



**Next On Deck – Robotic Physicians?
Be Sure Your Clients Don't Strike
Out When Encountering New
Medical Trends**

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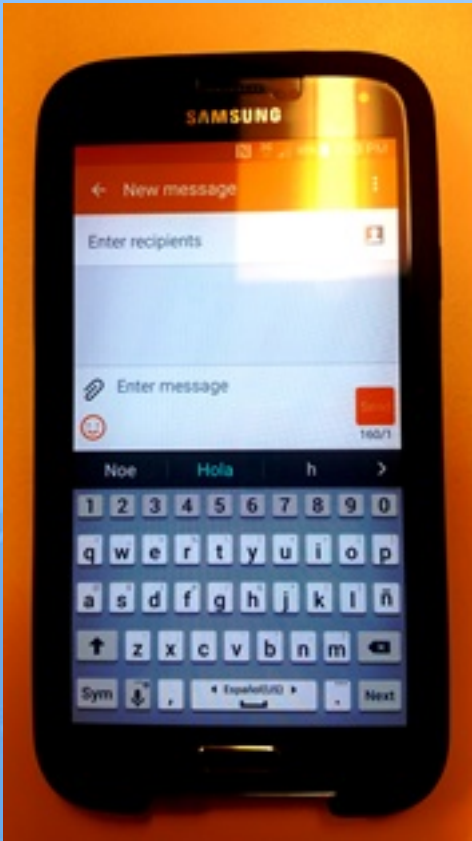
The Increasing Presence of Telemedicine



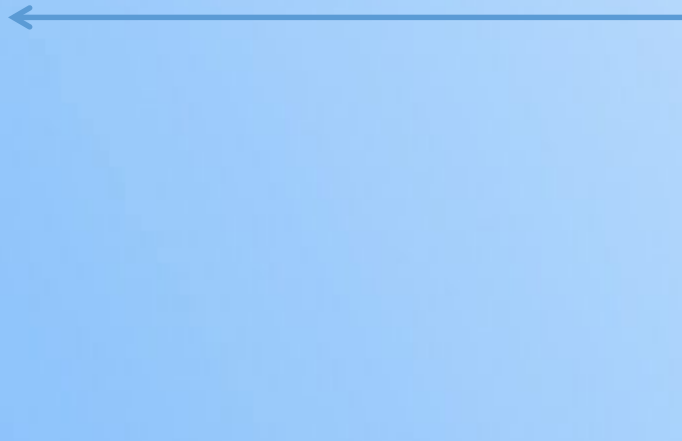
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Texting Instructions



Text TRAYLEWIS758 to 22333 to join



<Type> in your answer, i.e. A, B, C, etc.

The Increasing Presence of Telemedicine

According to the Deloitte Study in 2014 there were how many virtual provider visits in North America:

- a. 10 million
- b. 50 million
- c. 75 million
- d. 125 million

Between 2010 and 2017 the percentage of hospitals with at least partially implemented computerized tele health systems grew from:

- a. 5% to 10% between 2010 and 2017
- b. 35% to 75% between 2010 and 2017
- c. 60% to 90% between 2010 and 2017

The Increasing Presence of Telemedicine

Have you a close connection to a case where telemedicine played a significant liability role?

Yes / No

Have you, your firm, your carrier tried a case where telemedicine was a significant feature of the trial?

Yes / No

Of those who answered yes to one or both of the questions. Do you think the mere involvement of a telemedicine issue:

- a. Made the case harder to defend?
- b. Made the case easier to defend?
- c. Had a neutral impact on the defense?

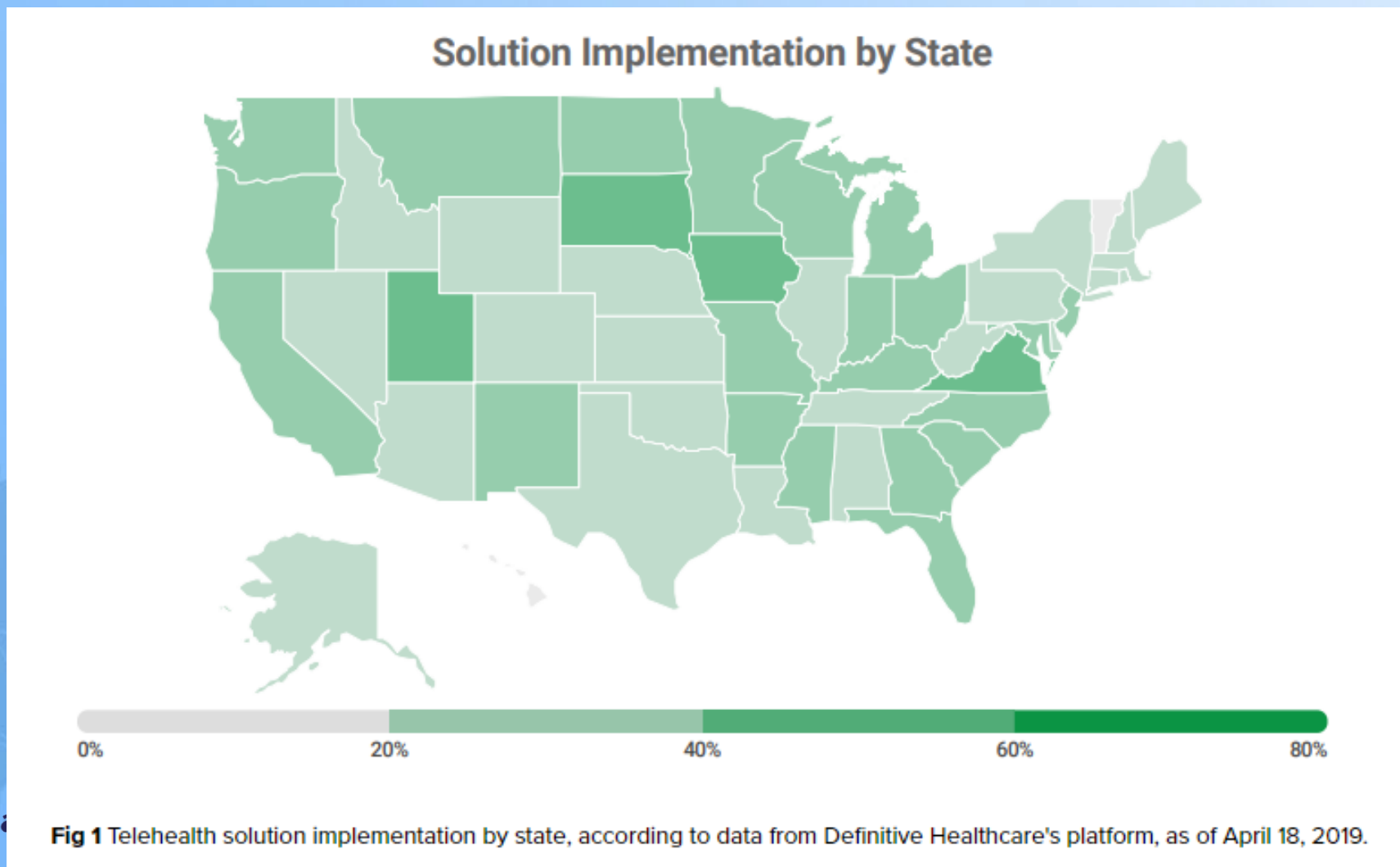
The Increasing Presence of Telemedicine

Types of telemedicine: store-and-forward, real time communication, and remote monitoring

Benefits:

- To allow home bound patients to receive care in the home setting.
- To facilitate the provision of mental health consultations to patients with access to care issues.
- To improve the provision generally of health care in rural areas.
- To reduce health care costs by providing remote monitoring technologies, particularly for patients with chronic conditions.

The Increasing Presence of Telemedicine



The Increasing Presence of Telemedicine

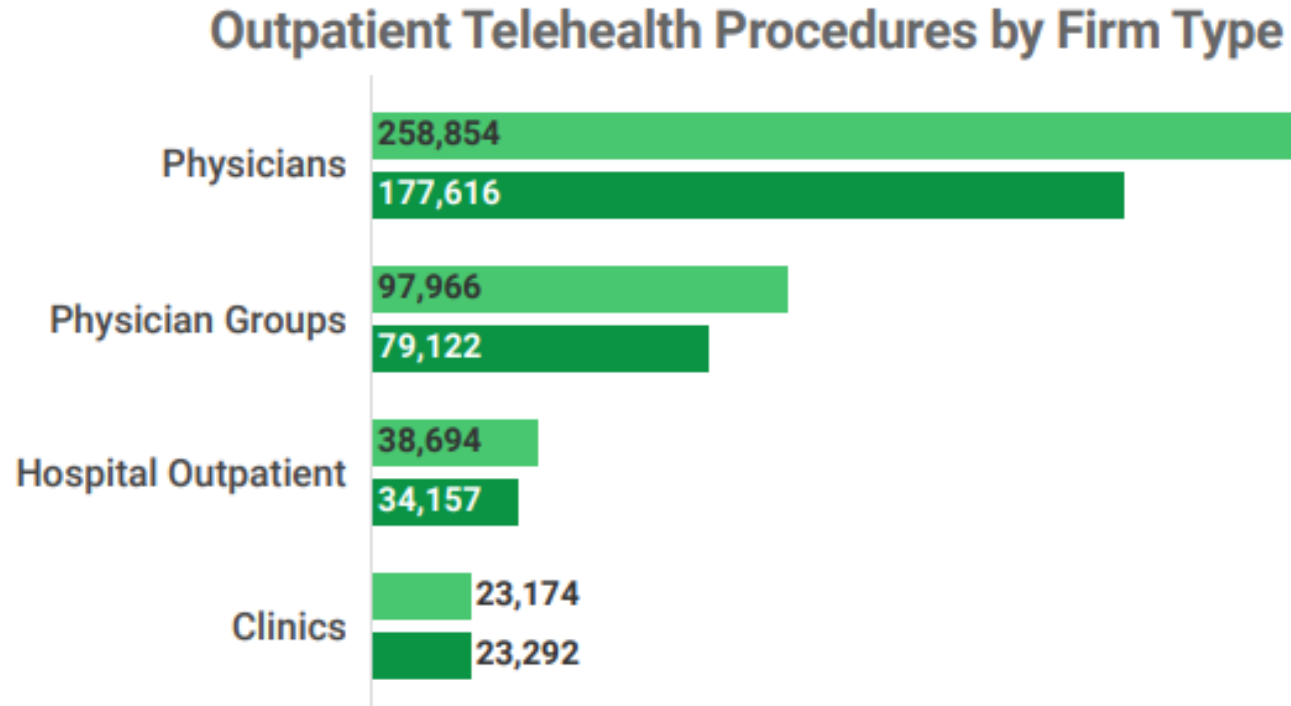


Fig 2 Light green (2018): number of HCPCS/CPT codes for outpatient telehealth services compared against darker green (2017) outpatient telehealth services – from the Definitive Healthcare platform.

The Increasing Presence of Telemedicine

Ethical and Legal Issues and Hurdles

- More errors
- Physician-patient relationship
- HIPAA privacy standards
- Concern with prioritizing efficiency/economics over quality of care
- Liability without geographical barriers

The Increasing Presence of Telemedicine

Case Study #1 - Facts

- 60 year old married female with 3 adult children
- Deceased secondary to an alleged failure to detect free air below the diaphragm on a chest x-ray indicating a perforated viscus.
- Plaintiff sued the treating Urgent Care Facility, their Physician, their PA and the telemedicine radiologist.
- Records revealed that the Urgent Care staff were evaluating the patient for pneumonia and/or bronchitis, the peritoneal signs were not reported to the reviewing radiologist, but a misdiagnosis was made nonetheless.

The Increasing Presence of Telemedicine

Case Study #1 (cont'd) - Hurdles to Insurance Carriers

- Telemedicine Corporation was domiciled in Indiana
- The teleradiologist was domiciled in Illinois; therefore NOT a Covered Healthcare Provider
- Indemnity agreement which asserts the teleradiologist was an IC and agreed to indemnify/defend the Telemedicine Corporation

Outcome

- The tender of coverage for defense and indemnity from the Telemedicine Corporation was denied. The Teleradiologist is now personally exposed due to contractual obligations. Additionally, as the teleradiologist erred in not electing a “qualified provider” policy they will not benefit from the caps provided in Indiana, thus exposing the full policy limits of \$1m

The Increasing Presence of Telemedicine

Case Study #2 – Facts

- Plt decedent did not regain consciousness after 3 hr cervical discectomy that was thought to have been uneventful.
- Rad'y studies revealed severe anoxic brain injury.
- Pt hosp'd 6 wks before expiring on 12/5/13.
- Cause of injury never established, but review of neuromonitoring performed by codef tech and overseen by insured during the surgery indicates abnormal signals throughout the procedure. This was not conveyed to surg / anesthesia team, and in fact not identified until ins'd reviewed images 2 days post-op to formalize report.
- Plt will argue that had issue been raised, problem would have been identified & addressed, avoiding ensuing brain damage.

The Increasing Presence of Telemedicine

Case Study #2 - Damage Analysis

- Dec'd survived by mother, w/ whom she lived, 3 adult children, & grandchildren.
- She had not worked in 2 yrs due to neck injury, but per family test'y had hoped to RTW after surg'y.
- Plt alleges econ claim of 650K-800K, comprised of 362K in lost earnings & remainder in lost services to family.
- Defense notes that had dec'd lived, personal consumption would have negated any potential earnings.
- Pain & suffering more at issue: Plt argues "minimally conscious state," which involved awareness of self & environment. Def counters that what appeared to have been "awareness," including established reaction to pain, was actually a reflex action, not indicative of conscious awareness.

The Increasing Presence of Telemedicine

Case Study #2 - Claim Issues

- Intraoperative neuromonitoring uses real time recordings of electrical potentials from nervous system to detect any worrisome changes in brain, spinal cord & peripheral nerve function before irreversible injury occurs.
- A tech situated in OR shares screen with overseeing MD, latter often in remote location.
- Although IN widely used, opinions as to efficacy are divided. This is nevertheless not a winning argument for us in light of insured's actions, which are likely to inflame jury.
- Codef tech test'd he had no duty to document or alert surg to suppressed nerve signals unless told to do so by Dr. This is not a viable defense for him, but carrier for tech & employer has filed DJ as to disclaimer, based on company's failure to disclose this incident on coverage application.

The Increasing Presence of Telemedicine

Case Study #3 – Facts

- Patient had spinal cord stenosis from C3-7. After conservative tx, the patient had ACDF procedure.
- Neuromonitoring was provided by a tech in the operating room as well as an offsite physician (Dr. O). After placing the implant at C5-6, and before the graft was performed at C6-7 by the surgeon, all signals were lost.
- For 8 minutes the tech performed troubleshooting measures and then notified the surgeon, who then checked for a hematoma, and removed and reinserted the graft material. An MRI was consistent with a cord infarction.
- Dr. O never responded regarding the lost signals. She was monitoring the surgery from a coffee shop on her cell phone.

The Increasing Presence of Telemedicine

Case Study #3 (continued)

Liability Analysis

- Steroids were not administered for 2 hours. The MRI suggests both contusion and infarct.
- The optics of a physician monitoring from a coffee shop will present challenges.

Damage Analysis

- The patient suffered partial paralysis in all four extremities, more severe in the LEs. Past medical 800K; Future medical & LCP \$11-13M.
- Lost wages \$1M. The defense has a LCP of 2M.

Current State of Opioid Crisis



Current State of Opioid Crisis

According to the National Institute on drug abuse, drug overdose deaths (all drugs) in the U.S. grew from nearly 17,000 in 1999 to 70,000 in 2019.

How many of these involved opioids (illicit and prescribed):

- a. 8,000 in 1999 growing to 47,000 in 2017
- b. 4,000 in 1999 growing to 26,000 in 2017
- c. 15,000 in 1999 growing to 34,000 in 2017

Current State of Opioid Crisis

How many of these opioid deaths involved prescribed opioids:

- a. 2,500 in 1999 growing to 12,000 in 2017
- b. 3,500 in 1999 growing to 17,000 in 2017
- c. 6,500 in 1999 growing to 37,000 in 2017

Current State of Opioid Crisis

History of Pain Management

- In the 1990's, nearly 100 million Americans were diagnosed with chronic pain;
- Lawsuits against doctors for not prescribing enough pain meds/undertreatment;
- Joint Commission on Accreditation of Healthcare Organizations (JCAHO)'s adoption of pain as the "fifth" vital sign;
- Pharmaceutical companies began to develop new painkillers that lasted much longer periods of time;
- Campaigns to destigmatize opioid use and heavy sales/marketing tactics
 - Reassurance to the medical community that patients would not become addicted
 - By 2002, over 34,000 coupons for free samples were issued nationally
 - 1997: 96 mg of morphine/person
 - 2007: 700 mg of morphine/person

America's Opioid Epidemic is Worsening, THE ECONOMIST (2017) <https://www.economist.com/graphic-detail/2017/03/06/americas-opioid-epidemic-is-worsening>

About the Epidemic; <https://www.hhs.gov/opioids/about-the-epidemic/index.html>

Current State of Opioid Crisis

Litigation

- Class-action settlements/mega verdicts against Big Pharma;
 - \$44 million settlement with Cardinal Health - failure to report suspicious orders in Florida;
 - McKesson paid \$150 million civil penalty for violations of Controlled Substances Act;
 - Purdue Pharma (OxyContin maker) paid Kentucky \$24 million for misleading public about addictiveness
 - Costco settled for \$11.75 million for improperly filling controlled substances.
- Retailers (CVS, Walgreen's, Walmart);
- Next "Wave" of Lawsuits: Hospitals, Doctors

Current State of Opioid Crisis

Case Study #4 – Facts

- 51 year old deceased single male deceased secondary to allegations of negligent narcotic pain management for treatment of adult scoliosis.
- Plaintiff sued the treating psychiatrist, internal medicine physician and a hospital.
- Records revealed that from 2009 the deceased was prescribed Norco and Morphine, then progressed to Fentanyl and Duragesic patches, and ultimately Methadone in 2013.

Current State of Opioid Crisis

Case Study #4 – Legal Hurdles

- State specific Prescription Monitoring Database was not properly utilized and accessed
- Referral to orthopedic surgeon or pain management specialist, not just psychiatrist
- No patient safety contracts
- No refill protocol in place for office staff
- Pre-litigation the family reported the internist to licensing department resulting in reprimand/fine
- Family appeared in TV expose wherein they showcases 3 kitchen sized bags of opioid bottles

Current State of Opioid Crisis

Case Study #4 – Outcome

- Settlement by hospital for an ER visit close to the time of death.
- Settlement by the psychiatrist and the internal medicine physician under \$500k globally with mitigating COPD life expectancy factors.

Mega Verdicts (> \$5 million)

Recent \$35M verdict is among largest Indiana jury personal injury awards

January 9, 2018 | Marilyn Odendahl

\$53M verdict for birth injury

By [Lauraann Wood](#) Law Bulletin staff writer

POSTED June 30, 2016 9:08 AM

UPDATED September 7, 2016 4:29 PM



Update: A correction was made to this story to include sole practitioner one of the attorneys who helped to secure the record amount

A Cook County jury on Wednesday awarded \$53 million to a young boy with a severe brain injury after suffering 12 hours of fetal distress during d

on Lake County judicial applicants

Waldron, like other trial lawyers, noted these v justice," explaining justice would be her client's

L INJURY / TESTIMONY / TRIALS

Home Breaking News, Sports, Weather, Traffic Story

\$14.5M verdict in '01 death

Chelmsford man's wife died after Brockton Hospital surgery

By [Lisa Redmond](#), lredmond@lowellsun.com

UPDATED: 03/05/2008 12:59:08 PM EST

LOWELL -- In the hours before his 30-year-old wife died, Brad MacPherson watched helplessly as her abdomen swelled with air for the second time and her internal organs began to bleed from the pressure.

By the time Shannyn MacPherson of North Chelmsford was rushed from Brockton Hospital to Boston Medical Center, it was too late. She died at 4 p.m. on May 10, 2001.

"This type of swelling is extremely painful," said MacPherson's attorney, Rob Higgins of the Boston law firm of Lubin & Myer. "She was scared. She knew something was wrong."

MALPRACTICE SUIT SETTLED FOR 14.5M



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Mega Verdicts (> \$5 million)

What is the largest verdict you have been associated with in a professional liability case involving a medical injury, bodily injury and/or personal injury?

- a. Under \$2 million
- b. \$2-5 million
- c. Above \$5 million

Mega Verdicts (> \$5 million)

Which statement(s) do you most agree with regarding the defense presentation of an alternative damages case at the trial.

- a. Do not believe in it / do not do it.
- b. Reserved for rare and special cases.
- c. Do it in close to every case.
- d. Do it in about half of my cases.
- e. Depends on whether I have a liability defense.

Mega Verdicts (> \$5 million)

In what percentage of the cases you have taken to trial did a defense damages expert actually testify at trial? (vocational rehab, economist, life care planner, etc.)

- a. less than 10%
- b. 10% to 30%
- c. 20% to 30%
- d. 30% to 50%
- e. 25% to 75%
- f. More than 75%

Do you give a damages a “number” / range of “numbers” at trial?

- a. Always
- b. Never
- c. Often
- d. Rarely

Mega Verdicts (> \$5 million)

Mass	\$30 million	NP failed to monitor progression of labor	No Defense LCP*
Illinois	\$8.5 million	Death of 60 YOM /shoulder replace	No Defense model***
Georgia	\$30.7 million	Damage to penis during circumcision	No Defense LCP**
Pa.	\$20 million	Death of 50 YOF following back surgery	No Defense model**
Michigan	\$5 million	Death of 47 YOF aortic dissection	No defense model*
Arkansas	\$46 million	Hyperbilirubinemia/brain injury	No Defense Model
NJ	\$45 million	Brain injury/failure to dx child abuse	No defense damage*
Colorado	\$14.9 million	Spinal epidural/paraplegia	No defense model**
NJ	\$5.1 million	Stroke in 54 YOF Family Practitioner	No defense damage*
Pa.	\$11 million	Laceration during childbirth	No defense damage**

* No Defense damage model submitted

** No defense model but economic damages limited

*** Admitted liability

Mega Verdicts (> \$5 million)

FACTORS THAT CAN DRIVE UP VERDICTS

- Rising Healthcare Costs & Uncertainty of the Personal Financial Future
- More Millennials on Juries
- Bad Testimony or Misidentification of Corporate Witnesses
 - Corporate Bias/Profits over Safety
- Not Setting a Floor or Offering an Alternative Damage Amount
- Not Addressing Key Issues/Themes in Jury Selection/Opening

Mega Verdicts (> \$5 million)

Case Study #5 – Facts

- 63 year old divorced female, 2 adult children, working as a university counselor alleged loss chance of treatment and survival due to an alleged failure to report a lung mass on a CT angiogram during cardiac evaluation.
- Specifically, if diagnosed at the time of the CT the plaintiff would have had removal with no chemotherapy or radiation and an 85% cure rate.
- Plaintiff sued the cardiologist, the cardiology group, and the hospital.
- The defense argued that when the cancer was diagnosed 3 years later that the lung tumor was a rare genetic mutation that targeted therapies would not have been an option.
- At trial, the jury understood the plaintiff had 1-2 years to live.
- Plaintiff was a non-smoker.

Mega Verdicts (> \$5 million)

Case Study #5 – Trial Synopsis

- Agency issues that impeded the continuity of the defense and made the jury consider that no party wanted to accept accountability
- “Incidental finding” defense was fragile from the onset – the cardiology aspects were barred
- Attack the speculation of the plaintiff’s experts that the lung mass was treatable 3 years earlier
- The jury disregarded the expert testimony as to the complexity and rarity of this type of lung cancer
- The jury disliked knowing the plaintiff was going to die in 1-2 years - they championed the sympathy, and all stopped to wish her well after the verdict

Mega Verdicts (> \$5 million)

Case Study #5 – Outcome

- The jury awarded the Plaintiff in excess of \$15m.
- There were no wage loss claims.
- The verdict form included:
 - Past/future medical expenses;
 - Past/future pain and suffering;
 - Past/future loss of normal life; d
 - Disfigurement;
 - Emotional distress; and
 - **Shortened life expectancy** at \$7m inclusive.
- A line by line rebuttal of these elements could have been better utilized for the defense.



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