1. Pain in the right chest**
- 2. Pain in the right forearm, biceps and right shoulder when she raises her arms. Sometimes, the pain extends to the left chest**
- 3. She notes some acidity in her stomach**

The patient's family history is positive for heart problems and CAD in her father. The patient says she is very concerned she might have heart problems also.

Practice Case 1 – Physical Exam

- The doctor performs a physical exam which is normal except for a finding that when the doctor palpated the right chest there is tenderness at T3, T4 and also from the substernal region to the mid-clavicular line on the right
- The right shoulder is tender, as are the right bicep, forearm and left flank area
- Diagnosis – Costochondritis or non-cardiac chest pain
- Resting EKG – non-specific changes in the ST waves – no evidence of an acute process
- The doctor prescribes Advil and recommends a follow-up visit for a complete physical

Practice Case 1 (Continued)

- The next day, after moderate exercise, the patient complains of feeling nauseous and dizzy. She also complains of chest pain radiating to the right shoulder
- A call to 911 is placed, and the patient is taken to the ER
- Upon arrival at the ER, the patient is found to have no blood pressure, and an EKG reveals status bradycardia with elevated T-waves
- Resuscitation fails, and the patient is pronounced dead as the result of an acute MI

Issues



Standard of Care

1. Was the history sufficient?
2. Was the evaluation of the EKG results appropriate?
3. Was the conclusion of non-cardiac pain appropriate?
4. Can you ever rule out cardiac pain?
5. Given the patient presentation, is there something different the doctor could have done?



Causation

1. **Would referral to a cardiologist have changed this outcome?**
2. **Can every cardiac arrest be resuscitated?**



Practice Case 2

PSA Levels	
November 9, 2009	.05
December 10, 2010	.39
February 24, 2013	.65
April 19, 2014	1.23
June 6, 2015	3.83
June 9, 2016	13.1
June 16, 2016	12.7

In June 2016, the patient is referred to a urologist for examination and possible treatment. Biopsy of the prostate revealed prostate cancer. The Gleason score was: $4+3=7$. The patient was staged at T1C.

Practice Case 2 – Plaintiff's Allegations of Negligence

- The plaintiff contends that the doctor should have either repeated the PSA test in June of 2015 (when the result was 3.83) or referred the patient to a specialist based on:
 - a) The tripling of the PSA from 2014; and
 - b) The fact that 3.83 is above the normal range for an African-American under the age of 50
- They contend that the doctor's failure to do so caused the patient's cancer to grow and ultimately metastasize prior to the radical prostatectomy, which was performed in 2016
- The prognosis is terminal

Standard of Care

- What are some indicators that would prompt a primary care physician to refer a patient even when lab values are within normal limits?



Causation

- In this scenario, would the alleged delay have made any difference? Explain.



Thank You

Questions?



Resources

- Jena AB, Seabury S, Lakdawalla D, Chandra A. Malpractice risk according to physician specialty. N Engl J Med. 2011.
- Crane M. Does “defensive” medicine differ from “careful” medicine? Medscape Business of Medicine. March 10, 2015.
- Mello MM, Kachalia A, Godell S. Medical Malpractice- Update. The Synthesis Project. Robert Wood Johnson Foundation. April 2011.
- American College of Physicians. Medical Liability Reform: Innovative Solutions for a New Health Care System. February 2014.
- Physician Insurers Association of America. State enactments of selected health care liability reforms. April 29, 2013.
- Bishop TF, Ryan AM, Casalino LP. Paid malpractice claims for adverse events in inpatient and out patient settings. JAMA 2011.
- Dill K. The best and worst states for doctors in 2015. Forbes. April 7, 2015.
- PIAA Specialty Specific Series: General and Family Practice. 2014 Edition.
- Medscape.com-Why Primary Care Physicians Get Sued.

Bureau of Primary Health Care <https://bphc.hrsa.gov/> 1-877-974-BPHC



Disclaimer

We ask you to please keep in mind that this conference is not the appropriate place to discuss detailed case specific aspects of unresolved claims or litigation. Likewise, risk management information provided in this conference is not to be considered legal advice and, as with any information provided by is intended as guidance to be used consistent with the internal needs of your organization. This information is not to be viewed as required by ECRI Institute, KEPRO or HRSA. Any detailed fact specific health center issues should be addressed to the FTCA helpline and all questions regarding pending legal cases should be directed to your own organization's private attorneys.



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