

**Safe Harbor Immunity:
the Right Prescription for
Providers' 'Bad Law' Claims
and Hyper-Risk-Averseness?**

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ASLME Health Law Professors Conference

Chicago, IL • June 10, 2011

Bad

law







Education

Carrots + Sticks

Safe harbors

Safe harbor

“low risk”

conduct

***Ex ante* defined**

AKS, Stark (e.g. FMV)

TX informed consent

EBM - CPG

Process defined

HCQIA

Negligent

selection / retention

Safe harbor

“worthwhile”

conduct

EMT

Good Samaritan

Crisis standards of care

Good faith: UHCDA UAGA

Mandatory reporting

Conscientious objection

Lethal injection

Safe harbor

blatant

protectionism

Statutes of repose

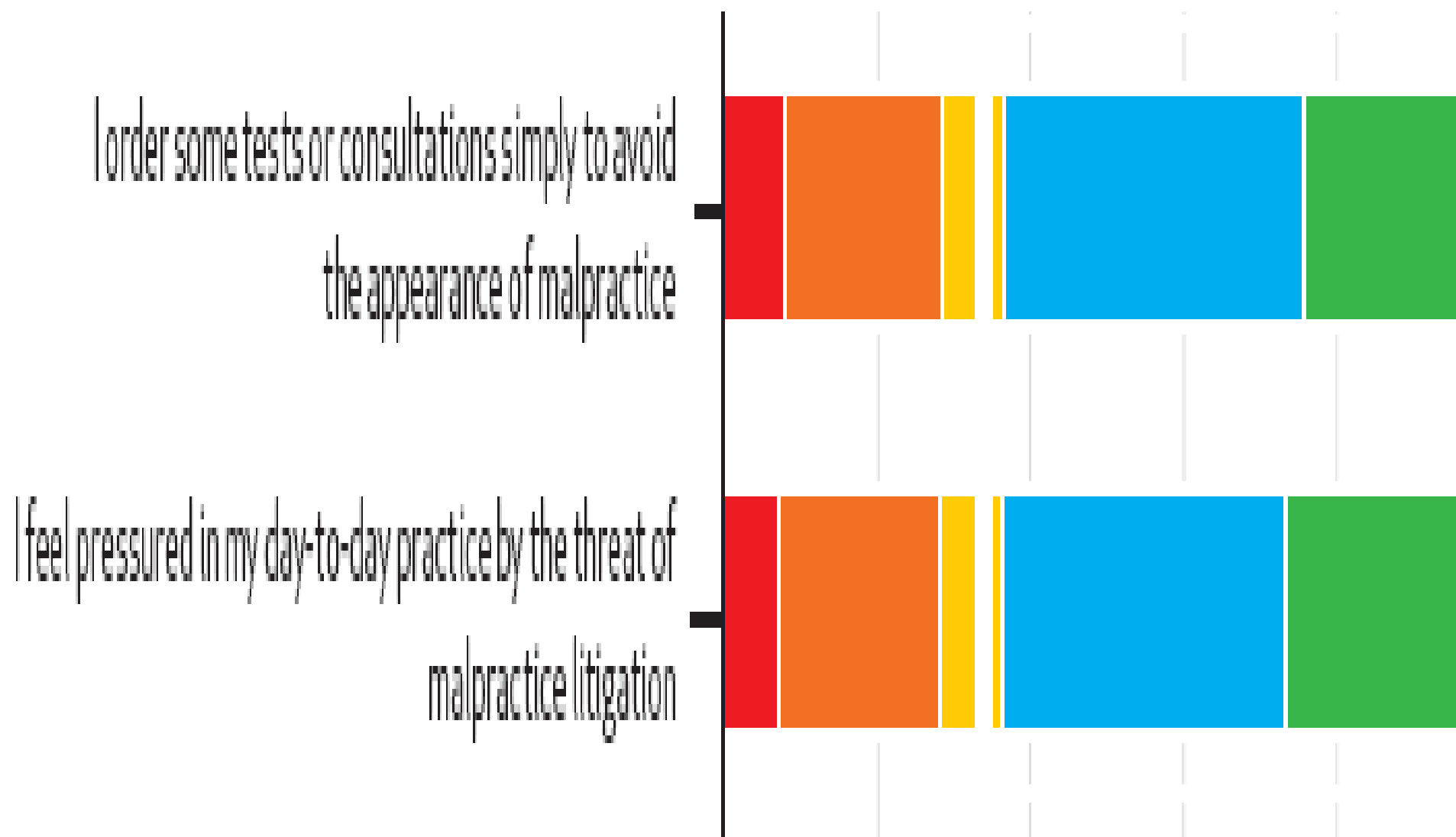
Many more

Defensive

Medicine

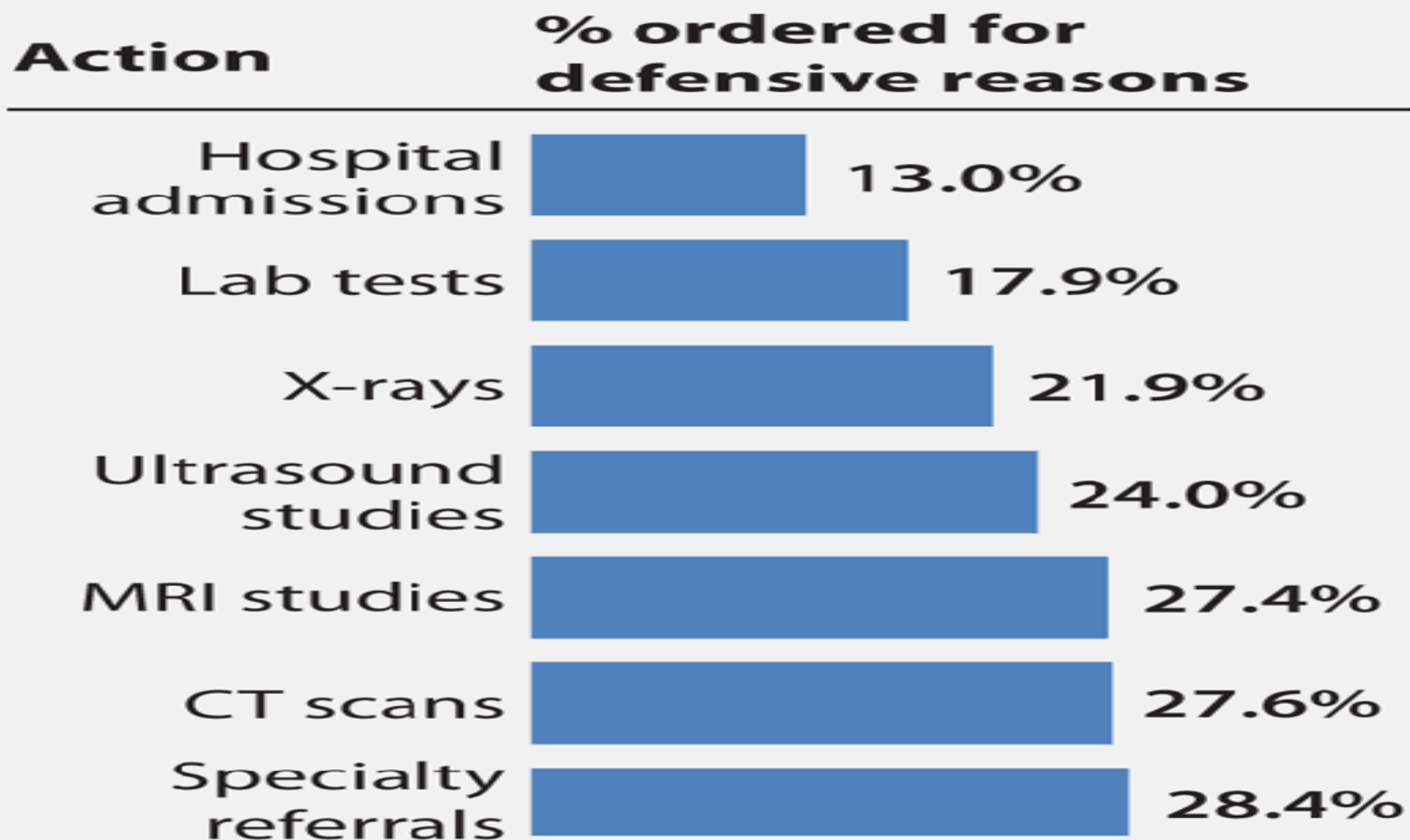
HEALTH AFFAIRS 29,
NO. 9 (2010): 1585-1592

● Strongly disagree ● Disagree ● Neutral ● Agree ● Strongly agree



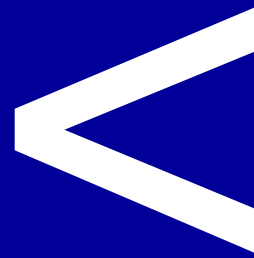
Mass. Med. Society (Nov. 2008)

DOCTOR SURVEY



Factor	Extremely or Very Important	Most Important of All Factors Listed
Patient's prognosis	98.5	12.0
What was best for the patient overall	98.1	33.2
Respecting the patient as a person	96.6	5.4
Patient's pain and suffering	94.6	12.5
What the patient would have wanted you to do	81.8	29.4
Providing the standard of care	81.5	2.2
Respecting the wishes of the family or surrogate(s)	80.9	3.3
Following the law	68.6	1.1
The burden on the family	44.8	0
Religious beliefs of the patient	35.3	0
Religious beliefs of the family or surrogate(s)	28.6	0
Cost to society of caring for the patient	14.2	0
Physician's religious beliefs	10.7	0
Concerns about paying for medical care	9.3	0
Concern that the surrogate(s) might sue	8.4	1.1

Defensive
medicine



Offensive
medicine

Significant cost

Significant

quality & safety

Medical Futility



Perceptions of “futile care” among caregivers in intensive care units

Robert Sibbald MSc, James Downar MD, Laura Hawryluck MD MSc

CMAJ 2007;177(10):1201-8

“Why they follow the instructions of SDMs instead of doing what they feel is appropriate, almost all cited a **lack of legal support.**”

“Remove the
____, and I will
sue you.”

Resolution 505-08

TITLE: LEGAL SUPPORT FOR NONBENEFICIAL
TREATMENT DECISIONS

Author: H Hugh Vincent, MD;
William Andereck, MD

Introduced by: District 8 Delegation

Endorsed by: District 8 Delegation

Reference Committee

E

October 4-6, 2008

*This resolution constitutes a proposal for consideration by the California Medical Association
House of Delegates and does not represent official CMA policy.*

WHEREAS, it is still common for physicians who feel non-beneficial or futile treatments are being provided or considered to feel threatened by legal action by the patient's family or other surrogates, and thus continue to provide such care against their best medical judgment; and

WASHINGTON STATE MEDICAL ASSOCIATION
HOUSE OF DELEGATES

Resolution: C-5
(A-09)

Subject: Legal Protection for Physicians When
Treatment is Considered Futile

Introduced by: King County Medical Society Delegation

Referred to: Reference Committee C

WASHINGTON STATE MEDICAL ASSOCIATION
HOUSE OF DELEGATES

Resolution: A-2
(A-10)

Subject: WSMA Opinion on Medical Futility in End-of-Life Care

Introduced by: Shane Macaulay, MD, Delegate
WSMA Board of Trustees

Referred to: Reference Committee A

RESOLUTION 1 - 2004

[\(read about the *action* taken on this resolution\)](#)

Subject: Futility of Care

Introduced by: Michael Katzoff, MD and the Medical Society of Milwaukee County

RESOLVED, That the Wisconsin Medical Society, concurrent with a recommendation of the American Medical Association, Medical Futility in End-of-Life Care policy E-2.037, supports the passage of state legislation which establishes a legally sanctioned extra-judicial process for resolving disputes regarding futile care, modeled after the Texas Advanced Directives Act of 1999.



MSNJ

MEDICAL SOCIETY
OF NEW JERSEY
Est. 1766





**MEDICAL FUTILITY &
MARYLAND LAW**

Tuesday, November 30, 2010

Medical Futility

Medicine Law & Ethics

Thursday, October 21, 2010

7:30 am - 12:45 pm

Education & Resource Center (ERC)

Hartford Hospital, Heublien Hall



HARTFORD
HOSPITAL

S.B. 1114 (Mar. 2009)



Cal. Prob. Code 4740

A . . . provider . . .
acting in good faith .
. . is **not subject to** .
. . **liability** or to
discipline

Cal. Prob. Code 4735

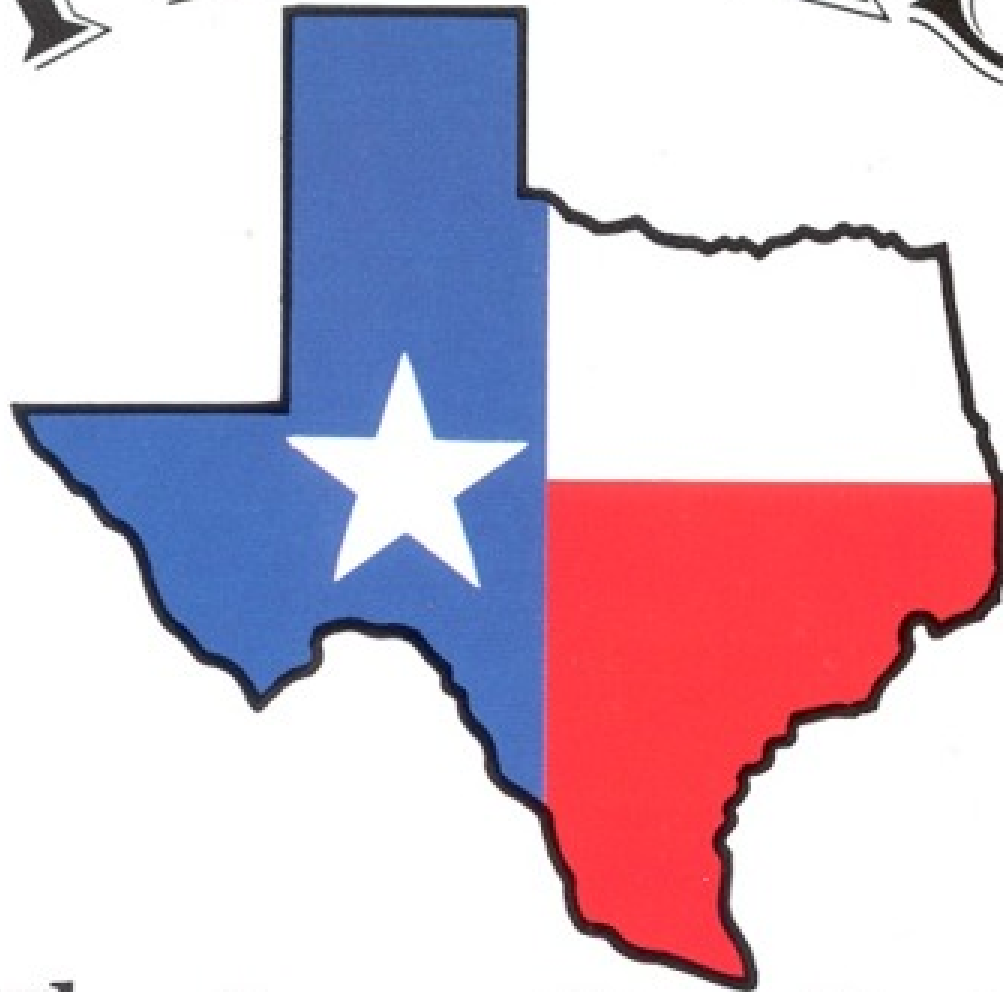
A . . . provider . . . **may decline** to comply with . . . decision that requires . . . health care contrary to generally accepted . . . standards



Model

1 of 2

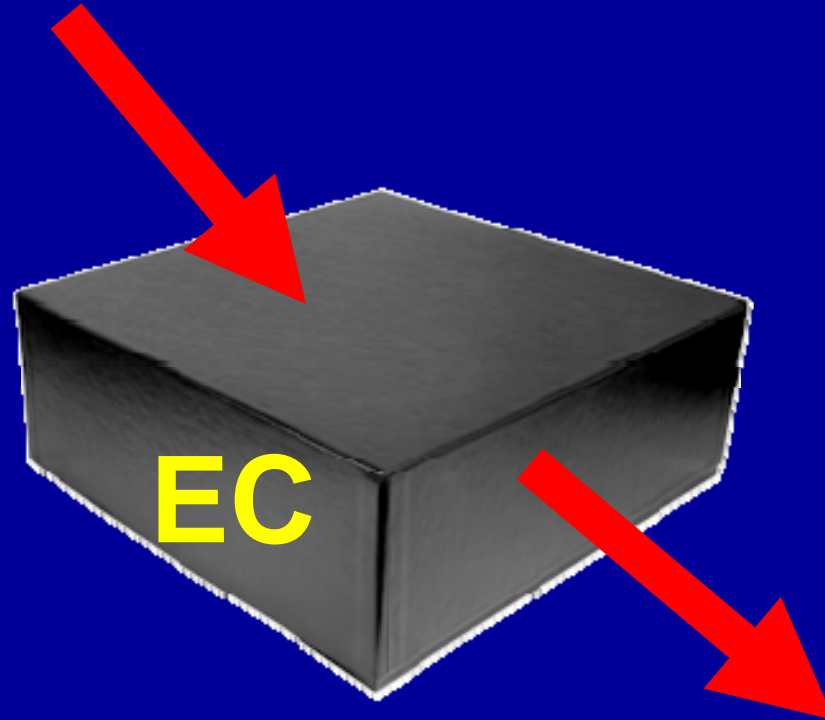
TEXAS



The Lone Star State

You may stop LSMT
for **any reason** - if
your hospital ethics
committee agrees

Treatment
conflict



Result worthy
of respect

Corrupt

Biased

Careless

Arbitrary



FOTOSERCLA



NEW YORK
EMPIRE STATE

ALBANY





Model

2 of 2



Consent and Capacity Board



HEC as process- defined safe harbor

Minimum required

Workability

Safe harbors

Taxonomy

Essential attributes



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