



**“STUFF OF NIGHTMARES: CRIMINAL PROSECUTION FOR MALPRACTICE”**

BY GARY STEINMAN, MD, PHD (AUGUST)

**Standard of care is defined nationally in a majority of cases**

The standard of care is defined locally in only a small and declining number of jurisdictions. The national standard is the most common “bright line” used to judge negligence. Furthermore, the variability in the number of malpractice cases initiated against the medical profession is clearly not related to the level at which the standard is set, but by other factors—most notably, the number of lawyers per capita and the presence (or absence) of caps for pain and suffering.

To be sure, the standard for Ob-Gyns in New York is not more stringent than what is found in California or Texas, but there is a greater willingness to sue in New York, where jury awards are much higher than they are in California, Pennsylvania, and Texas. Attorneys will attempt to transfer a case to a more friendly venue for the plaintiff whenever possible. It is called “venue shopping.”

Physicians who have been found guilty of criminal malpractice are usually stripped of their license and denied the opportunity to practice. Dr. Steinman blunts significant differences between a physician being sued for malpractice, being found guilty of negligence, and being found guilty of gross negligence warranting a charge of reckless endangerment.

**Theodore Zaleski, MD, JD**  
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» Dr. Steinman responds:  
*Local factors hold sway more often than you think*

*Dr. Zaleski is correct: The greater litigious atmosphere in certain geographic areas accounts for the greater frequency*



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*of civil suits in such areas. However, evidence-based medicine has and will continue to diminish the effect of expert witnesses who base their subjective testimony on the opinions of name physicians rather than objective facts gleaned from actual biomedical observations. (Certain specialty boards are beginning to take a closer look at “experts” who actually fabricate and exaggerate to suit the needs of the plaintiff.) On the other hand, the situations that tend to be prosecuted as examples of criminality vary from locale to locale because of what is perceived to be criminal in each community.*

*Prosecution for criminal malpractice, in contrast to civil claims, is much more uncommon in the United States than it is in other countries—in Japan, to name one. The monetary motivation probably has much to do with this. Criminal charges are usually brought when the offense is so egregious that the standard of care has little to do with the decision to proceed with a prosecution. The likelihood that a prosecutor will pursue such a complaint depends largely on what the local community considers criminal, a standard that varies considerably, locale to locale.*

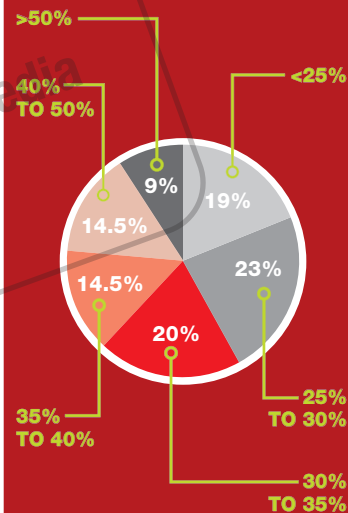
**Instant Poll Results**



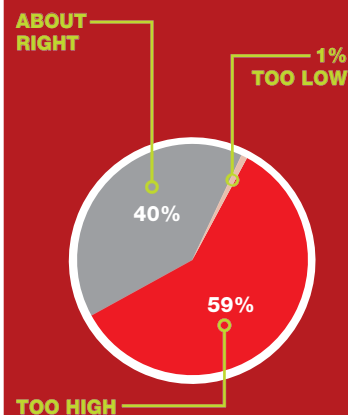
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**WHAT IS THE C-SECTION RATE AT YOUR HOSPITAL?**

At my hospital, the overall cesarean delivery rate is:



...and I think that this rate is:



**Instant Poll** → page 15

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