Hot Topics in Orthopedics: Liability Claims Trends & Risk Management Strategies

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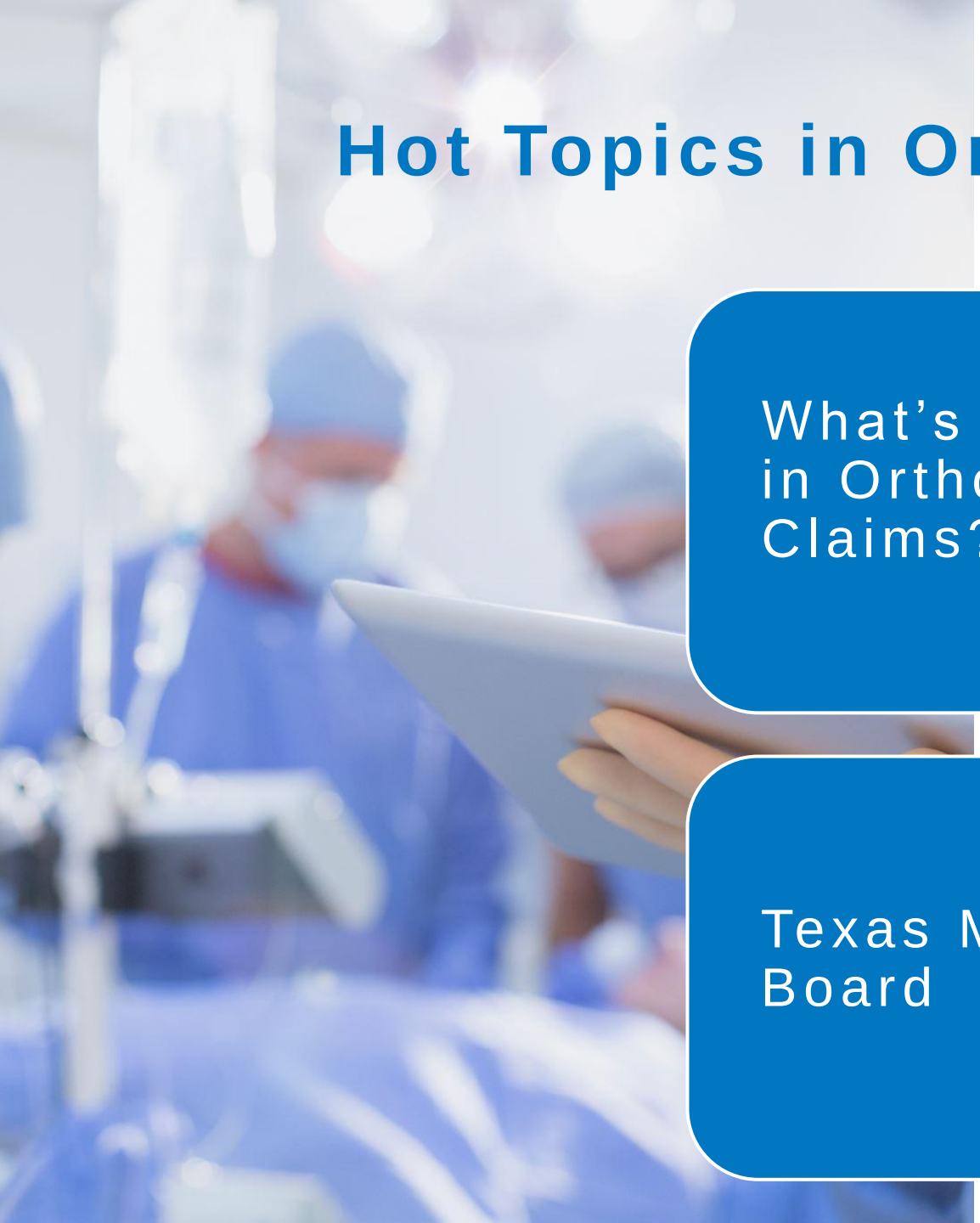

Hot Topics in Orthopedics

What's happening in Orthopedic Claims?

Risk Management Tips & Hot Topics

Texas Medical Board

A few items from the Texas Legislature...

Orthopedic Claims Data

The Medical Professional Liability Association (MPL Association) collects and compiles liability claims data from insurers as part of their Data Sharing Project.

Not all medical liability insurers participate, but TMLT does. All submitted data is “blinded” to protect the privacy of both the provider and the patient.

More than 32,000 closed claims and lawsuits (all specialties) were reported to the DSP between 2019 and 2023. These included 2,078 orthopedics claims.

The following information is national claims data for orthopedic surgery medical liability claims closed from 2019-2023.

Source: Data Sharing Project Dashboard. Data analysis by TMLT.

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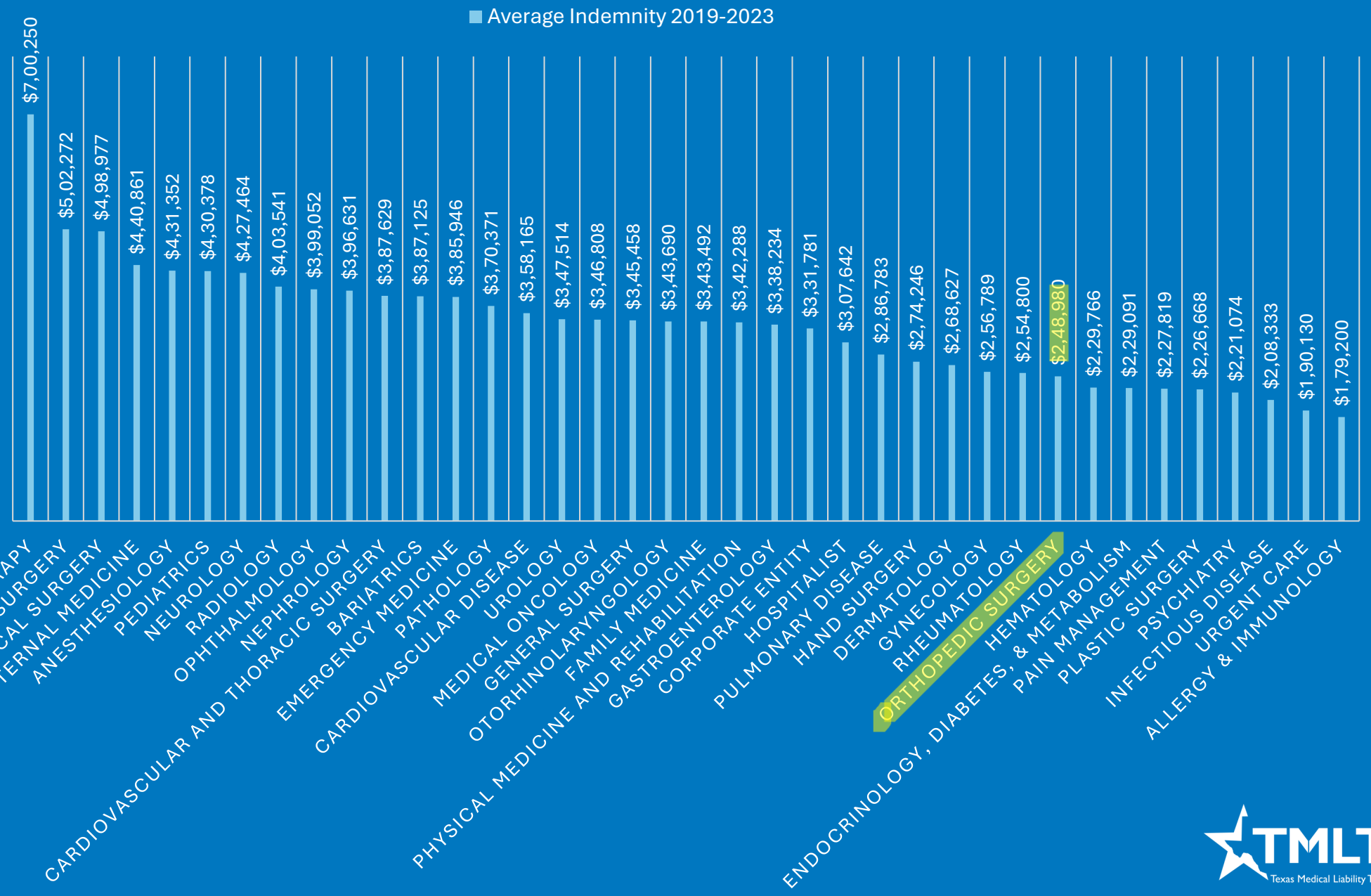
AVERAGE INDEMNITY BY SPECIALTY 2019-2023

Orthopedic Surgery claims fall in the low end of average paid indemnity. **$248, 980**

However, almost **40%** of orthopedic surgery claims closed with an indemnity payment. (For all specialties combined, 30%).



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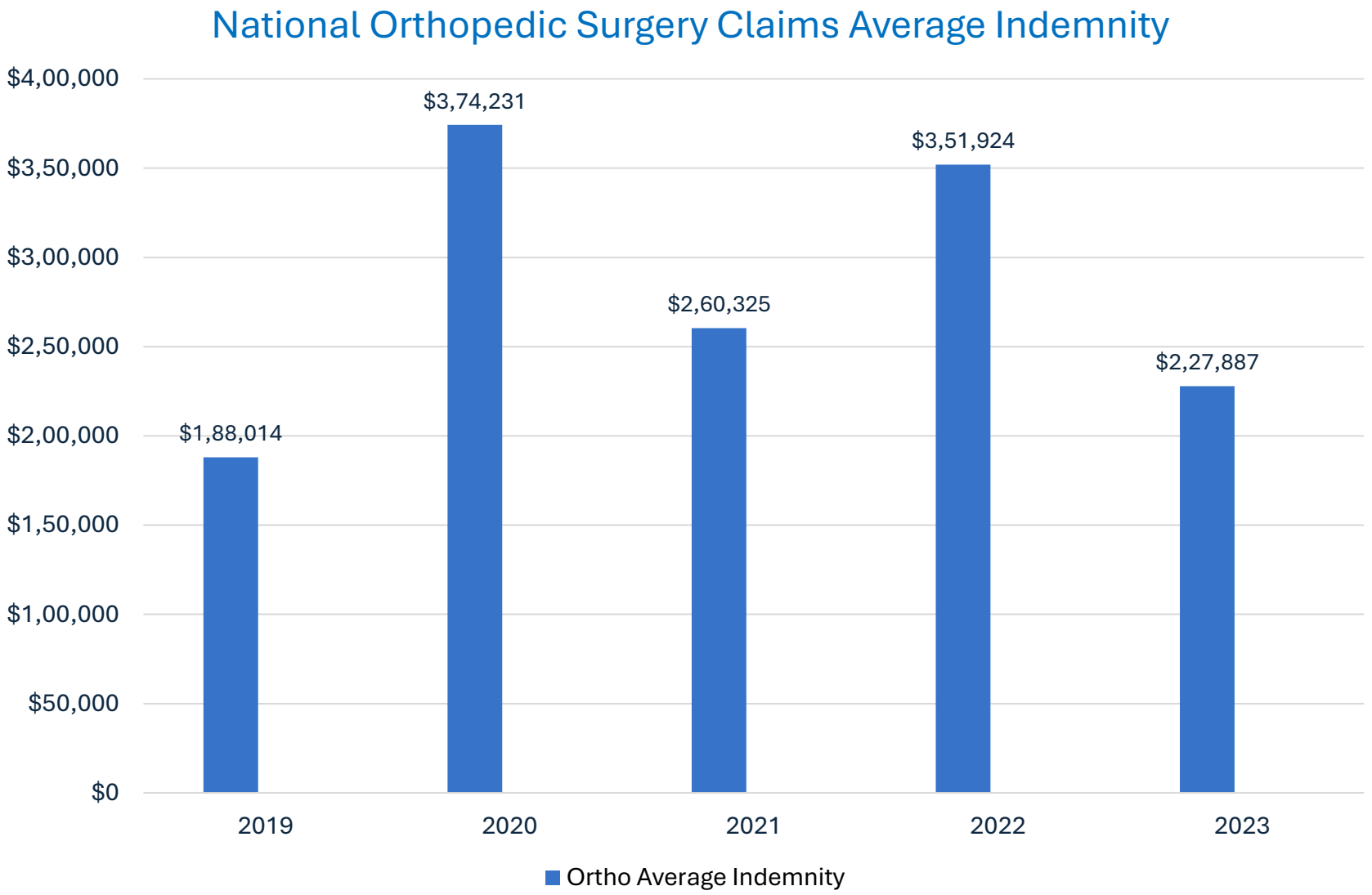
GOOD NEWS!

Orthopedic Surgery claims have not seen a significant increase in indemnity.

With the rise of “nuclear verdicts” this may be surprising.



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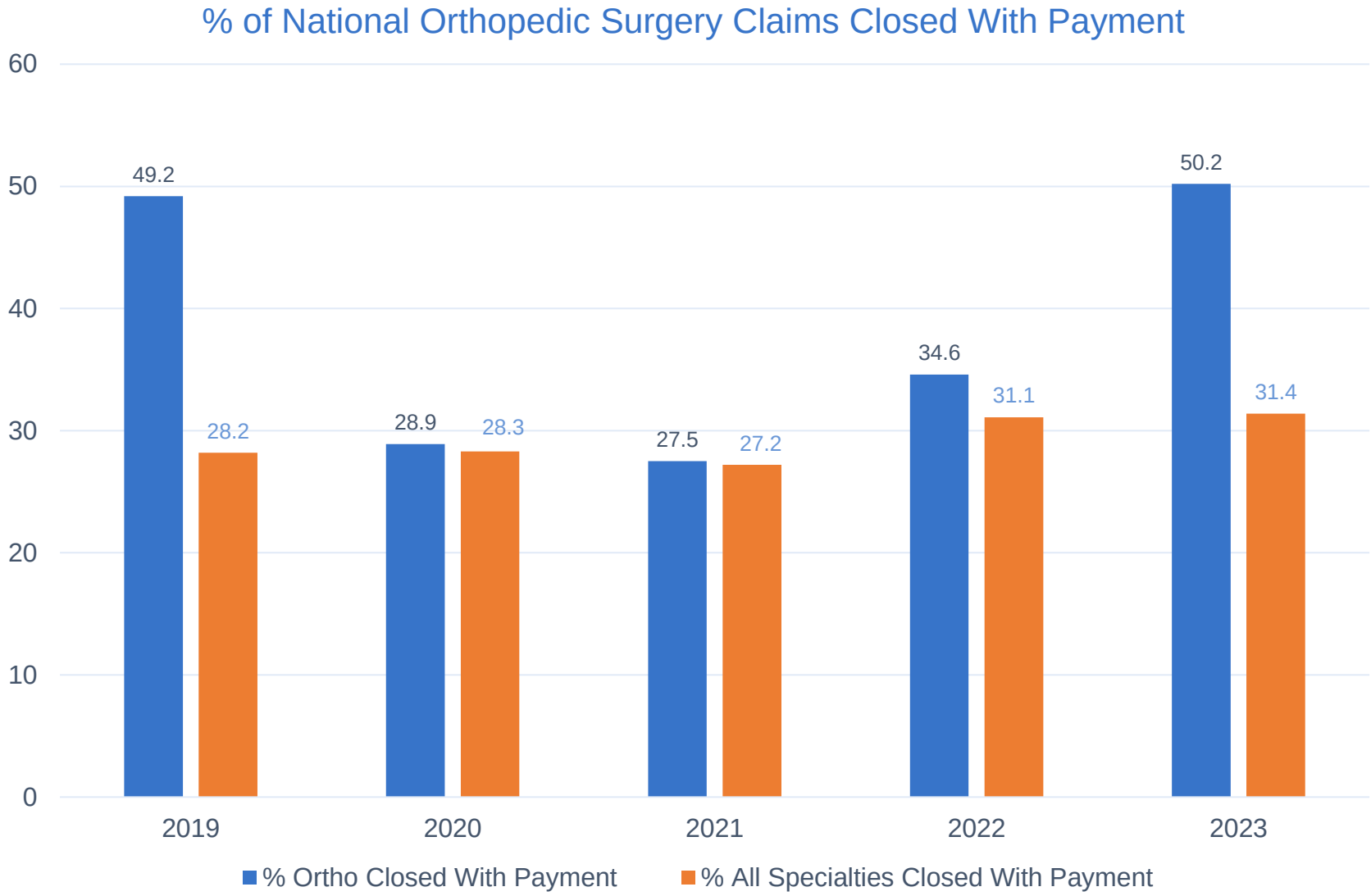
BAD NEWS (?)

Orthopedic Surgery claims have seen a few very high “paid-to-close” years.

BUT 2019 and 2023 were very low indemnity years…more claims paid, but for less $$.



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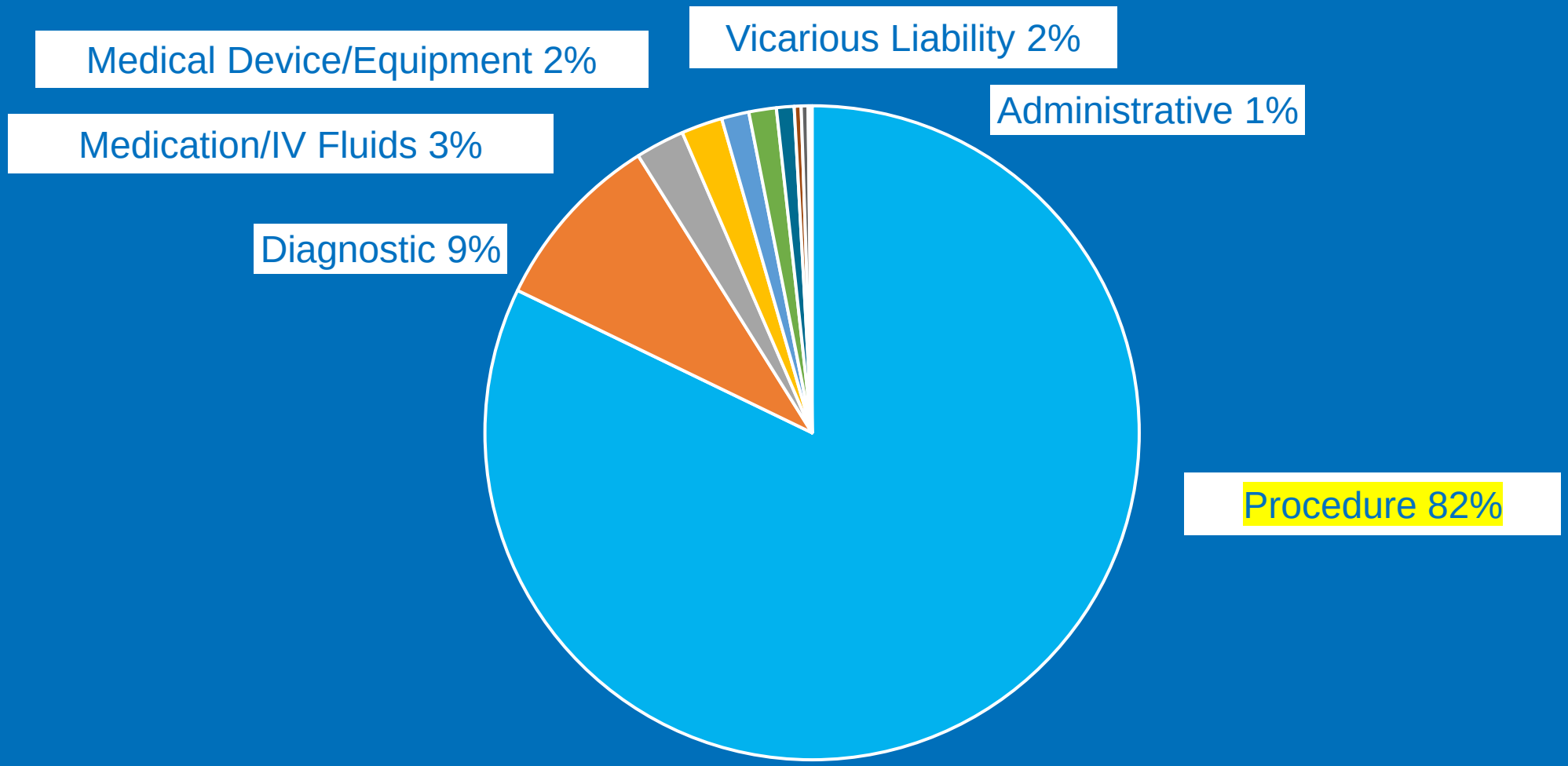
Top 6 Primary Allegation In Orthopedic Surgery Claims



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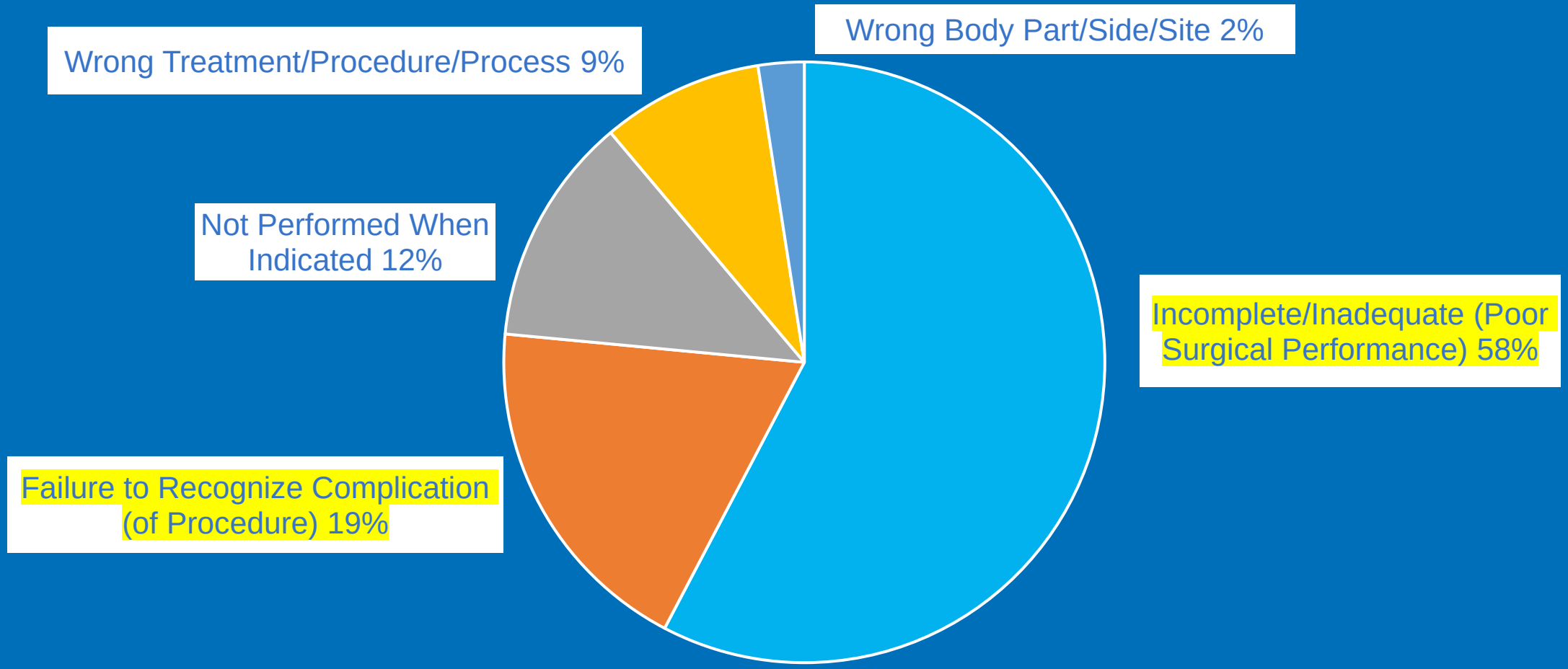
Top Issues in Procedure-Related Ortho Surgery Claims



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Liability Risk in Orthopedic Surgery

Procedures are the biggest generator of claims.

- Adequate pre-surgical assessment
- Surgical clearance if needed
  - received,
  - documented, and
  - REVIEWED by surgeon
  - “Incidental” findings noted and action taken
- Surgical Documentation
- Communication failures post-operatively
  - Physician-Healthcare Team
  - Healthcare Team/Physician- Patient

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What are we seeing in Texas claims?

TREND: Spinal surgery cases with patient post-op neurological deficits

- Delay in returning the patient to the OR
- Poor documentation of exam/patient status by nurses or other providers
- Poor communication among physicians or other healthcare team
- Physician assumption neurological deficits are transient and normal postop complications.

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Risk Management for Ortho Practices

- Informed Consent
- Surgical Documentation
- Communication & Responsiveness
- Supervision & Delegation

INFORMED CONSENT

Problems with the informed consent process may not be the *cause* of a claim, but they are often included in the list of allegations when something goes wrong.

Excellent informed consent processes and documentation may save the physician's defense.

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Texas Medical Disclosure Panel (TMDP)

- General consent forms on TMDP site
- **List A** procedures & required risk disclosures
- **List B** not “required”, but…
- Add additional pertinent risks- even if not on list.
- Include all possibilities! (change in procedure)
- Review List A regularly for updates

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Informed Consent

Obtaining informed consent

- Don’t rely solely on a form- DOCUMENT consent discussion in office.
- Risks and alternatives explained, questions answered, patient consented
- Consent form bolsters and documents the conversation with the patient.
- BOTH the discussion and the consent form help to defend physicians.

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PERILS OF OPERATIVE NOTES

- Timely completion (**same day** if possible)
- New laws allow patients almost immediate access to records.
- Caution with use of templates!
- Operative complications or challenges should be noted **in detail**.
- Late note = critical information unavailable to the healthcare team.
- Completing an operative note, procedure note or discharge summary **after** a complaint or claim damages physician credibility.

Monitor and encourage your docs

Communication & Response

30% of malpractice claims involve a communication error.*

DETAILED communication protocols for staff.

Post-surgical complaints promptly reported to the surgeon.

Any communication with patient documented in chart.

Encourage your staff to **ask** questions
&
encourage physicians to **welcome** questions.

**Malpractice Risks in Communication Failures*- 2016 CRICO Strategies Comparative Benchmarking System.

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Delegation & Supervision

- **Scope of Practice**
  - Delegation Protocols
    - For ALL clinical staff
    - Phone/portal messages, refills, etc.
  - Advanced Practice Providers (APPs)
    - Prescriptive Authority Agreements (PAA)
    - QA process including meetings & chart review

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ADVANCED PRACTICE PROVIDERS (PAs & APRNs)

Risk Management Tips

- Consider adding information to initial patient paperwork; introduces the APPs & describes their role in the practice.
- Ensure schedulers are informing patients that they will be seeing a physician or advanced practice provider.
- Implement name badges as required by Texas Medical Board & Board of Nursing.
- Identification recommended for all staff and physicians.
- Check licensure- implement system!

QA PLAN:

A quality assurance and improvement plan that includes:

- chart review, with the number of charts to be reviewed determined by the physician and APRN or PA; and
- periodic meetings between the APRN or PA and the physician.
- meetings must include sharing of info relating to patient treatment, patient care improvement, etc.,
- **Meetings MUST TAKE PLACE AT LEAST MONTHLY** and **MUST BE DOCUMENTED.**

-Texas Occupations Code 157.0512

Delegation & Supervision

Detailed Prescriptive Authority Agreements (PAA) must

- Be in writing, including the name, address, and all professional license numbers of the parties to the agreement; nature of and location of practice;
- identify the types or categories of drugs or devices that may be prescribed or the types or categories of drugs or devices that may not be prescribed;
- provide a general plan for addressing consultation and referral; and a plan for addressing patient emergencies;
- state the process for communication and the sharing of information between the physician and the advanced practice registered nurse or physician assistant to whom the physician has delegated prescriptive authority related to the care and treatment of patients.

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Hot Topic-Texting

- Text messages = potential problems in malpractice trials
- Texts are often subpoenaed
- Not HIPAA-compliant (unless secure app)
- Avoid texting with patients- CALL INSTEAD
- ALL communications should be in the patient's record.
  - Phone calls
  - Portal Messages
  - Texts (avoid, but if they must)
- TMB Rule 163.1 Records must include a "(*5) summary or documentation of communications with the patient*".

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Chapter 171 Complementary or Alternative Medicine Standards

- "*Alternative medicine"* is defined by the Board as methods of diagnosis, treatment, or interventions that are not generally considered as conventional treatment or medicine and may or may not be regulated by the FDA.
- Written Consent: **Must use** a Board-created consent form with specific elements
- Form available in **Rule §**171.2 Required Consent and Disclosure

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TMB Pain Management Rules

- **TMB rule 172** “Pain Management Clinics” but applies to **all physicians**.
- Most relevant to Orthopedics: “acute pain” and “post-surgical, post-procedure, persistent non-chronic pain”
  - **Acute pain-** 30 days from date of initial prescription for opioids related to acute injury/condition
  - **Post-surgical, post-procedure, persistent non-chronic pain-** more than 30 but less than 90 days from date of the original opioid prescription
  - **Chronic Pain- more than 90 days from the date of initial opioid prescription; not** relieved with acute, post-surgical, post-procedure, or persistent non-chronic pain treatment.

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Pain Management Rules

- **Chronic Pain**

  If treating chronic pain, see **TMB Rule 172.4** *Minimum Operational Standards for the Treatment of Pain Patients*

- **Prescription Monitoring Program (PMP) Checks**
  - Applies to ALL PHYSICIANS
  - Prior to prescribing (or refilling) **opioids, benzodiazepines, barbiturates, or carisoprodol** PMP checks are required. (Texas Health and Safety Code, §§481.0764)
  - Review of PMP **must** be documented in the patient medical record. (TMB Rule 163)

  PMP Exceptions: inpatient stay, emergency department or ambulatory surgery center visit, hospice care, patients with cancer or sickle cell, and more.

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Other Chapters of interest…

- Chapter 163 Medical Records
- Chapter 169 Delegation
- Chapter 173 Office-Based Anesthesia
- Chapter 175 Telemedicine
- Chapter 183 Physician Assistants

https://www.tmb.state.tx.us/laws-rules/occupations-code-board-rules

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2025 Legislative updates

What new laws passed in the 2025 Texas Legislative Session?

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2025 Legislative updates

SB 922 Sensitive Test Results disclosed electronically

Occupations Code Sec. 159.0062.

- Sensitive test results may not be disclosed to a patient or patient representative by electronic means before the third day after the date the sensitive test results are finalized.
- A person is not subject to civil, criminal, or administrative liability or professional disciplinary action for failure to comply with Section 159.006(d)(2) or this section.

A "sensitive test result" is defined in the code as:

pathology report or radiology report that has a reasonable likelihood of showing a finding of malignancy; or test result that may reveal a genetic marker.

This does NOT apply to all test results; only "sensitive" as defined above.

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Risk Management Recommendations

- “Sensitive” results less significant issue in Orthopedics, but…
- Could come up in surgical pathology results
- Educate physicians and staff
- Determine how to delay “sensitive” results when needed

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2025 Legislative updates

SB1188 Electronic Medical Records

Includes multiple new rules under Electronic Medical Records addressing: AI, cloud storage of EHR, access to minor's records, biological sex documentation in the EHR…

Artificial Intelligence (AI)

- A healthcare practitioner may use AI in a diagnostic capacity IF…
  - They are acting within the scope of their license
  - The particular use is not prohibited by law
  - The practitioner using AI reviews all records created with AI in a manner that is "consistent with standards developed by the TMB" (see TMB Rules Chapter 163)
- The practitioner using AI for diagnostic purposes must disclose the practitioner's use of that technology to patients.

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AI use in Orthopedic Practice

- Ambient Scribing?
- AI-generated replies to patient portal messages?
- Clinical decision support/ diagnostic tools?

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AI use in Orthopedic Practice

- AI-scribed notes can be CONVINCING (even when inaccurate).
- Recent small study on AI-scribed notes:
  - 44 total scribed notes (used 2 products)
  - Total of 127 errors (70% of notes contained an error)
  - Mostly errors of omission (missing information)
  - Omission errors are difficult to detect

- Biro J, Handley J, Cobb N, Kottamasu V, Collins J, Krevat S, Ratwani R. Accuracy and Safety of AI-Enabled Scribe Technology: Instrument Validation Study. J Med Internet Res 2025;27:e64993 DOI: 10.2196/64993

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AI use in Orthopedic Practice

- AI-generated portal message replies don’t save time.
- Physicians like it (overall).
- Patients like it (AI is polite!)…until they know it is AI.
- Inaccurate messages are often not caught/edited.

- Tai-Seale M, Baxter SL, Vaida F, et al. AI-Generated Draft Replies Integrated Into Health Records and Physicians' Electronic Communication. JAMA Netw Open. 2024;7(4):e246565. Published 2024 Apr 1. doi:10.1001/jamanetworkopen.2024.6565
- Garcia P, Ma SP, Shah S, Smith M, Jeong Y, Devon-Sand A, Tai-Seale M, Takazawa K, Clutter D, Vogt K, Lugtu C, Rojo M, Lin S, Shanafelt T, Pfeffer MA, Sharp C. Artificial Intelligence-Generated Draft Replies to Patient Inbox Messages. JAMA Netw Open. 2024 Mar 4;7(3):e243201. doi: 10.1001/jamanetworkopen.2024.3201. PMID: 38506805; PMCID: PMC10955355.
- Biro JM, Handley JL, Malcolm McCurry J, Visconti A, Weinfeld J, Gregory Trafton J, Ratwani RM. Opportunities and risks of artificial intelligence in patient portal messaging in primary care. NPJ Digit Med. 2025 Apr 24;8(1):222. doi: 10.1038/s41746-025-01586-2. PMID: 40275104; PMCID: PMC12022076.
- https://www.medicaleconomics.com/view/patients-prefer-ai-generated-portal-messages-until-they-learn-the-source

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Risk Management Recommendations

- Disclose AI use to patients
- Document patient acknowledgment
- Prepare physicians/team to discuss with patients
- Physician/provider CAREFUL review of any AI generated or scribed notes prior to sign off.
- Encourage scribed note review **ASAP**
- AI-generated portal replies should be used with caution

Resources:

- TMA AI Resource Page: https://www.texmed.org/AI/
- TMLT AI Scribe Article: https://www.tmlt.org/resource/using-ai-medical-scribes-risk-management-considerations
- JAMA- Ethical Obligations to Inform Patients About Use of AI Tools (includes sample language): https://jamanetwork.com/journals/jama/fullarticle/2836687

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Resources

- **TMLT Orthopedics Closed Claims, Articles & Resources:** https://www.tmlt.org/specialties/orthopedics
  - **Podcasts-TMB Updates & Legislative Session:** https://www.tmlt.org/resources?format=Podcasts
- **Texas Medical Board Rules**: https://www.tmb.state.tx.us/laws-rules/occupations-code-board-rules
- **Texas Medical Board FAQs:**
  - **Prescribing & Supervision** https://www.tmb.state.tx.us/resources/for-applicants-and-licensees/prescribing-and-supervision
  - **Practice Topics:** https://www.tmb.state.tx.us/apply-renew/physician/additional-practice-topics-physicians
- **Texas Medical Association Billing & Coding Help:** https://www.texmed.org/billing_and_coding.aspx
- **Texas Medical Disclosure Panel (TMDP):** https://www.hhs.texas.gov/providers/health-care-facilities-regulation/texas-medical-disclosure-panel (consent forms, links to List A and B)

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Thank You!

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