

Top Lessons Learned From Medical Malpractice Trials

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Like any profession, health care providers are no strangers to clients bringing legal action related to their craft. But the specter of medical malpractice litigation is one that hits especially close to home for those institutions and individuals responsible for caring for the sick and wounded in their time of need.

Hospitals, doctors and other health care practitioners are in positions where public trust and respect are key to their ability to help their patients. That trust and respect is fostered and reinforced by a reputation developed through years of serving patients well. A lawsuit brought by an aggrieved patient can strike a blow to that reputation. Additionally, an adverse verdict could impact a doctor's or facility's license, or compromise staff privileges.

Considering the stakes of any medical malpractice litigation, attorneys who represent doctors, hospitals, medical facilities and other health care providers should take the following key lessons to heart.

Lesson #1: Know the Plaintiff's Potential Verdict Amounts

Sometimes, settling a case is undoubtedly the right move for your client. But whether you and your client are prepared to consider defending a medical malpractice claim at trial may depend on where you are litigating, given the sometimes high amounts that plaintiffs are awarded in such cases. After all, when it comes to jury verdicts, not all states are made equal.

From 2015 to 2016, 24 states saw awards of \$5 million or more for plaintiffs in medical malpractice cases. Awards in 12 of those states were in excess of \$20 million during the same time. Most of these amounts were awarded in states east of the Mississippi, though California, Colorado, Minnesota, Missouri, Texas and Washington all issued verdicts in the seven- to eight-figure range.

Regardless of where the case is filed, defense counsel should verify whether the state with jurisdiction has any statutory damages cap on medical malpractice damages. Determining early whether there is a limit on potential damages can play a key role in deciding whether settling a putative



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malpractice claim or taking it to trial is more advantageous for your client.

Lesson #2: Know Your Case and How It Will Play

Preparation is the watchword for all attorneys when taking a case to trial. But because you are unlikely to find jurors who understand Latin, defense counsel should do all they can to ensure that the often complex topics, procedures, legal theories, and even vocabulary that often make up medical malpractice claims are put into easy-to-understand terms for the jury.

Conducting mock trials and focus groups can be one of the best ways to refine your themes and legal theories of the case and put them into terms the average jury can comprehend. Such sessions can also help you flesh out what arguments and strategies plaintiff's counsel are likely to raise during trial, making you better prepared once you're in the courtroom.

Finally, having mock jurors during such sessions can help you better understand how average jurors during the real trial may view the facts of your case, whether the plaintiff's arguments pack more of a punch than you expect, and whether your presentation style and visual aides connect with the men and women who will decide the case.

Defense counsel should carefully weigh the pros and cons of using mock trials and focus groups when prepping for trial. These sessions can be costly — both in time and money — and overly relying on any mock results may cause counsel to ignore signs of what is actually working (and what isn't) during the real trial.

Lesson #3: Know Your Jury

All jurors are asked to be impartial and decide a case based on the merits. However, knowing your potential jurors and selecting the right panel — and identifying potential jurors who might judge the case on their personal beliefs — is sometimes just as critical as the case you present.

Here, jury consultants experienced in medical malpractice litigation can help with voir dire by suggesting appropriate questions to ask prospective jurors. Additionally, jury consultants can pick up on subtle clues about possible jurors by observing their general demeanor, noticing what books or newspapers they are reading, or hearing their conversations with others. Some jury consultants can help with conducting real-time social media searches as well, so that you can know more about prospective jurors' general attitudes while voir dire is actually happening.

Jury questionnaires are also helpful, but may not be needed or even helpful in every case. Questionnaires can help understand jurors' viewpoints on sensitive subjects that some people may feel uncomfortable discussing in public, like mental health issues, addiction and substance abuse, or suicide.

Note that digesting jury questionnaires takes time, so defense counsel should ask the judge to allow counsel at least a day to analyze jurors' responses.

Lesson #4: Expertly Use Your Expert Witnesses

Since most people are not well-versed in complicated medical science, your average jury is likely not able to understand the ins and outs of a complex medical malpractice claim on their own. Instead, the jury typically requires a special kind of guide to see how all the pieces of the puzzle — the case, the

facts, medical terms and procedures, and your theories and defenses — fit together. This is where your expert witness is key.

An expert witness should be strategically used to help jurors understand the complex information surrounding the case in simple terms. Make sure that your expert witness is not only knowledgeable in the field, but also that he or she is relatable to the jury. Does the expert communicate through good eye contact? Does he or she speak in a polite manner or tone, or does he or she instead tend to talk over people's heads? Defense counsel should have answers to all these questions before putting their expert on the witness stand.

Additionally, make sure that your expert witness is well-prepared by giving him or her everything needed to fully understand your client's case. Make sure that your expert also genuinely believes your client's position in the case, so as to not undermine your position before the jury. Finally, be ready to work together with your expert while he or she is on the stand, such as catching when your expert uses medical or other hard to understand terms and asking him or her to clarify for the jury (for example, "When you say 'prone,' do you mean the patient is lying down on his stomach?").

Lesson #5: Keep the Snakes at Bay by Blunting Plaintiff's "Reptile Approach"

In doing all you can to present your client's case effectively to the jury, defense counsel should also be wary of plaintiffs attempting to win by bringing a reptile into the courtroom.

Not a literal reptile, of course (unless the facts of your case actually involve one). Instead, the "reptile approach" refers to a tactic used by plaintiff's counsel to try and bolster their client's case by speaking to the primitive or "reptilian" parts of jurors' brains and appealing to jurors' desires to be protectors of their community and of "the little guy." In this approach, plaintiff's counsel crafts a story that portrays defense counsel's client as a threat the jury must protect against. Instead of asking the jury to decide the case based on the facts and their own theories, plaintiff's counsel asks jurors to give their clients a favorable verdict — and award — by painting the defendant as someone who harmed the plaintiff and who could harm again.

The reptile approach can be a dangerously effective method for plaintiff's counsel to shape the narrative of the case, and could cause jurors to reach results and damages amounts that the facts may not support. Defense counsel should do all they can to blunt any use of the reptile approach at all stages of the case:

- Start at voir dire. Plaintiff's counsel is likely to use the reptile approach right at voir dire to frame the plaintiff's narrative early on that the defendant is a threat no matter the facts. Don't wait until the trial phase to push back and frame your own narrative for the case.
- Don't take the bait. Resist the urge to paint the plaintiff with the same brush that their attorney is trying to paint your client with. An "eye-for-an-eye" approach is likely to leave the whole jury blind to the merits of your client's case.
- Remember the Golden Rule. Relatedly, remember the maxim "do unto others as you want them to do to you." The jury is likely to pick up on whether you are treating the plaintiff and their attorney with respect while opposing counsel tries to paint your client as the villain.

- Acknowledge the jury’s natural desire to empathize. The men and women that make up your jury won’t be robots. Depending upon the extent of the plaintiff’s alleged injuries, many members, no matter the facts of the case, might feel bad for the plaintiff. Defense counsel should acknowledge this early on in the trial as well as at closing while reminding the jury to decide the case based on the facts. Where appropriate, defense counsel may even point out where the defendant also empathizes with the plaintiff, to better humanize their client in the jury’s eyes.
- Refocus the jury’s attention on the facts. Repeatedly remind jurors over and over what the relevant facts of the case are and what they are there to decide. This may help blunt plaintiff’s counsel’s use of the reptile approach, and remind jurors throughout the case where opposing counsel has failed to prove certain elements of plaintiff’s case.
- Be aware of problem jurors. Some jurors may be receptive to the reptile approach. Take note of those jurors who are particularly drawn in by plaintiff’s negative portrayal of your client and adjust your communication approach where possible to bring those jurors back to their central mission — deciding the case based on its merits.

This article was produced based on an upcoming webinar from Lewis Brisbois Bisgaard & Smith LLP, airing Thursday, May 18, at 12 p.m. EDT.

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