



**HINKLE SHANOR LLP**

# EMOTION V. MEDICAL SCIENCE: UPDATE OF MEDICAL LITIGATION

NMAFP MEDICINE SEMINAR

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## Rules of the Road

Basic rules of Medicine govern activities (simple as driving a car)

Who needs experts?

Black and white. Defense: grey.

If this is so easy we would all be doing it.

Psychology has a preference for Black and White thinking. We all Love Pandas and we all aren't as fond of grey seals. But Orca whales are dangerous and grey dolphins can be appealing...

Appeal to juror intelligence

1. Rule must prevent danger.  
Looks for guarantee of safety. Example drug side effects; choice of least invasive surgery (Lesser harm than doing nothing) "do not harm" is a mantra that isn't literally true
2. Protect people in wide variety of situations not just the Plaintiff. Abstract.  
Patient's situations are not easily interchangeable
3. Rule must be clear English
4. Must explicitly state what a person can or cannot do.  
Must - no room for generally, typically, probably
5. Practical and should have been easy for Defendant to follow  
Easy in hindsight... "if only..."  
COULD he physician have done...usually yes...were told solid reasons AT THE TIME

Timelines

Multiplicity of treatment options

6. Defendant must agree or will appear Stupid, Careless or Dishonest
7. DOCTOR LESSON: Do not take the easy route...take the accurate route

## Reptile

Safety rule plus DANGER = Reptile

Focuses on three parts of the brain.

Focused on the reptilian part (the Amygdala): primitive, oldest part. Science shows that when that part takes over the frontal lobe (reasoning) functions less effectively...(study of focus juries... consider a selfish verdict. What makes YOU safer? What makes the community safer?) ...appeal to the primitive danger avoidance instincts

What is the Opposite of Safety? DANGER

## Profits Over People

Not new BUT permeates a case and of patients are in DANGER because of MONEY skyrocketing verdict...

New trend: Unfair trade practice claims, misrepresentations, informed consent.

## Unfair Trade Practice

What does your website say?

What did your advertising promise? Did you keep that promise?

## Misrepresentation

What did you tell the patient?

## Informed Consent

Did you disclose every risk?

Did you disclose every alternative?

Did you disclose the risk or benefit of every alternative?

## Now That You Know What They Are

How do we see it and HOW do attorneys deal with it?

FIRST – The Complaint

Out of the box, you will see rules appearing in the complaint and you will see the word danger and safety used as a standard of care definitions.

EXAMPLES

## Depositions

### EXAMPLES

Get the doctor to agree with the rules or the concepts

The Rules: One way to create them is using the policies and procedures

Guidelines from professional organizations

Comment on standard of care for other Defendants

The absurd hypothetical

This is the first line of questioning (can go for hours before we see a question about the Plaintiff)

There could be a long gap before the patient is even mentioned.