

ETHICAL ISSUES IN TORT REFORM AND MEDICAL MALPRACTICE

2005 Western States Osteopathic Convention

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PURPOSE OF TORT SYSTEM

- TO PROVIDE INCENTIVES FOR SAFETY
- TO PROVIDE COMPENSATION FOR VICTIMS

MALPRACTICE LIABILITY

Legal Liability for Injuries:

- **Statute**
- **Common Law**

Types of Liability:

- **Negligence**
 - ➔ **Provable Fault**
 - ➔ *Res Ipsa Loquitor*
- **Strict Liability**

ELEMENTS OF MALPRACTICE

- LEGAL DUTY
 - ➔ **Fiduciary Duty**
- BREACH OF DUTY
- CAUSATION
- DAMAGES

FIDUCIARY DUTY

➤ Legally Duty Explained As: (COLAN)

➔ Care

➔ Obedience

➔ Loyalty

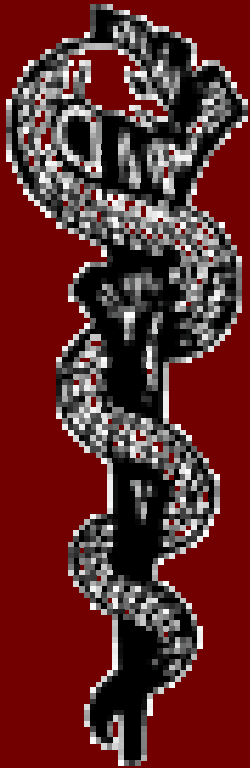
➔ Accounting

➔ Notice

FIDUCIARY DUTY

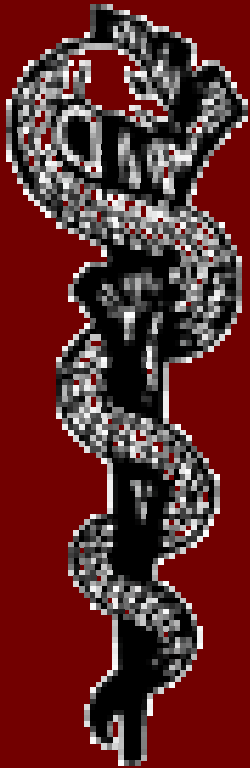
- **Medically Explained As:**
 - ➔ **Osteopathic Oath**
 - ➔ **Hippocratic Oath-Ancient**
 - ➔ **Hippocratic Oath-Modern**
 - ➔ **Medical Ethics Principles**

OSTEOPATHIC OATH



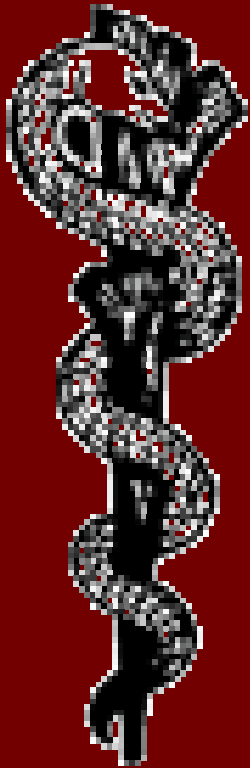
I do hereby affirm my loyalty to the profession I am about to enter. I will be mindful always of my great responsibility to preserve the health and the life of my patients, to retain their confidence and respect both as a physician and a friend who will guard their secrets with scrupulous honor and fidelity, to perform faithfully my professional duties, to employ only those recognized methods of treatment consistent with good judgment and with my skill and ability, keeping in mind always nature's laws and the body's inherent capacity for recovery.

OSTEOPATHIC OATH



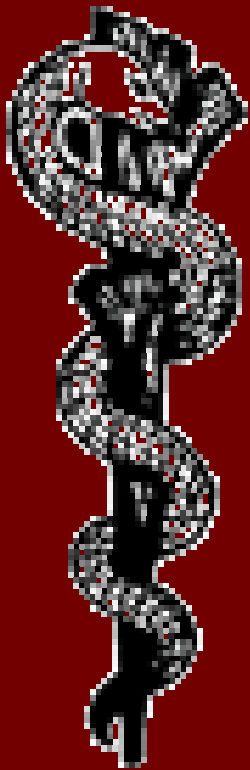
I will be ever vigilant in aiding in the general welfare of the community, sustaining its laws and institutions, not engaging in those practices, which will in any way, bring shame or discredit upon my profession or myself. I will give no drugs for deadly purposes to any person, though it may be asked of me.

OSTEOPATHIC OATH



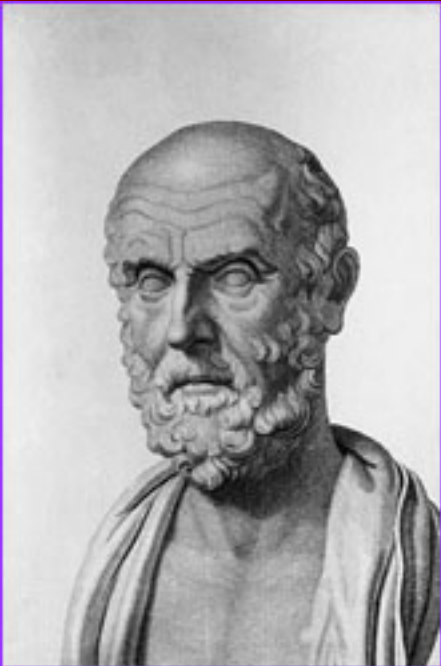
I will endeavor to work in accord with my colleagues in a spirit of progressive cooperation and never by word or by act cast imputations upon them or their rightful practices.

OSTEOPATHIC OATH



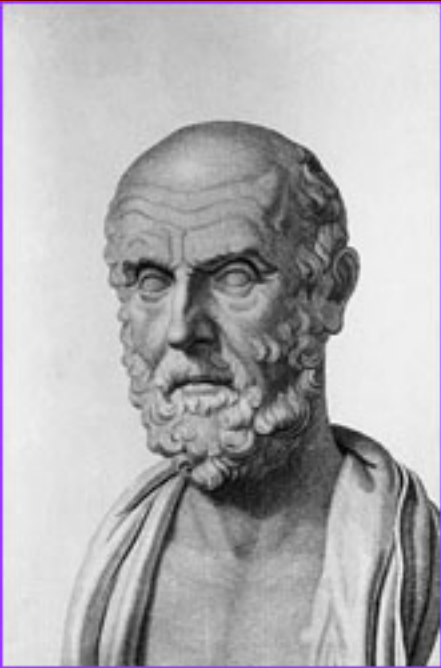
I will look with respect and esteem upon all those who have taught me my art. To my college I will be loyal and strive always for its best interests and for the interests of the students who will come after me. I will be ever alert to further the application of basic biologic truths to the healing arts and to develop the principles of osteopathy, which were first enunciated by Andrew Taylor Still.

HIPPOCRATIC OATH (Ancient-400 B.C.)



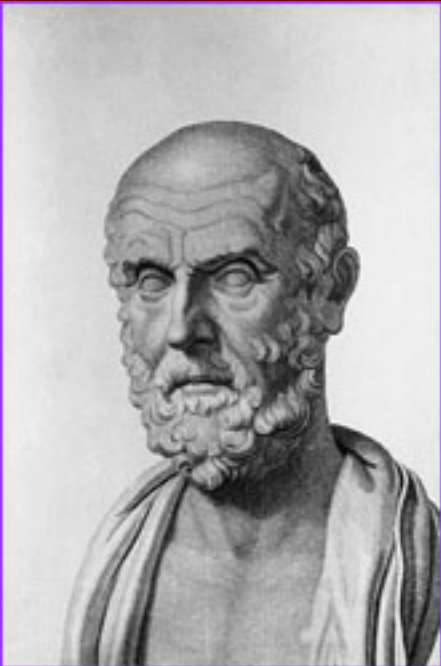
Swear by Apollo Physician and Asclepius and Hygieia and Panaceaia and all the gods and goddesses, making them my witnesses, that I will fulfil according to my ability and judgment this oath and this covenant:

HIPPOCRATIC OATH (Ancient-400 B.C.)



To hold him who has taught me this art as equal to my parents and to live my life in partnership with him, and if he is in need of money to give him a share of mine, and to regard his offspring as equal to my brothers in male lineage and to teach them this art - if they desire to learn it - without fee and covenant; to give a share of precepts and oral instruction and all the other learning to my sons and to the sons of him who has instructed me and to pupils who have signed the covenant and have taken an oath according to the medical law, but no one else.

HIPPOCRATIC OATH (Ancient-400 B.C.)

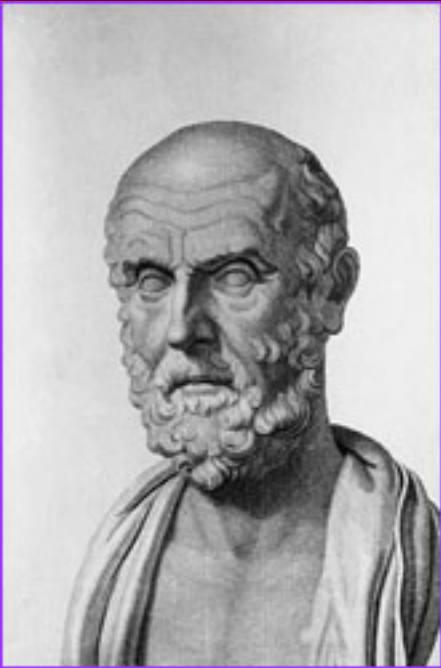


I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice.

I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect. Similarly I will not give to a woman an abortive remedy. In purity and holiness I will guard my life and my art.

I will not use the knife, not even on sufferers from stone, but will withdraw in favor of such men as are engaged in this work.

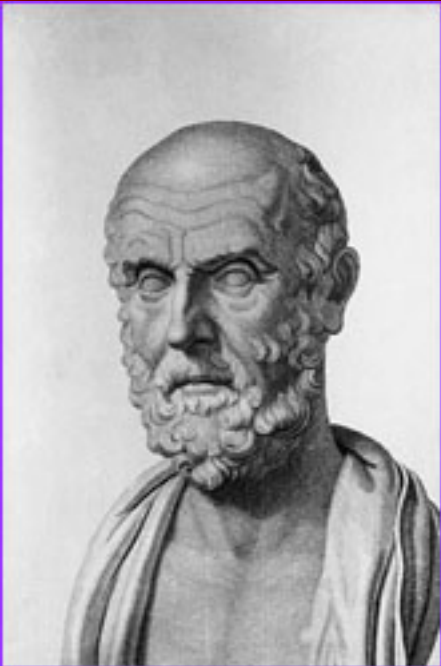
HIPPOCRATIC OATH (Ancient-400 B.C.)



Whatever houses I may visit, I will come for the benefit of the sick, remaining free of all intentional injustice, of all mischief and in particular of sexual relations with both female and male persons, be they free or slaves.

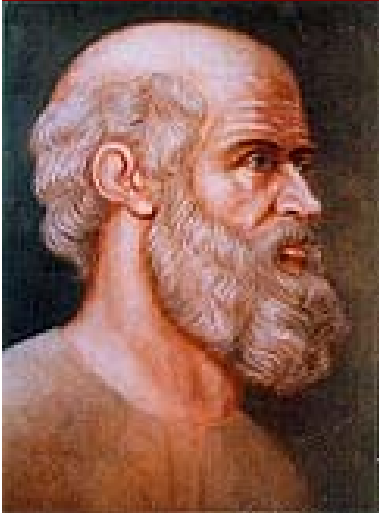
What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself, holding such things shameful to be spoken about.

HIPPOCRATIC OATH (Ancient-400 B.C.)



If I fulfil this oath and do not violate it, may it be granted to me to enjoy life and art, being honored with fame among all men for all time to come; if I transgress it and swear falsely, may the opposite of all this be my lot.

HIPPOCRATIC OATH (Modern-1995)

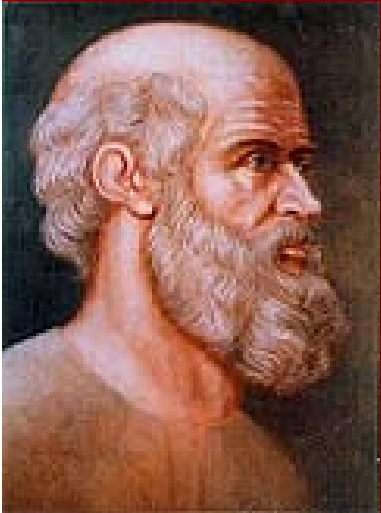


I swear to fulfill, to the best of my ability and judgment, this covenant:

I will respect the hard-won scientific gains of those physicians in whose steps I walk, and gladly share such knowledge as is mine with those who are to follow.

I will apply, for the benefit of the sick, all measures which are required, avoiding those twin traps of over-treatment and therapeutic nihilism.

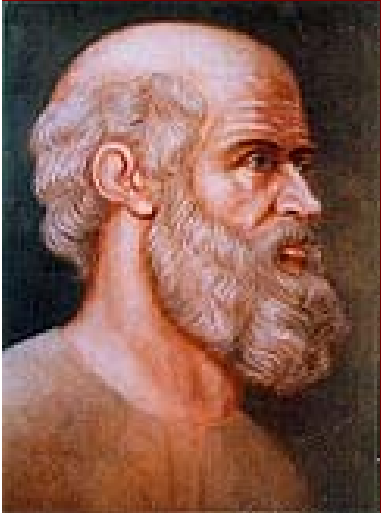
HIPPOCRATIC OATH (Modern-1995)



I will remember that there is art to medicine as well as science, and that warmth, sympathy, and understanding may outweigh the surgeon's knife or the chemist's drug.

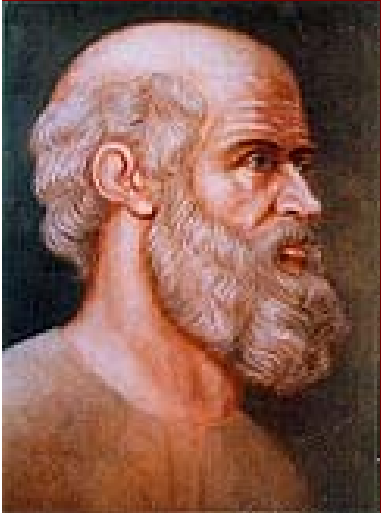
I will not be ashamed to say "I know not," nor will I fail to call in my colleagues when the skills of another are needed for a patient's recovery.

HIPPOCRATIC OATH (Modern-1995)



I will respect the privacy of my patients, for their problems are not disclosed to me that the world may know. Most especially must I tread with care in matters of life and death. If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty. Above all, I must not play at God.

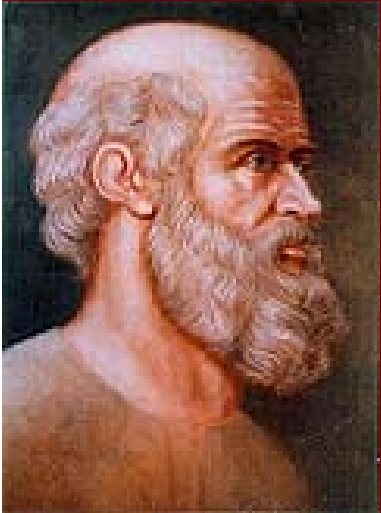
HIPPOCRATIC OATH (Modern-1995)



I will remember that I do not treat a fever chart, a cancerous growth, but a sick human being, whose illness may affect the person's family and economic stability. My responsibility includes these related problems, if I am to care adequately for the sick.

I will prevent disease whenever I can, for prevention is preferable to cure.

HIPPOCRATIC OATH (Modern-1995)



I will remember that I remain a member of society, with special obligations to all my fellow human beings, those sound of mind and body as well as the infirm.

If I do not violate this oath, may I enjoy life and art, respected while I live and remembered with affection thereafter. May I always act so as to preserve the finest traditions of my calling and may I long experience the joy of healing those who seek my help.

PRINCIPLES OF MEDICAL ETHICS



- **BENEFACTENCE**
 - ➔ Acting For The Benefit Of The patient
- **NON-MALEFICENCE**
 - ➔ Do No Harm
- **AUTONOMY**
 - ➔ Informed Consent
 - ➔ Decision Making Capacity
- **JUSTICE**
 - ➔ Benefit Society

ELEMENTS OF NEGLIGENCE

➤ LEGAL DUTY

→ Fiduciary Duty

➤ BREACH OF DUTY

→ Minimum Standard of Care in the Community

→ Certification: National Standard of Care

➤ CAUSATION

➤ DAMAGES

ELEMENTS OF NEGLIGENCE

➤ LEGAL DUTY

➔ Fiduciary Duty

➤ BREACH OF DUTY

➔ Minimum Standard of Care in the Community

➔ Certification: National Standard of Care

➤ CAUSATION

➔ Joint and Several vs. Joint And Not Several

➤ DAMAGES

CAUSATION

Joint And Several Liability:

- **Multiple Parties Combine to Cause Loss**
 - ➔ Each Defendant Is Responsible Only For His/Her Percentage of Fault
 - ➔ Claimant's Settlement Amounts Not Factored Into Trial Judgment

Joint But Not Several Liability:

- **Multiple Parties Combine to Cause Loss**
 - ➔ Each Defendant Is Responsible For Entire Amount
 - ➔ Claimant Can Only Recover Once

ELEMENTS OF NEGLIGENCE

➤ LEGAL DUTY

➔ Fiduciary Duty

➤ BREACH OF DUTY

➔ Minimum Standard of Care in the Community

➔ Certification: National Standard of Care

➤ CAUSATION

➔ Joint and Several vs. Joint And Not Several

➤ DAMAGES

➔ Compensatory

➔ Punitive

TYPES OF DAMAGES

➤ Compensatory

➔ Special

➔ Medical Bills, Lost Wages, *Etc.*

➔ General

➔ Pain & Suffering

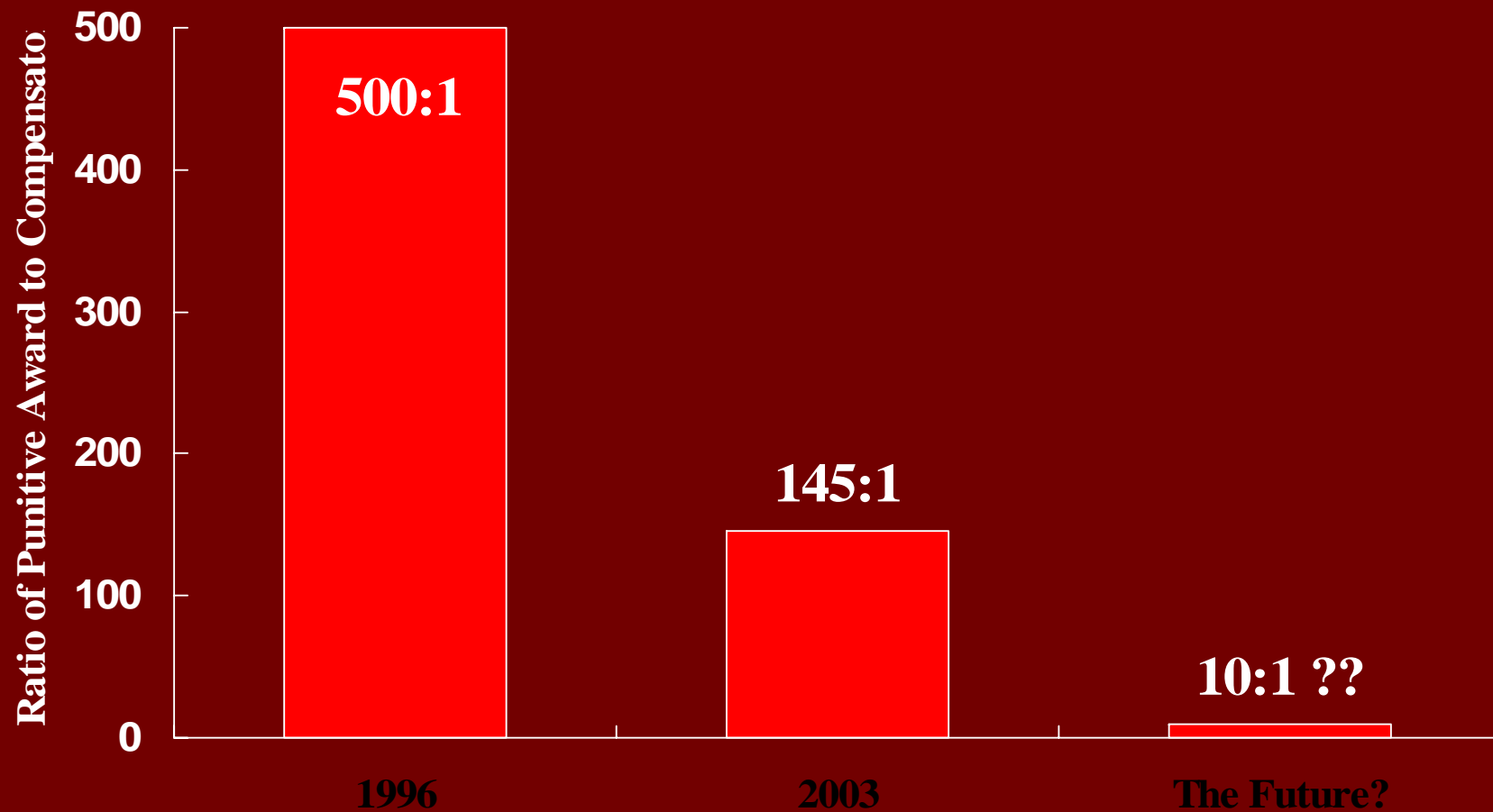
➤ Punitive

➔ Meant to Punish and Deter

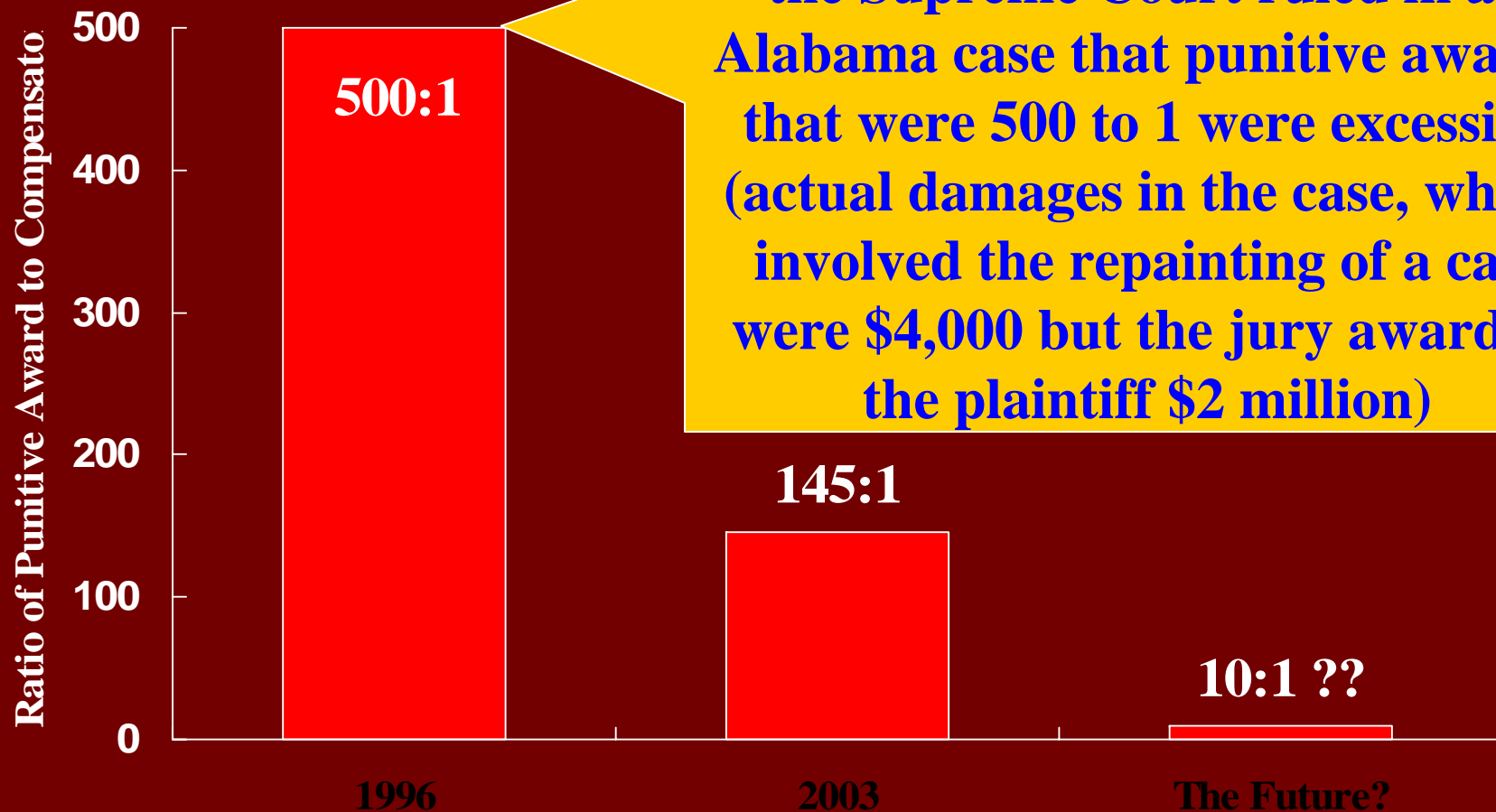
➔ Higher Culpability of Wrongdoer

➔ Higher Standard of Proof

PUNITIVE DAMAGES

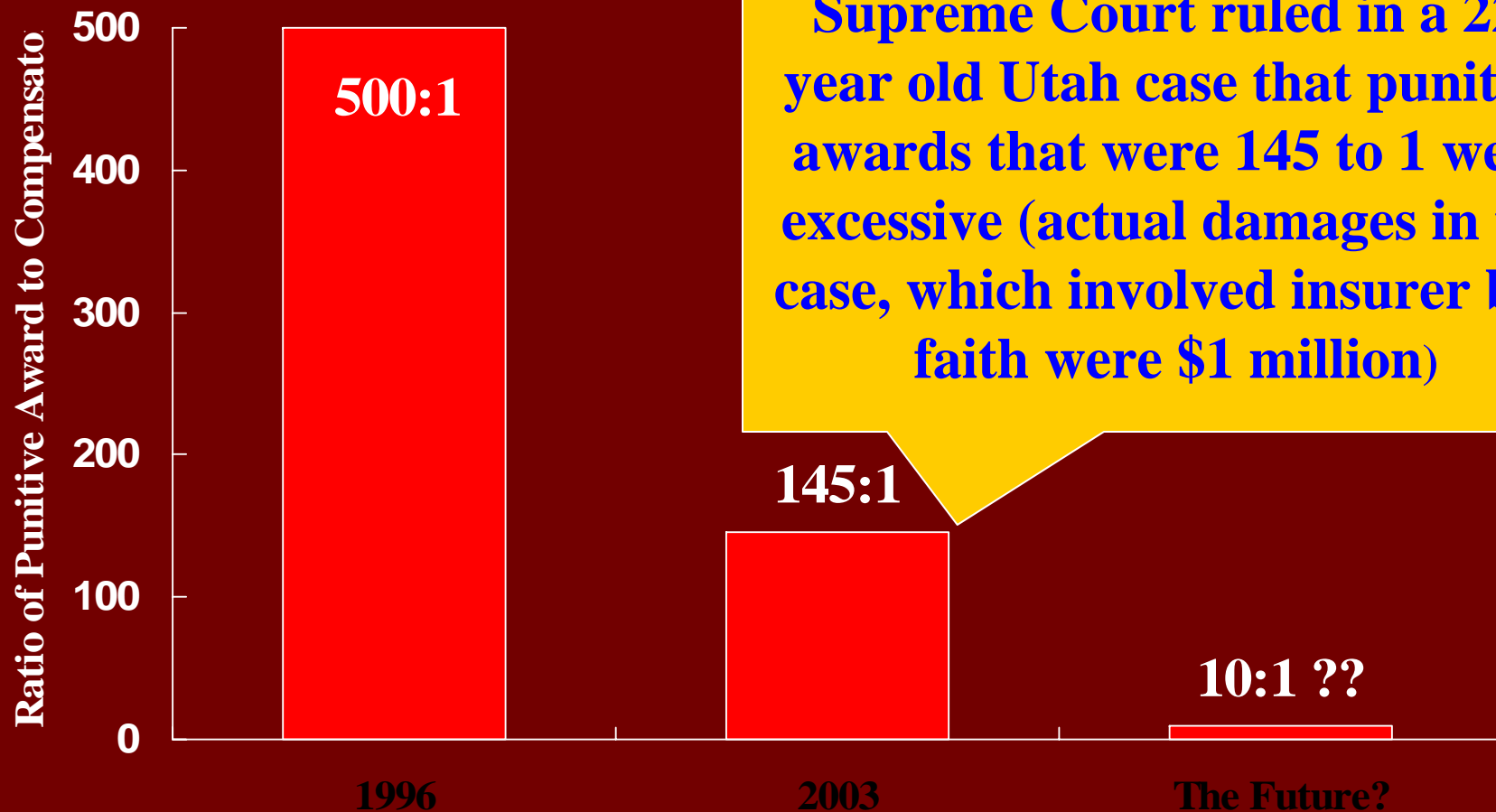


PUNITIVE DAMAGES



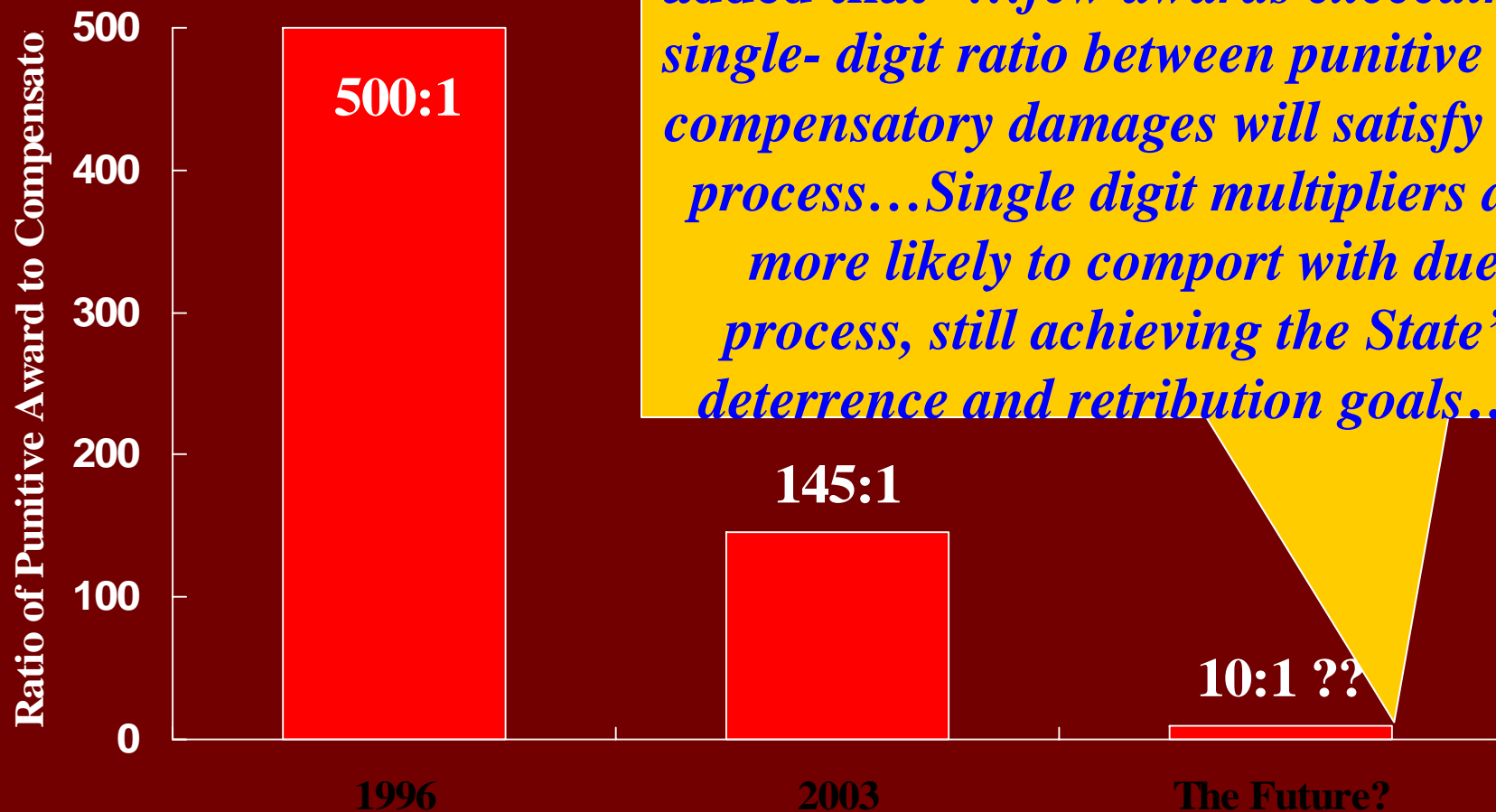
In *BMW of North America v. Gore*, the Supreme Court ruled in an Alabama case that punitive awards that were 500 to 1 were excessive (actual damages in the case, which involved the repainting of a car, were \$4,000 but the jury awarded the plaintiff \$2 million)

PUNITIVE DAMAGES



In *Campbell v. State Farm*, the Supreme Court ruled in a 22-year old Utah case that punitive awards that were 145 to 1 were excessive (actual damages in the case, which involved insurer bad faith were \$1 million)

PUNITIVE DAMAGES

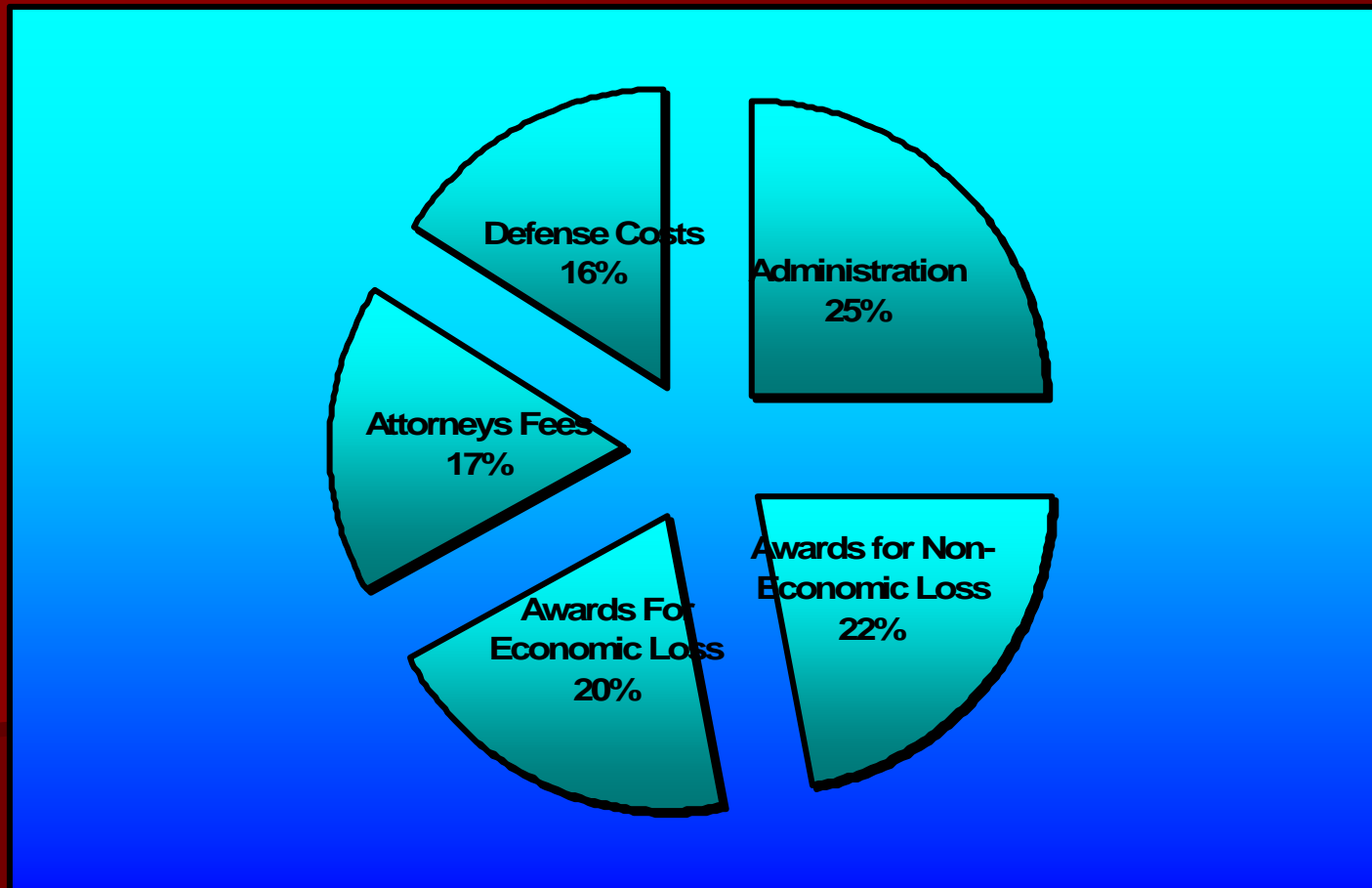


In Campbell v. State Farm, the Court added that "...few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process...Single digit multipliers are more likely to comport with due process, still achieving the State's deterrence and retribution goals..."

TORT DOLLAR DISTRIBUTION

- Administration Fees = 25%
- Awards For Non-Economic Loss = 22%
- Awards For Economic Loss = 20%
- Attorneys Fees = 17%
- Defense Costs = 16%

TORT DOLLAR DISTRIBUTION



EXPRESSED REASONS FOR TORT REFORM

STOP
"FRIVOLOUS"
LAWSUITS

REASONS TO STOP "FRIVILIOUS" LAWSUITS

- **To Make Medical Malpractice Insurance More Affordable**
- **To Allow Physicians To Practice "Medicine" As Opposed To "Defensive" Medicine**
- **So Patients Do Not Receive "Rewards" From Lawsuits**

SPECIFIC TORT REFORM PROPOSAL

- **Cap Non-Economic Damages At \$250,000**
- **Reduce Attorney's Fees**
- **Inform The Jury Of Collateral Sources**
- **Joint And Several Liability**
- **Stricter Statute of Limitations**

THE BIG QUESTION

QUESTION: Will The Proposed Tort Reform Reduce Frivolous Lawsuits?

ANSWER: The Proposed Tort Reform Will Only Reduce Legitimate Lawsuits.

WHY?

The Proposed Tort Reform Will Reduce Only Legitimate Lawsuits Because Frivolous Lawsuits Do Not Result In Jury Verdicts.

Therefore, Caps Do Not Have The Intended Effect.

FRIVOLOUS LAWSUITS

**Federal Rule Of Civil Procedure,
Rule 11 And The State Statutory
Counterparts Prohibit The Filing
Of A Lawsuit Without Merit By A
Licensed Attorney.**

FACTS

- 98,000 Americans Die Each Year From Medical Mistakes
 - ➔ 12,000 Deaths From Unnecessary Surgeries
 - ➔ 7,000 Deaths From Medication Errors
- 1,000,000 Americans Are Injured Each Year From Medical Mistakes
 - ➔ Only 1 In 8 Injured Patients Files A Lawsuit
- Medication Mistakes Alone In Hospital Settings Cost \$2,000,000,000 Per Year

FACTS

- The Median Payout (Settlement and Judgment) For Patients Who Receive Money In A Malpractice Case is \$125,000
- The Median Jury Judgment For Patients Who Are Successful In A Malpractice Lawsuit Is Approximately \$1,000,000
 - ➔ Punitive Damages Were Awarded In Less Than 1% Of Cases
- The Median Of Jury Verdicts In All Tort Claims Dropped By 33% to \$30,000 Since 2000

FACTS

- Only 6.5 Of Every 1,000 Physicians Will Be Sued In Any Given Year
- 5% Of Physicians Are Responsible For 54% Of All Malpractice
 - ➔ Only 17% Of Physicians Who Have Paid On 5 Or More Lawsuits Has Been Disciplined By Their State Board
- Healthcare Providers Are Successful In Jury Trials Over 60% Of The Time

FACTS

- The Number Of Medical Malpractice Lawsuits Has Not Increased In The Last 10 Years
 - ➔ Federal Lawsuits Have Not Increased Since 1970
 - ➔ State Lawsuits Have Continued To Decrease Since 1989
- The Total Number Of Medical Malpractice Claims Decreased By 4% From 1995 To 2000

WHY HAVE MALPRACTICE PREMIUMS INCREASED

- A Price War Started By St. Paul Led To Inadequate Premiums In The 1990s
 - ➔ St. Paul Had \$1,100,000,000 In Over-Reserves Which It Converted Over
 - This Mistakenly Appeared As Profit
 - ➔ Other Malpractice Carriers Slashed Prices In An Attempt to Attract Physicians Because They Mistakenly Believed There Were Huge Profits
- A Large Number Of Malpractice Insurers Became Under-Capitalized And Went Into Receivership

WHY HAVE MALPRACTICE PREMIUMS INCREASED

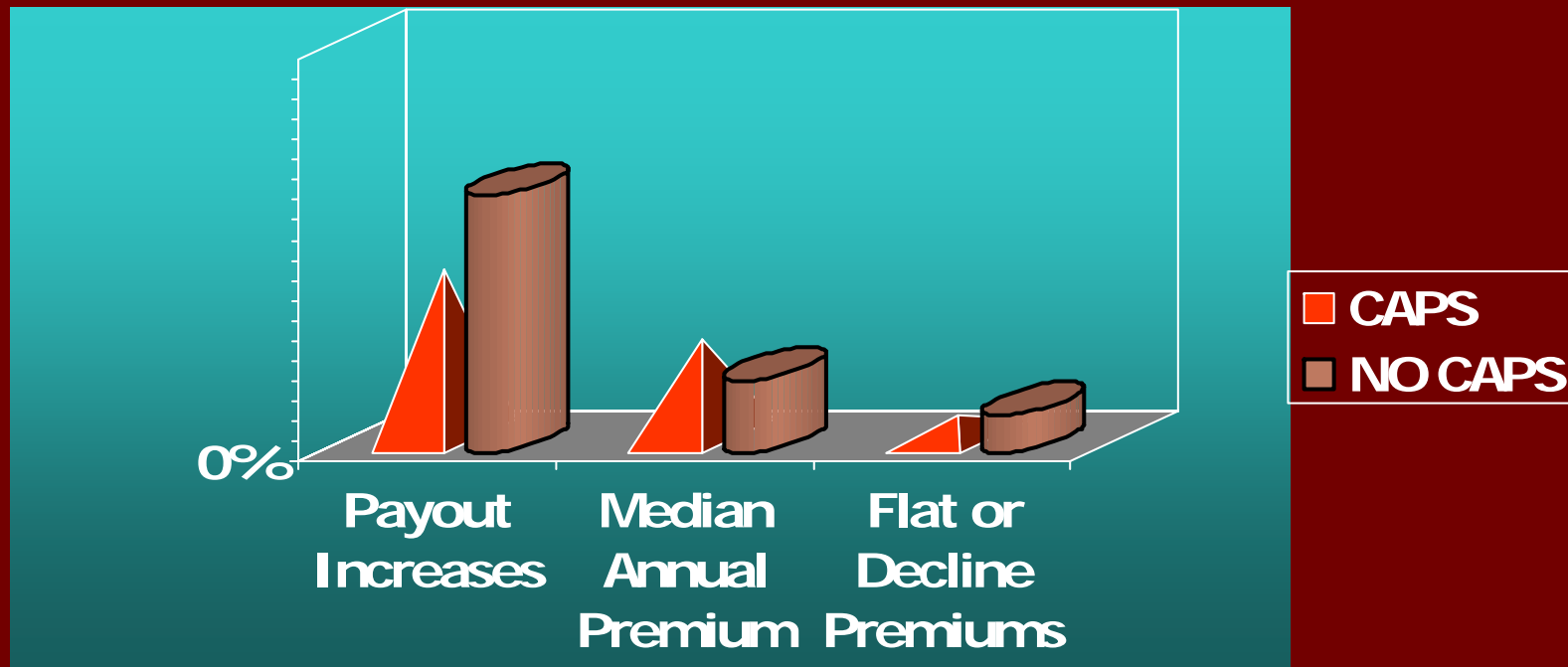
- Insurance Carriers Invest A Portion Of Premiums In The Stock Market
 - ➔ The Stock Market Was Strong In The 1990s And Insurers Were Able To Maintain Profitability Through Gains
 - ➔ The Stock Market Decline Began In 2000 And Insurers Were Left With Limited Premiums Which Needed To Increase To Make Up For The Loss Of Profitability
- September 11, 2001, Cost Over \$8,000,000,000 In Claims To Re-Insurers Which In Turn Raised The Rates To Malpractice Insurers

WILL CAPPING AWARDS DECREASE MALPRACTICE PREMIUMS

- Capping Awards Did Not Correlate To Lowering Malpractice Premiums From 1991 To 2002
 - ➔ The Median Payout In States With Caps Was 15.7% Lower Than In States With Caps
 - ➔ Payouts Increased By 83.3% In States With Caps While States Without Caps Increases Were 127.9%
 - ➔ The Median Annual Premium Increase For States With Caps Was 48.2% While The Median Annual Premium Increase For States Without Caps Was 35.9%
 - ➔ States With Caps Experienced 10.5% Stagnant Or Decline In Medical Malpractice Premiums While States Without A Cap Showed A Stagnant Or Decline Medical Malpractice Premium Rate Of 18.7%

WILL CAPPING AWARDS DECREASE MALPRACTICE PREMIUMS

Medical Malpractice Caps



WILL CAPPING AWARDS DECREASE MALPRACTICE PREMIUMS

- California's Medical Injury Compensation Reform Act (MICRA)
 - ➔ Non-Economic Damages Are Limited To \$250,000
 - ➔ Medical Malpractice Premiums In California Are 8% Higher Than Non-Cap States
 - ➔ Medical Malpractice Premiums Rose 450% During The First 12 Years (1975-1987) Until Proposition 103
 - ➔ Proposition 103 (1988) Mandated A 20% Drop In Medical Malpractice Premiums

SOLUTIONS?

- Remember The Medical Principles
 - ➔ Try Not To Commit Mistakes
 - Beneficence
 - Non-Maleficence
 - ➔ Admit Mistakes
 - Autonomy-Respect For Patients As People
 - Justice-Statutes Not Allowing Evidence Of "Admissions"
- Change of Attitude
 - ➔ Not A Physician Versus Attorney Issue
 - ➔ Caps Hurt Legitimate Patients And Do Not Affect "Frivolous" Lawsuits
 - ➔ "Legitimate" Lawsuits Correct Bad Behavior

SOLUTIONS!

- **Honesty**
- **Better State Regulation Of Bad Doctors**
- **Stiffer Penalties For Frivolous Lawsuits**
 - ➔ **Award Sanctions Against Attorneys And Plaintiffs**
 - Costs
 - Attorneys Fees
 - Better State Regulation By Bar Against Offending Attorneys
 - ➔ **Mandate Qualified Experts Who Comply With Their Oaths**
 - Establish Databases With Previous Forensic Experience
- **Joint And Several Liability**
- **No Collateral Source Rule**