

INSIDE THE MINDS™

REPRESENTING PLAINTIFFS IN MEDICAL MALPRACTICE CASES

LEADING LAWYERS ON BUILDING A STRONG CASE AND
IMPLEMENTING SUCCESSFUL LITIGATION STRATEGIES



ASPATORE

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I N S I D E T H E M I N D S

Representing Plaintiffs in Medical Malpractice Cases

*Leading Lawyers on Building a Strong Case and
Implementing Successful Litigation Strategies*



ASPATORE

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Winning Trial Strategies for
Plaintiffs' Medical Malpractice
Lawyers: How to Win Over
Jurors Who Demand
More from You than the
Law Requires

Howard A. Janet

Managing Principal

Janet Jenner & Suggs LLC



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Introduction

Representing plaintiffs in medical malpractice claims gives rise to unique and formidable challenges—ones that can stand in the way of achieving favorable outcomes, even in the most meritorious cases. This chapter concentrates on analyzing the challenge I consider to pose the greatest threat to our clients—juror bias in favor of health care providers—and on presenting strategies I use to meet that challenge.

Overcoming this bias is vital to securing the “full justice” settlements and verdicts our clients need and the peace of mind they deserve.

Voir Dire: It Will Take You Only So Far

In a perfect world, the *voir dire* process will facilitate the selection of a completely neutral jury to decide your cases. But we do not live in a perfect world.

Therefore, you should assume that at least some of your jurors will possess a deep-rooted bias in favor of health care providers. That bias can result in jurors demanding more proof from you than the law requires.

Jurors Side with Medical Negligence Defendants in Most Cases

Defendants win more than 75 percent of medical malpractice trials.¹ This is not news to those of us who practice in this area. However, this statistic does not tell the whole story.

What the research does not reveal is that the best plaintiffs’ cases are settled, not tried. It also does not reflect (nor could it) how many cases tried to a verdict would have been won by plaintiffs had they been litigated differently, or how many would have been won with a different jury.

No matter how you view the data, however, it is evident that there is ample room for improvement on the plaintiffs’ side. I am confident implementing the strategies presented in this chapter will help skew your personal win-loss record in your favor.

¹ National Center for State Courts, Medical Malpractice Litigation in State Courts, Vol. 18, no.1 (Apr. 2011), <http://www.courtstatistics.org/FlashMicrosites/CSP/images/ch-18-1.pdf>.

Root Causes of Juror Bias

The Physician-as-Deity

Unlike most other personal injury defendants, medical doctors walk into court with a huge leg up on the everyday people who are charging them with negligence. With few exceptions, jury pools are replete with men and women who hold physicians in extremely high esteem. Historically, our society has placed physicians on pedestals and even attributed deity-like status to them.

This bias is deeply ingrained. Media plays a big part. Altruistic and highly competent fictional doctors from literature, television, and film abound; characters like Dr. Marcus Welby, Dr. Ben Casey, Dr. James Kildare, and the main characters from *ER*, *St. Elsewhere*, and *House* have influenced the attitudes of multiple generations toward the medical profession. Celebrity physicians Dr. Oz and Dr. Phil show up weekly in future jurors' homes to advise and soothe them.

But an even more significant factor in juror bias in favor of health care providers is personal experience. Most jurors have had positive health care experiences. They have been directly or indirectly touched by a physician who made a timely and important diagnosis, performed an expert surgery, or in another way helped extend or save the life of someone dear to them, if not the juror himself. These jurors are likely to stay in the pool, as they typically claim they can remain impartial in spite of these positive experiences. Potential jurors who have had negative experiences, on the other hand, tend to reveal they are not sure whether they can be impartial, and that their bad experiences may improperly influence them.

Tort Reform Propaganda

For decades, heavily financed health care, insurance, pharmaceutical, and other big business interest groups have been inundating the public with tort reform propaganda. Their efforts do not appear to have slowed down.

Much of the propaganda continues to be focused on medical malpractice—particularly that medical malpractice lawsuits and “runaway juries” are major factors in skyrocketing health care costs.

The result (no doubt by design) is that jurors improperly factor tort reform issues into their deliberations. Given the struggling economy, more jurors than ever are susceptible to being manipulated by this tactic.

Biased Jurors Demand More Proof than the Law Requires

Juror bias in favor of health care providers manifests itself in many ways. Some jurors are inclined to see the evidence in the light most favorable to defendant doctors. Some are predisposed to give physician defendants the benefit of any doubt. If the doctor's version of events differs from the patient's account, they automatically assign more credibility to the doctor and accept his or her version.

To some jurors, it is extremely difficult to find against physicians who “merely committed simple negligence” and are disposed to find against physicians only if their negligence was gross. Some even excuse negligence if they are convinced doctors tried their best, meant well, or did not mean for the harm to occur.

In other words, these jurors are predisposed to ignore the jury instructions that plaintiffs desperately need them to follow, and, if they feel compelled to side with plaintiffs, they tend to force down the amounts of verdicts.

Bias Extends to Other Providers

The bias in favor of physicians carries over to other health care provider defendants, as well, although not quite to the same extent. As for non-physician defendants, health care institutions tend to benefit the least, and nurses tend to benefit the most. At least in part, that seems to be a function of how we as a society view institutions, as opposed to individuals. Consequently, the extent of the challenge of ensuring a fair fight—and even, preferably, shifting the odds in favor of plaintiffs—differs, depending on the class of health care defendant involved.

How to Frame and Litigate Your Case

Treat the Burden of Proof as Clear and Convincing Evidence

The realities of less personalized late twentieth- and early twenty-first-century health care are beginning to erode the advantage that physicians