INSIDE THE MINDS™

DEFENDING MEDICAL MALPRACTICE CLAIMS

LEADING LAWYERS ON NAVIGATING MEDICAL MALPRACTICE DEVELOPMENTS AND MOUNTING A SUCCESSFUL DEFENSE

ASPATORE

William E. Galeota, Steptoe & Johnson PLLC; Charles L. Bach Jr., Heidell Pittoni Murphy & Bach LLP
Robert W. Frank, Neil Dymott Frank McFall and Trexler APC; Troy S. Bundy, Hart Wagner LLP
Frederick W. Bode III, Richard J. Kabbert, and Kristen Hock Prex, Dickie McCamey & Chilcote PC
Rodger A. Hagen, Meagher & Geer PLLP

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Mounting Effective Medical Malpractice Defenses in the Face of Unsatisfactory or Even Tragic Outcomes

William E. Galeota

Member

Steptoe & Johnson PLLC

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Introduction

One of the most daunting challenges in the defense of any malpractice case is usually in the nature and extent of the "bad outcome" that drives it. Without that, and the proposition that it may entitle the usually sympathetic patient or family member to a monetary recovery, there would literally be no case. The attorneys or firms who have to make contingent fee commitments and sizable expense investments in malpractice cases would not do so, but for the prospect of a large monetary award. Therefore, the most tragic and intrinsically sympathetic cases make their way into the civil justice system in the hands of the most experienced and accomplished plaintiffs' attorneys. Adopting a proven persuasive approach, then applying that from the beginning of the case through the entire process to a jury trial and verdict, is the most important element of a successful defense.

Legal Protections for Health Care Providers and the Tactical Countermeasures

The law in most states permitting patients to sue for injuries caused by substandard care was for many years the common law of negligence, shaped by case law, until statutes defined it more specifically. In West Virginia, for example, this occurred in 1986, 2001, and 2003, when the legislature set caps on some damages and prescribed the essential elements and requisite proof for a sustainable malpractice claim.[1] There remains an ongoing debate about whether the reforms are necessary and appropriate, but one thing is certain: as reforms have imposed restrictions and limitations on recoveries, patients and their lawyers have developed new theories and strategies to avoid them. Frequently, those strategies are based on making an individual doctor, nurse, or other caregiver appear "blameworthy." Those efforts can be doubly fruitful if they are based on legal theories that fall outside the scope of caps or other limits.[2]

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[1] W. VA. CODE §§ 55-7B-1, *et seq.*

[2] *See, e.g., Boggs v. Camden-Clark Memorial Hospital Corporation,* 216 W. Va. 656, 609 S.E.2d 917 (2004) (The Medical Professional Liability Act of 2003 [MPLA] does not apply to other claims related or contemporaneous to alleged act of malpractice). *Compare Blankenship v. Etnicon Inc.*, 221 W. Va. 700, 656 S.E. 2d 451 (2007); *Gray v. Mena,* 218 W. Va. 564, 625 S.E. 2d 326 (2005).

The burden of proof is on the complaining patient seeking money; most caregivers can ably explain what they did in the circumstances and why; and "dueling experts" will often neutralize each other. Therefore, even with the most tragic consequences and sympathetic circumstances, a jury's resolution of close questions on the standard of care or causation may favor the health care provider. That fairly balanced presentation of the issues is completely skewed, however, and shifted heavily to the patient's favor if the individual caregiver can be made to appear generally incompetent, dishonest, or uncaring. Add to this the reality that most health care is provided in the context of a hospital or other facility operated by a corporate organization, much more easily cast as impersonal or greedy. Thus, we have seen the development of theories like negligent credentialing[3] (making the doctor's claim and suit history arguably relevant), spoliation of evidence (altering a health care record to conceal an error is particularly reprehensible),[4] and abandonment (a judgment not to intervene can be so characterized).

Juries are made up of good folks who are doing their best to follow their oath and determine the truth, often on conflicting accounts and disputed evidence. Experience has taught us that persuasion begins with giving the jury what it needs to tip the scale with the impressions made by the parties, and the most dramatic are those made by the accused health care professional. Therefore, the winning approach to defending a malpractice case starts with that individual.

Top Medical Malpractice Defense Strategies

Lawyers effectively representing health care providers must present their clients as the caring, compassionate caregivers they are, even in the face of vigorous attacks and harsh accusations. While it is difficult and even counter-intuitive, once clients understand and embrace this approach, they begin to feel more comfortable with the process and are better situated to explain to a jury, using simple terms, how a procedure is intended to help the patient and what went wrong. The defense must answer all essential questions, including what the health care provider did and why, and how a bad outcome alone does not prove negligence.

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[3] *See, e.g., Darling v. Charleston Community Memorial Hospital,* 211 N.E. 2d 253 (Ill. 1965); *Roberts v. Stevens Clinic Hospital,* 176 W. Va. 492 (1986).
[4] *See, e.g., Hannah v. Heeter,* 213 W. Va. 704, 584 S.E.2d 560 (2003).

In my practice, we set up a sort of "lay clinic" using illustrations, videos, charts, diagrams, and, if a surgical procedure is involved in the case, the instruments associated with that procedure. We bring everything to the courtroom we can to acquaint the jury with the issues at hand. As defense attorneys, we do not want cases to be so complicated that it takes a panel of doctors to understand what happened; instead, we attempt to demystify medicine and surgery using a logical, thoughtful process to explain medical procedures in lay terms. We want to be able to open the case with a preview of all this demonstrative evidence and reassure the jury that they will learn all they need to decide the issues. In closing argument, we invoke the jury's common sense and life experience ("you do not have to be a doctor to understand what happened here") to a conclusion that the patient's dissatisfaction is misplaced; the bad outcome did not result from the care, but in spite of it.

This strategy includes demonstrating that the plaintiff did not suffer any injury as a result of the defendant's actions. Defense attorneys should begin by fully explaining all the pre-existing, predisposing, or later-developing conditions the client experienced as being the primary factors causing or contributing to the bad outcome. There are risks and complications inherent in any surgical procedure, and usually the plaintiff has signed a consent form showing the plaintiff was properly informed and assumed those risks and complications in asking the physician to perform the procedure. Otherwise, there would be liability for proceeding without permission.[5] While a full and legally sufficient informed consent form does not excuse negligence, it is important for a jury to understand complications may be associated with the procedure even in the absence of negligence, that medicine and surgery are imprecise and fallible, and that the patient knew that going in.

The defense attorney should also emphasize the standard of care by definition. Most states define it as what the ordinary or average physician or surgeon is expected to do in the same or similar circumstances. "Standard of care" does not include perfect or prophetic insight, or even using the ideal approach. It is simply reasonable and prudent care.[6] Of course, what a reasonable, prudent physician would be expected to do in the same or similar circumstances is for a jury to decide.

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[5] *See, e.g., Cross v. Trapp,* 170 W. Va. 549, 294 S.E.2d 445 (1982).
[6] *See, e.g.,* W. VA. CODE § 55-7B-3.

Developing an Effective Medical Malpractice Defense

There are some basic steps associated with putting a successful medical malpractice defense in place. The defense attorney should enlist the client's help early in identifying the best treating and independent experts. Treating experts are the caregivers who were involved and understand the issues in the case firsthand and may include prior or subsequent treaters. If inclined in the defendant's favor, they can be very helpful. The next step is to select the most highly qualified and presentably appealing independent experts available to defend the quality of care and causation issues. The most highly qualified experts are not always the best choice; the defense attorney may favor someone in the same kind of practice as the defendant or an academic with a teaching role. When choosing the person who will play best before a jury, the defense attorney must make an overall assessment instead of simply picking the expert with the most impressive *curriculum vitae.*

It is essential in the beginning to plan for and develop an appealing presentation of the case to a jury. This means disabusing the client, whether an individual or an institution, of the idea that it is beneficial to act righteously indignant about being sued. Acting offended and conveying that attitude to a jury will only result in the jury being less inclined to give the defendant any benefit of the doubt. This may be harder than it seems. It is a natural human reaction to feel offended and wronged by an accusation of wrongful conduct causing harm, and those feelings may be amplified if the plaintiff did not ask the doctor directly about the bad outcome when it happened.

The defense attorney must reassure the client that a lawsuit is simply the plaintiff's way of getting answers, and this is the defendant's opportunity to explain what happened and why the defendant's judgment was good at the time and consistent with the standard of care. Even though the burden of proof is on the plaintiff, the burden of persuasion is on the health care provider, so it is essential for the defendant to present a palatable explanation for the jury that shows the outcome was not a result of negligence or professional misdeed. Often, the explanation the plaintiff receives in the courtroom is the one the plaintiff could have had by simply talking directly to the doctor, and I have frequently used that observation in closing arguments.

Using Medical Experts to Build a Defense

Medical experts are essential to building an effective defense strategy. In nearly thirty years, I have tried only two cases without a malpractice standard of care expert. Both of those cases turned on disputed facts, so I did not need independent support for the quality of care defense. Even though I did not disclose and call an expert in those cases, I benefited from the client's expertise and guidance through the medicine, as well as confidential consults with trusted physicians and surgeons to help shape my defenses.

A good medical malpractice expert can help guide the defense attorney through the entire process. Even if the expert does not support the quality of the care provided, it is critical to know what the expert thinks—good, bad, or indifferent—as an impartial view. Experts are in a position to explain some things better than clients can. While the client may be able to explain the procedure involved and impress a jury with explanations, diagrams, or charts and demonstrations of tools and materials, experts are also great sources of information. Of course, it is possible to be redundant, and the attorney should avoid having an expert repeat or reiterate what the client just said.

Defense attorneys should not overlook their clients as experts, and it is important for the court to so recognize the defendant health care professional, who will usually qualify.[7] In the usual array, the defendant is the only expert in the case with firsthand knowledge of the circumstances in which the questioned judgment (his own) was exercised. The client is typically deposed early in a case, and the defense attorney can confidentially challenge the client on areas of vulnerability to prepare for that test. It is also important to ensure the client knows what to expect, so it is beneficial for the defense attorney to confront the client with the criticisms in the complaint, demonstrating the tactics and techniques the opposition is likely to use in the deposition. It is wise to send a transcript of the deposition to outside experts, both to see how it may affect their impressions and to give the defense expert a more complete basis for his opinions.

[7] *See, e.g.*, W. VA. R. EVID. 702; *Mayhorn v. Logan Medical Foundation,* 193 W. Va. 42, 454 S.E.2d 87 (1994).

Common Defense Challenges

One of the top challenges in defending against a medical malpractice claim is in thwarting aggressive opposing lawyers who effectively try the caregiver or the institution instead of the care itself. This includes finding ways to make the defendant look blameworthy or impersonal and making an institution appear bureaucratic and profit-focused. Because the relationship between a patient and a health care provider is tremendously personal, a large measure of professionalism, caring, and compassionate personification must be brought to the case through the defendants. Ultimately, the goal is to have the jury conclude that the defendant is a valuable asset to the community and that they would seek him or her out if they or their family member had the same problem or condition.

One of the most recent developments is the use of so-called "corporate responsibility theories" against hospitals and other institutions that credential physicians and surgeons. The tactic is to allege the institution negligently credentialed the health care provider, a tactic that is developing around the country, intended to move the plaintiff past the caps to substantial damages against an institution. It also may give the plaintiff the advantage of bringing up other disparaging information from the doctor's past—prior claims, medical board complaints, questionable training, or failed certification.[8] This makes it challenging for the attorneys defending the staff physician or surgeon or the credentialing institution. The use of bifurcation to minimize the prejudice of anything the court may determine to admit on the credentialing issues is also critical.[9]

Another challenge presents if multiple caregivers are named in a claim or suit. Because the suit is about a bad outcome, and litigation is all about fixing blame, there is a compelling, but usually misplaced, inference that someone must be at fault. Defendant caregivers—and all too often their inexperienced lawyers—will therefore decide their best defense may be in deflecting responsibility to others, giving the jury someone else to blame. Of course, this may be met with an equally misplaced counterattack, with the result that the patient's lawyer simply sits back and watches it play out inevitably in his

[8] This invokes the application of "other acts" analysis and objections or motions to exclude. *See, e.g.,* W. VA. R. EVID. 404(b).

[9] *See, e.g., Schelling v. Humphrey,* 916 N.E.2d 1029 (Ohio 2009). *Compare Purcell v. Zimbelman,* 500 P.2d 335 (Ariz. Ct. App. 1972) (within court's discretion to deny severance).