

# **WAIT...SO *THAT'S* DELIBERATE INDIFFERENCE?**

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- Disclosure Statement :

- We do not have any relevant financial relationships with any commercial interests.

- Disclaimer Statement:

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# Educational Objectives

***Learning Objective 1:*** Describe the basic legal statutes that expose correctional health care professionals to potential liability

***Learning Objective 2:*** Recognize the differences between tort (negligence) claims and constitutional deliberate indifference actions

***Learning Objective 3:*** Propose procedures to help avoid actions that might expose correctional health care professionals to liability

# Prison/Jail Inmates Bring Suits Over:

- Access to books, newspapers and literature
- Ability to practice their religion freely
- Visitation limitations
- Excessive force by guards
- Excessive restraint
- Isolation
- Lack of protection from physical injury or abuse
- Censorship or limitation of mail or telephone privileges
- Discrimination (racial, gender, religious, etc.)
- Medical care

# Types of Correctional Medical Claims

- **Civil Rights**

- “Deliberate Indifference”
- “Serious Medical Need”
- Federal Court

- **Medical Malpractice or Death Tort Claims**

- Negligence
- Standard of Care
- Injury Causation
- State Court?



# State Tort Law Medical Malpractice Create Problems for Inmates

- Requirement of expert review/certification
- Procedural deficiencies
- Failure to appear
- Fees/Costs



## Pro Se Plaintiff



## Appointed Counsel



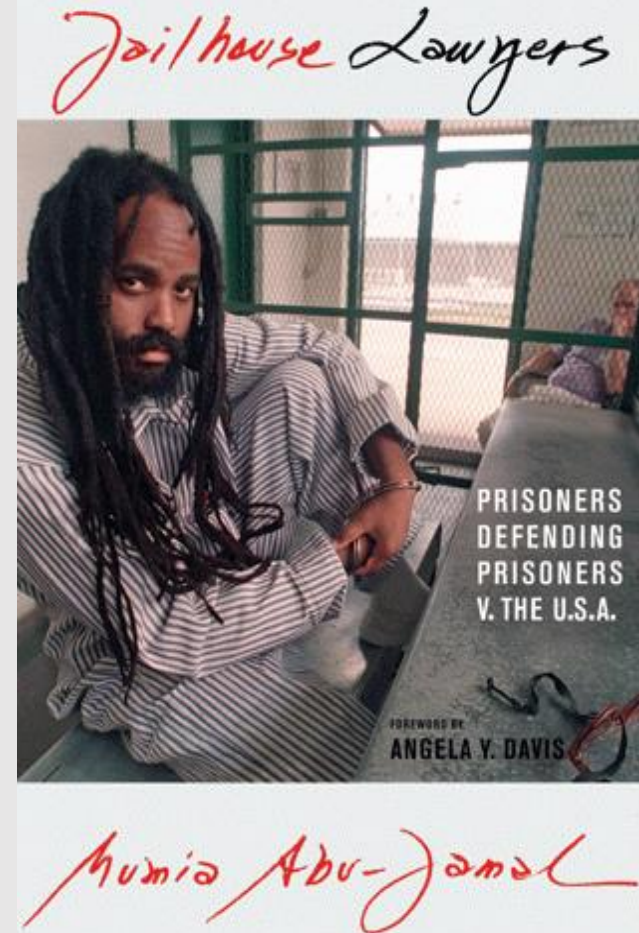
## Retained Counsel





# THE INMATES' HELPLINES:

- Jailhouse lawyers
- Inmate litigation “playbook”
- The law library





The  
**Jailhouse  
Lawyer's  
Handbook**

How to Bring a Federal Lawsuit to Challenge  
Violations of Your Rights in Prison

Published by the  
Center for Constitutional Rights and the  
National Lawyers Guild  
5th Edition, 2010



# The Jailhouse Lawyer's Handbook

How to Bring a Federal Lawsuit to Challenge  
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<http://jailouselaw.org>





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Jailhouse Lawyers Handbook |

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jailhouselaw.org

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the jailhouse

lawyer's handbook


6TH EDITION, 2021

HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON

PUBLISHED BY THE

CENTER FOR CONSTITUTIONAL RIGHTS

NATIONAL LAWYERS GUILD



Download this handbook (7.2mb PDF)

Have a printed copy mailed to someone in prison

Note From the Editors

CHAPTER ONE  
How to Use the JLH

CHAPTER TWO  
Overview of Types of Lawsuits and the Prison Litigation Reform Act

CHAPTER THREE  
Your Rights in Prison

CHAPTER FOUR  
Who to Sue and What to Ask for

CHAPTER FIVE  
How to Start Your Lawsuit

CHAPTER SIX  
What Happens After You File Your Suit


CHAPTER SEVEN  
The Legal System and Legal Research

APPENDICES

A Glossary of Terms

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# Elements of “deliberate indifference” claims

- Existence of “Serious Medical Need”
- Medical care providers knew of this need and failed to reasonably respond to it (i.e. ignored it) – provider was “deliberately indifferent”.
- CAUSED actual harm or injury

## NOT ACTIONABLE:

- Simple mistake or even medical negligence
- Inmate’s disagreement with care plan or decision
- Hypothetical or “potential” future injuries

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# What is a “Serious Medical Need”?

Defined by MEDICAL PROFESSIONALS as: “it depends”.

Defined under the LAW as: **“one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the necessity for a doctor's attention.”**

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# What is “Deliberate Indifference”?

***An official (custody officer or medical personnel in a correctional facility) must:***

- (1) be actually aware of facts from which an inference could be drawn that a substantial risk of harm exists;
- (2) actually draw the inference; but
- (3) nevertheless disregard the risk to the inmate's health."

Who Determines if Conduct is “Deliberate Indifference”  
or Patient had a “Serious Medical Need”?

# Who Determines if Conduct is “Deliberate Indifference” or Patient had a “Serious Medical Need”?

- ***The Fact Finder(s)***

# Who Determines if Conduct is “Deliberate Indifference” or Patient had a “Serious Medical Need”?

- The Fact Finder(s)
- *For Dispositive Motions (MSJ) – the JUDGE*
- *What is a Motion for Summary Judgment?*



# Motion for Summary Judgment

- Usually filed by Defendants
- Viewed in the light most favorable to NON-moving party.
- Doesn't weight the evidence other than to determine whether there is a genuine issue for trial.
- “No reasonable jury could find for plaintiff”.



# Who Determines if Conduct is “Deliberate Indifference” or Patient had a “Serious Medical Need”?

- The Fact Finder(s)

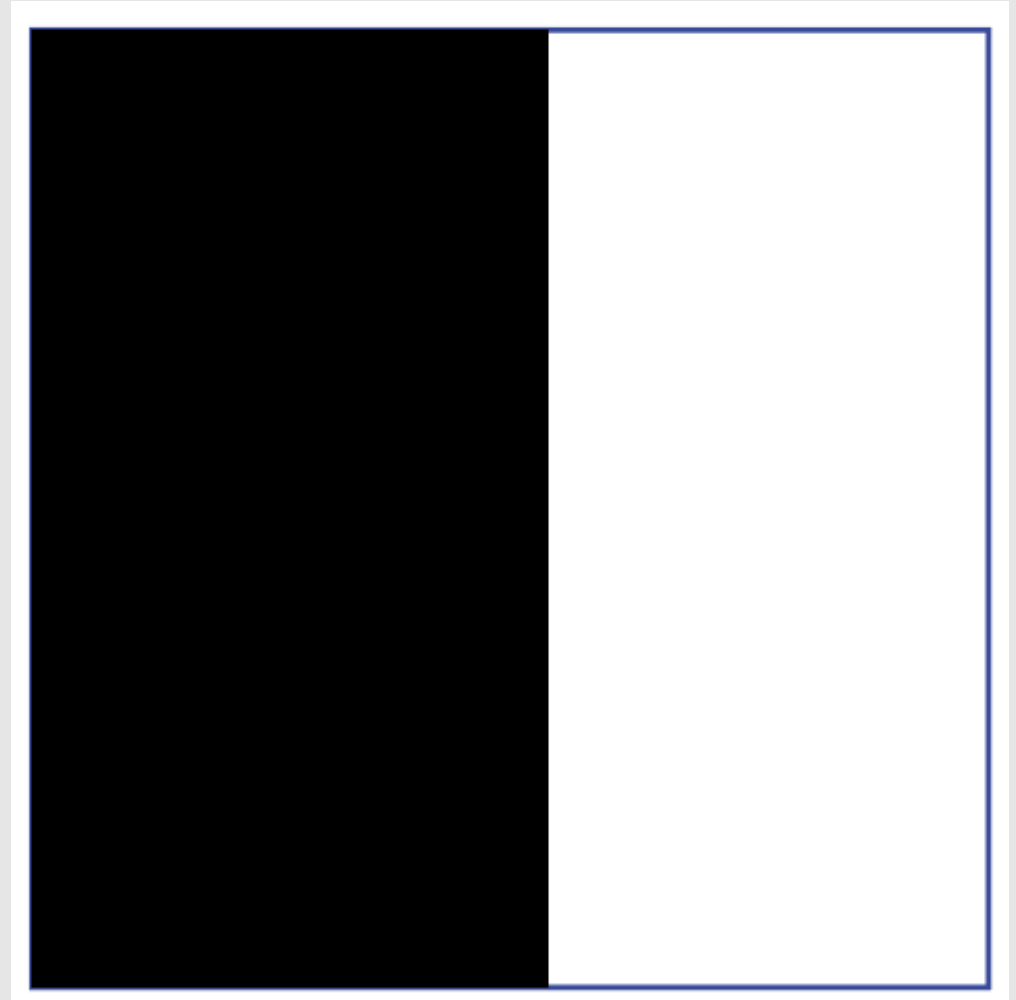
- *At trial – the JURY*





# What Constitutes Deliberate Indifference?

- Is there a bright line between what is and what is not deliberate indifference?
- Is it all black and white?



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# What Constitutes Deliberate Indifference?

- Is there a bright line between what is and what is not deliberate indifference?
- Is it all black and white?
- Or is there a “gray area”?
- *In reality, it is MOSTLY a “gray area”!*



# What Constitutes Deliberate Indifference?



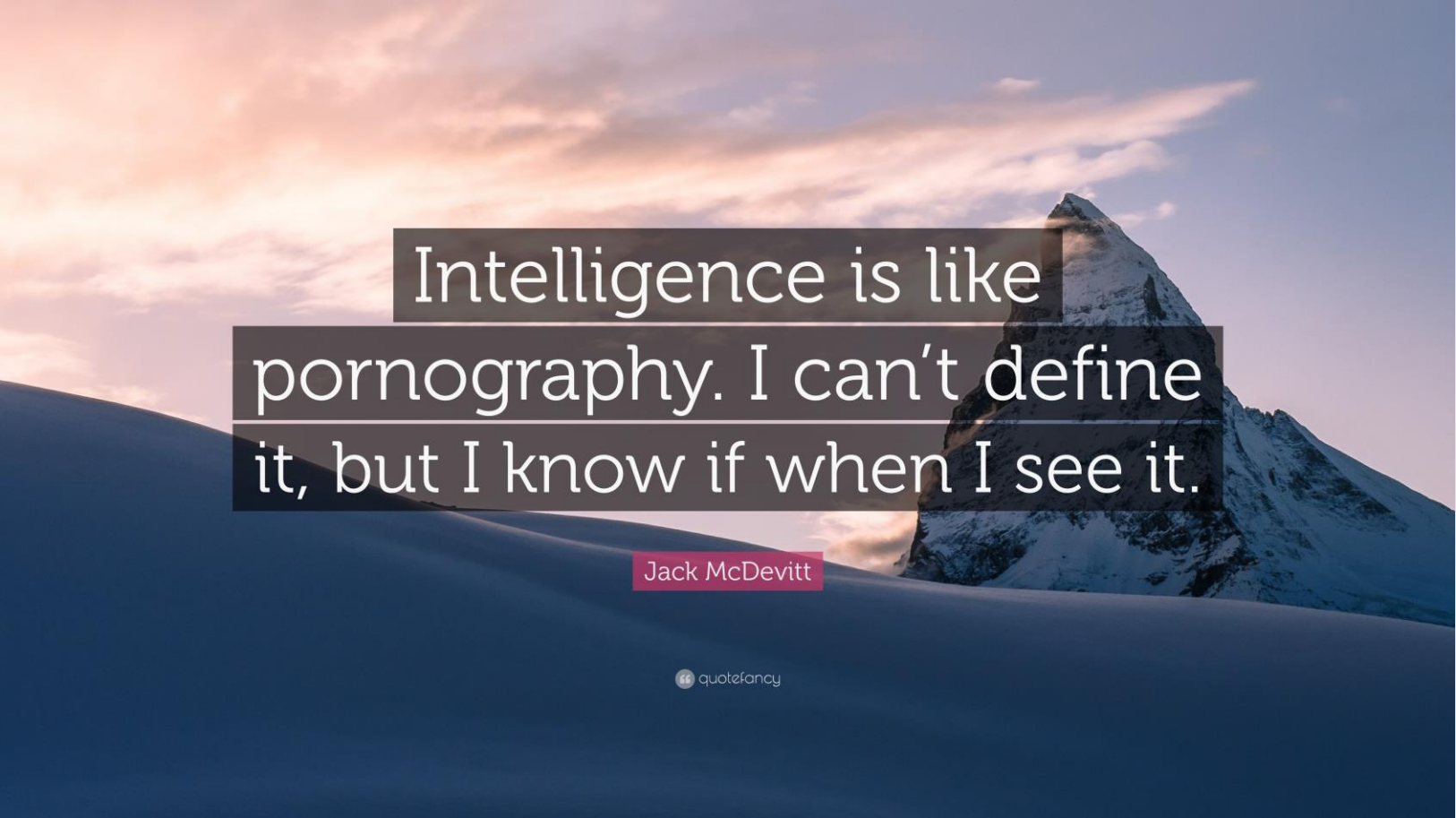
**“I know it when I see it.”**

Justice Potter Stewart

# What Constitutes Deliberate Indifference?

I SHALL NOT TODAY ATTEMPT FURTHER TO DEFINE  
THE KINDS OF MATERIAL I UNDERSTAND TO BE  
EMBRACED WITHIN THAT SHORTHAND DESCRIPTION  
[HARD-CORE PORNOGRAPHY]; AND PERHAPS I  
COULD NEVER SUCCEED IN INTELLIGIBLY DOING SO.  
BUT I KNOW IT WHEN I SEE IT, AND THE MOTION  
PICTURE INVOLVED IN THIS CASE IS NOT THAT.

- POTTER STEWART -



Intelligence is like  
pornography. I can't define  
it, but I know if when I see it.

Jack McDevitt

**I DON'T ALWAYS KNOW WHAT  
OUTREACH IS**



**BUT I KNOW IT WHEN I SEE IT**

[makeameme.org](http://makeameme.org)



# What Constitutes Deliberate Indifference?

**Duckworth v. Ahmad**

**USCA (7<sup>th</sup> Cir) / 2008**

- Patient diagnosed with bladder cancer, but went 16 months before diagnosis, with treatment for “gross hematuria” instead. Had referred patient out for evaluation and relied on that opinion.
- “Evidence establishes that [doctor] placed too much faith [in referral], but deliberate indifference requires more”



# What Constitutes Deliberate Indifference?

**Winslow v. PHS**

- Summary judgment granted to prison physicians who did NOT send patient out for hernia surgery, but treated with Motrin and hernia belt.
- Patient's disagreement with the care provided does not alone make it deliberately indifferent.

**USCA (3<sup>rd</sup> Cir) / 2011**



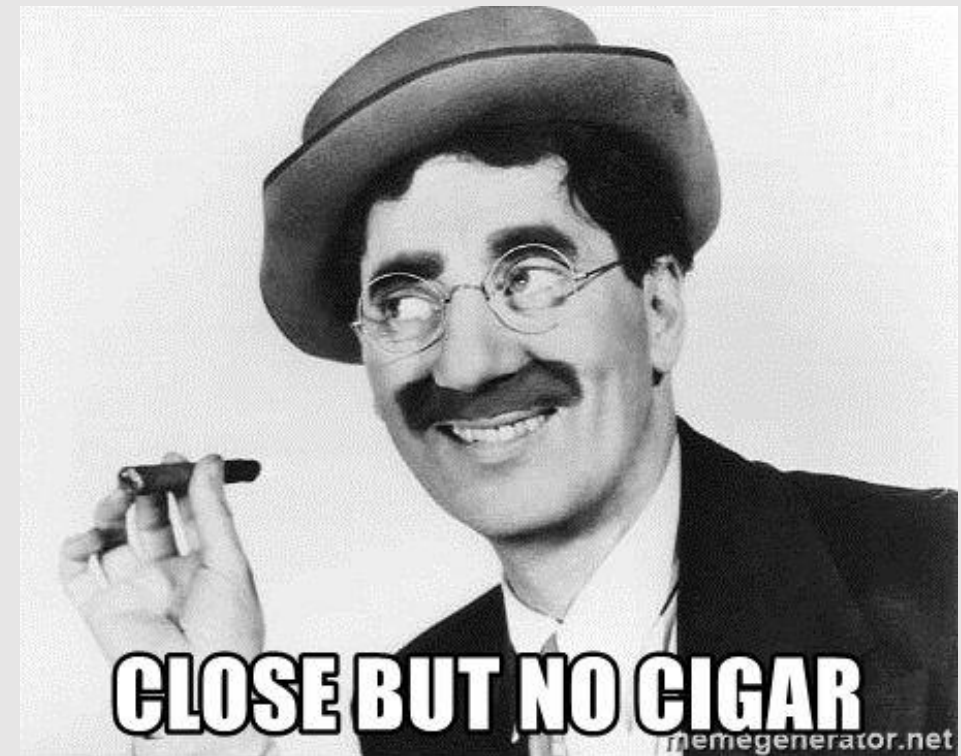
# What Constitutes Deliberate Indifference?

Carswell v. Bay County

USCA (Florida) / 1988

“...although they did not diagnose Carswell’s condition correctly, [they] contend that in light of their efforts, their conduct did not amount to deliberate indifference.

*We think the jury properly could find that [their] acts...constituted deliberate indifference.”*



# What Constitutes Deliberate Indifference?

**Christmas v. Rodriguez**

**USDC (Florida) / 2021**

- Inmate with hernia due to GSW put in 29 medical requests over 16 months. Was treated with Tylenol, diet changes, Remeron, Effexor, but was never sent out for consult. Had significant pain and an enlarging hernia.
- Verdict for plaintiff, noting that surgery could have resolved issues.





# What Constitutes Deliberate Indifference?

## Carswell v. Bay County

- Over 11 weeks, inmate complained of rash, constipation and weight loss. Was given MOM and some cream for rash.
- After losing 53 pounds (initial weight of 145) he was finally sent to hospital and diagnosed with diabetes.

USCA (11<sup>th</sup> Cir) / 1988



# What Constitutes Deliberate Indifference?

Smith v. Harrington

USDC (SD Ill.) / 2018

- Plaintiff wins on claim of deliberate indifference for prison medical providers *failure to treat hemorrhoids*, DESPITE having prescribed ointments, warm compresses, stool softeners, Colase and Dibucaine, and having seen the patient regularly.





**DON'T WORRY, I  
HAVE AN ACE UP MY SLEEVE**

**I'VE SEEN ENOUGH COURTROOM DRAMA  
MOVIES TO KNOW THAT JURIES DON'T CARE  
ABOUT FACTS, THEY JUST WANT A GOOD SHOW**

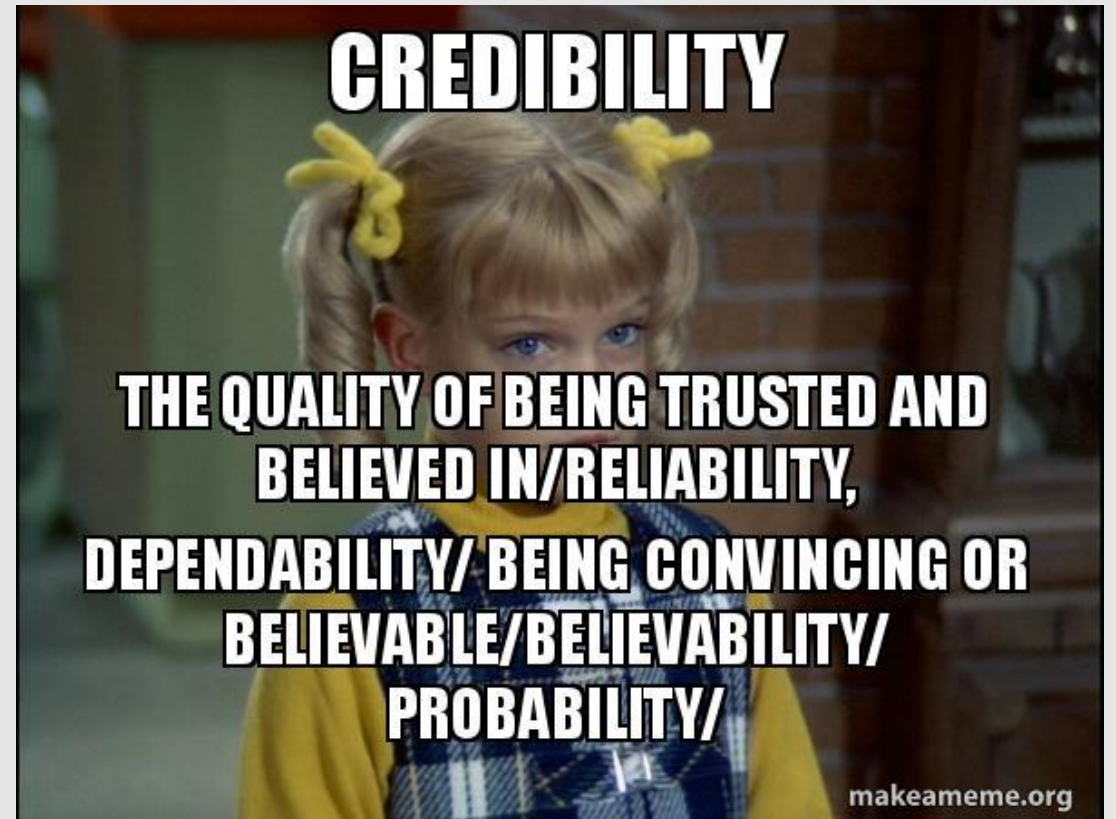


# What Can a Good Correctional Healthcare Professional Do to Avoid a Lawsuit?



# Preventative Practices

- Trials/Litigation are swearing contests. You SHOULD be more credible than an inmate (but aren't always....)
- Attitude
- Reputation
- Demeanor
- Statements
- Actions



# Preventative Practices

- Attitude
  - Reputation
  - Demeanor
  - Statements
  - Actions
- Caring, sympathetic
  - Always attentive OR always unconcerned? What do others say?
  - Smile? Listen? Ignore?
  - “Lied”, “faked”, “malinger”.
  - Do a P/E that they’ll remember – take vitals, palpate, listen, move extremities.

# Preventative Practices

- Recollection of events years ago?
- The key to your defense is your DOCUMENTATION.

**Documentation  
is like sex.**

**When it's good,  
it's very good.**

**When it's bad, it's better  
than nothing.**

# Preventative Practices

- Recollection of events years ago?
- The key to your defense is your DOCUMENTATION.

When I eat too much dessert, I don't post about it on Facebook.

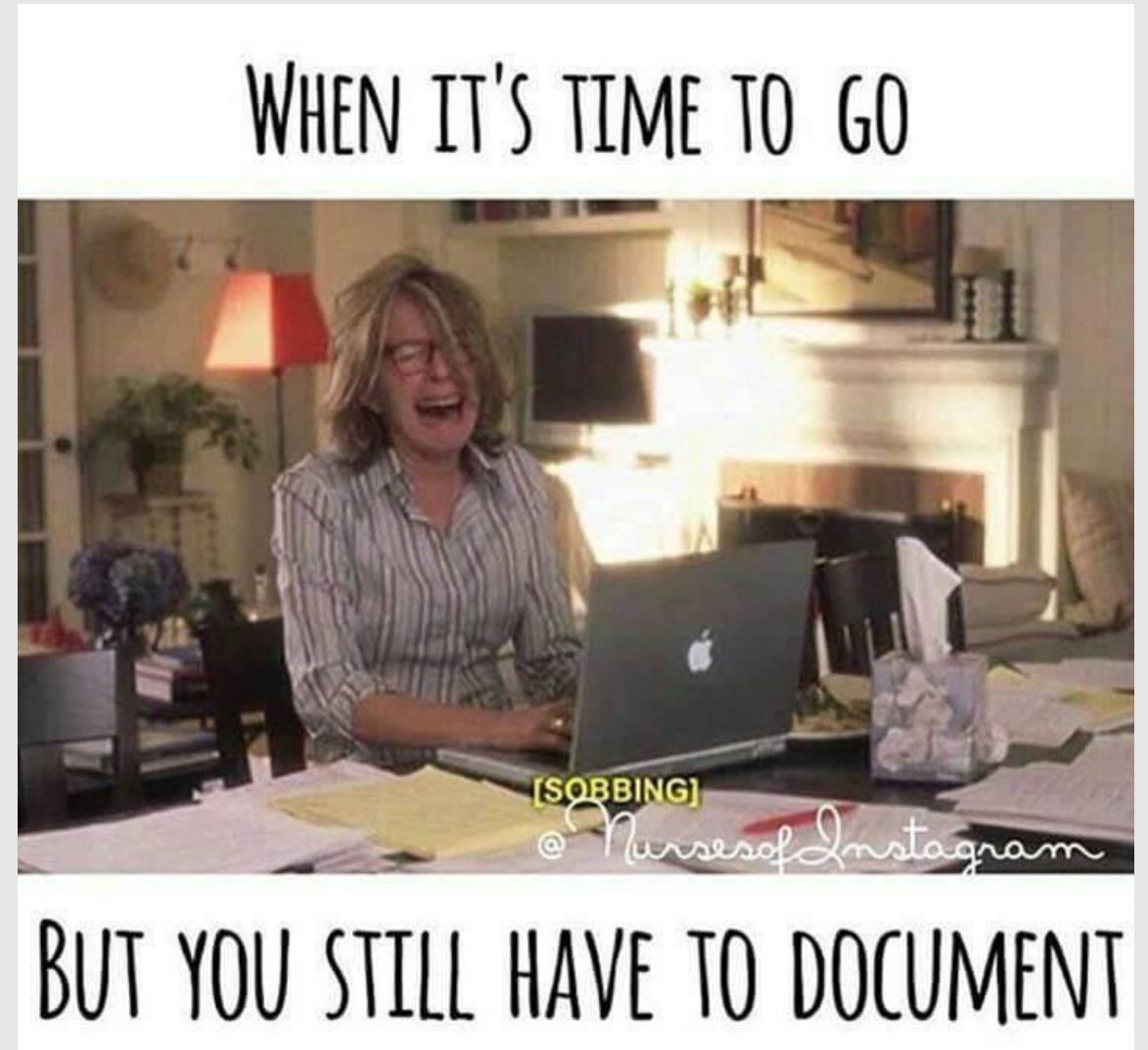
Because if it isn't charted, it didn't happen.





# Preventative Practices

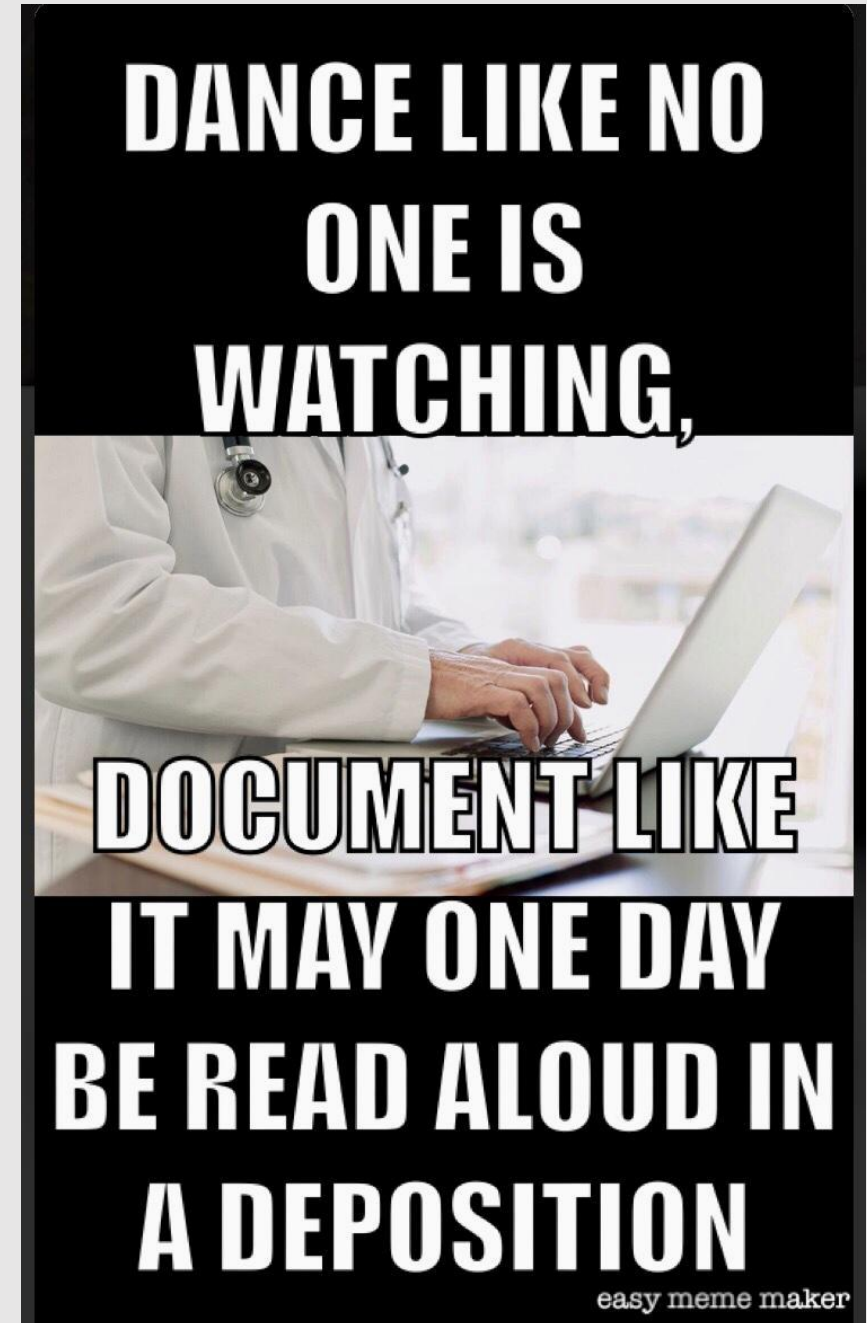
- The key to your defense is your DOCUMENTATION.
- Time constraints / patient load.





# Preventative Practices

- The key to your defense is your DOCUMENTATION.
- What to say / How to say it.
- WHY you chose to do something.



# Preventative Practices

## Frequent lawsuit claims –

They won't SEND YOU OUT / ORDER A TEST / GIVE A MEDICATION (etc.) because:

- 1) Save money
  - 2) Avoid work
  - 3) They don't care
  - 4) They think we're all lying.
- So state WHY you chose to do something.



# Preventative Practices

## **Don't:**

- Criticize other staff or COs
- Make remarks about the patient (keep it factual)
- Cut corners
- Make remarks outside your scope (i.e., about custody issues)
- Worry about calling the doctor after hours.



# Preventative Practices

## Do:

- Keep records organized
- Use good penmanship (to the extent possible)
- Follow any written protocols or procedures (of the facility or your employer)
- Treat patients as if they were NOT inmates.





Questions?

