

# Does Your 'Bedside Checkup?

*"If I had to do it all over again,  
I'm not sure I would go into medicine."*

*"It was the worst experience of my life,  
hands down."*

*"I kept asking myself, 'What did I do wrong?'"*

These are some of the things doctors said when I asked them to share their litigation experiences. As a health care defense attorney — and as the wife of a physician who has been sued — I've had many opportunities to talk with doctors about medical-malpractice lawsuits and their emotional impact.

Whether in casual conversation with my husband and his colleagues or in working with a client, I have found that being sued, for a doctor, feels a lot like getting a dire medical diagnosis. As much as your clients need a robust defense strategy, they also need a professional who will shepherd them through "treatment" to "cure."

Just as a doctor's bedside manner can make all the difference to the patient fighting a disease, so, too, can your dealings with your clients ease the stress and anxiety they may be feeling so they can focus on the fight ahead.

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## **Advice for Representing Health Care Providers in Medical-Negligence Litigation**

By Wendy R.S. O'Connor







It's vital that attorneys understand what their clients are going through and develop a "bedside manner" to help enable those clients to participate effectively in their defense.

**The 'Disease':  
Malpractice Filings in Pennsylvania**

According to the Unified Judicial System of Pennsylvania, from 2010 to 2014, the number of medical-malpractice lawsuits filed in Pennsylvania averaged 1,549 per year. An analysis of such filings since 2002, when Pennsylvania enacted the Medical Care and Reduction of Error (MCARE) Act, shows a 44.7 percent decrease in the 12 years that followed. Additionally, of those cases filed from 2010 to 2014, only 8 percent went to verdict. While this may be encouraging, statistics aren't always terribly comforting if you're the defendant. For many physicians, a medical-negligence lawsuit symbolizes failure at the deepest and most profound level, so much so that it can derail an effective litigation strategy and adversely impact the attorney's ability to present a winning defense.

In order to represent doctors who have been sued for malpractice, it's vital that attorneys understand what their clients are going through and develop skills that will best enable those clients to participate effectively in their defense.

**Signs and Symptoms:  
How It Feels for the Doctor**

In the immediate aftermath of being sued, doctors may experience a panoply of emotions: anger, defensiveness, fear and anxiety, to name a few. In the days and weeks that follow, they may find themselves second-guessing the care, obsessively retracing their encounters with the patient and questioning whether they should have done something differently. They may suffer a loss of confidence in their skill and judgment and may begin to practice defensive medicine as a result.

It's difficult for physicians not to take a lawsuit personally or to internalize the allegations against them as an indictment of their entire medical career or personal integrity. Compounding the emotional wallop of a medical-negligence lawsuit is that most are so completely unexpected; many physicians I have talked with report being astonished when they were sued. "I thought that patient *liked* me," a doctor may say, especially if the plaintiff is still a patient or one with whom the doctor thinks there was a good relationship.

Often there's nothing about the care in question that stands out in the doctor's mind. While there are certainly instances in which an unfortunate outcome may trigger concerns that a lawsuit may be in the offing, the doctor is often unaware that the patient is unhappy with a particular result or believes that proper treatment was not provided.

Then, too, there is a tremendous level of anxiety as the physician worries about how the lawsuit will be resolved — and when — and imagines the possible impact on his or her career. If the doctor settles a case, how will this affect privileges or insurability? If there is a judgment against the doctor, how will that impact his or her professional reputation? It's very common for doctors to feel embarrassed about being sued and to worry that their colleagues' opinions of their abilities will suffer. There is also concern as to how a verdict against them might affect their practice. Will current patients choose to seek care elsewhere? Will their colleagues stop referring patients?

It can be hard for doctors to avoid feelings of resentment as they ponder the years of training and the many thousands of dollars spent in obtaining a medical license, only to have their skill and judgment second-guessed by a patient and that patient's attorney, who in most cases are not medical-care providers themselves.

Finally, many doctors who have been sued question whether they should leave the practice of medicine altogether, especially if they are nearing retirement age. Younger doctors may ask themselves if they should have chosen another profession. Most doctors take enormous pride in their ability to help their patients get healthy and stay healthy. The suggestion that they have harmed rather than healed a patient is perhaps the most damning and devastating accusation that can be made against them. By the time a doctor meets with his health

care defense attorney, he or she is likely feeling depressed, bitter, personally attacked or worse. Thus, health care defense attorneys must understand that the medical-negligence lawsuit is about far more than dollars and cents. It's about the client's self-image, personal integrity and professional reputation.

### **Care and Treatment: How to Help**

Armed with this understanding of what your client is going through, you can make an enormous difference in how the client perceives the litigation experience. Most of the following suggestions may seem self-evident, but, based on my conversations with many physicians over the years, it seems they are worth repeating.

*Explain the process.* Many lawyers forget that being involved in litigation is an entirely foreign experience for most people, and fear of the unknown adds needless stress to an already stressful process. It's important to sit down with your client early on and explain the procedure, including your estimate of how long it is likely to take for the case to be resolved, and to share your initial strategy and theory for defending the action.

*Keep your client up-to-date and involved.* As with any lawsuit, attorneys should provide regular status updates to their physician clients, even if nothing seems to be going on. Your client wants to know that his or her case is important to you and that it is receiving your full attention. Make sure your client is aware of important dates well in advance and be respectful of your client's professional responsibilities when making scheduling decisions. One physician complained, "My attorney scheduled my deposition without even asking if I was available, and I had to reschedule an entire day's worth of appointments."



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# What Your Client May Be Feeling

## **Confusion and Surprise**

- What did I do wrong?
- What should I have done differently?

## **Fear and Anxiety**

- What if I lose this lawsuit?
- What will happen to my practice?

## **Anger and Resentment**

- I didn't do anything wrong!
- I went out of my way for that patient!

## **Embarrassment**

- What will my colleagues think of me?
- Do my patients know?

## **Bitterness and Despair**

- Why did I even go into medicine?
- Maybe I should just quit.



You can make a complicated process less stressful, scary and intimidating, and that, in the long run, may be the best thing you can do for your client.

*Make sure your client is prepared.* It seems unthinkable, but I've attended more than one deposition of a co-defendant where it has become apparent that the attorney has not adequately prepared him or her for testimony. There is simply no excuse for such a situation. You must meet with your client as many times and for as long as it takes for the client to be prepared to testify confidently and credibly. This may mean reviewing the chart or progress notes over and over again so your client can discuss the care in question without hesitation or excessive reference to the chart. This also means role-playing with the client, if necessary, to illustrate some of the difficult questions he or she may be asked in order to avoid testimony that would be an obstacle to overcome at trial. Such preparation takes time, especially if there have been a number of patient encounters or the care was rendered over an extended period of time. While this can be a tedious process, the time spent or not spent can significantly impact the defense. One doctor

told me that during his deposition preparation his lawyer was constantly checking his cellphone and seemed distracted and disengaged. The doctor felt ill-prepared for his deposition and ultimately asked his insurance carrier to assign new counsel.

*Make time to listen.* With all the emotion attendant to being sued for malpractice, your client may need some handholding along the way. Some physicians don't need much support during the process, especially if they've been through it before; others — or their spouses — may need a great deal of support, especially during trial. As tired and busy as you may be at the end of a long day in court, finding a half-hour to go over the day's proceedings with your client may be an absolutely necessary exercise as the client processes the criticisms leveled against him or her or analyzes how the case is going. It's important to remember what is on the line for your client and to be available to listen and reassure.






*Be candid.* As much as we want to reassure our clients of a successful outcome, there are some cases that are simply not defensible, and your client needs to know that. Such conversations require skill and diplomacy, but it's critical to be candid when things look bad. If you believe that an adverse verdict is likely, you must be honest with your client. One doctor told me, "I wish my lawyer had just told me right up-front that it was a bad case. Instead, he waited until right before trial to tell me that I should think about settlement. It would have saved me a lot of time and heartache if he'd just leveled with me from the start." It's your job to make your best recommendation for handling the case, which means being completely candid as to what you believe will likely occur and then step aside and allow your client to make an informed decision. Another doctor told me, "I kept asking the attorney what he thought I should do, and he just kept telling me it was my decision." While only the physician can make that choice,

we should make sure the client has our best assessment of what the probable outcome will be.

**Prognosis for Cure:  
The Path to 'Recovery'**

Your representation of a health care defendant requires not only your legal skills and acumen but also your willingness to be a "counselor" in every sense of the word. By being present and available to your client and by being mindful of exactly what your client is experiencing, you can make a complicated process less stressful, scary and intimidating, and that, in the long run, may be the best thing you can do for your client. A client our firm represented in a contentious lawsuit several years ago recently sent a thank-you on the anniversary of his defense verdict, and his comments had less to do with the outcome than with the manner in which he was treated: "Thank you for your patience and understanding during the trial. You made a horrible situation bearable."

Just as we hope our health care professionals will treat our medical issues with compassion and understanding, so, too, should we legal professionals not forget that our "bedside manner" can make all the difference in the world to our clients. 



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