

Bedside Manner: An Ounce of Prevention Is Better Than a Pound of Tactics in Defending a Malpractice Case

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I'm often struck by how much easier it is to defend physicians in medical malpractice cases who are "nice doctors" than those who come in with a chip on their shoulder, appear arrogant or combative, or simply act like their mere appearance in court is a waste of their precious time. Needless to say, we spend many hours over several pre-trial preparation sessions making sure that our clients put on the best face possible for trial.

It is an unfortunate fact of life, however, that we even have to do so for many a defendant physician. Jurors are human, of course, and like all humans, they make value judgments about who they like and don't like within seconds of first encountering them. As the saying goes, "you never get a second chance to make a first impression." What is more surprising is how many intelligent, well-educated individuals simply don't get this basic fact of life.

When we have an opportunity to talk to jurors post-trial, they often aren't shy about telling us what they thought of one doctor or another, including those who appeared as experts, fact witnesses, and especially the defendant. In one recent trial, a juror told me after trial that "we all agreed that if we ever needed a doctor of that specialty, he'd [the defendant] be the one we'd go to." Needless to say, they loved that doctor, found him credible and personable, and we prevailed in that trial. The simple fact is, if the jury likes you, then your chances of winning at trial are much higher. The corollary to that truism is that if your patients like you, the chance of ever even being sued are greatly reduced.

This does not mean to suggest that you'll never get sued if you are a nice doctor or well-liked by your patients. Even the nicest

doctor can have a terribly bad and unexpected outcome with a patient, or even commit an act of negligence. Some patients, of course, are simply hard to please or are difficult to deal with. Likewise, of course, even the most arrogant doctor will not be sued by every patient who has a bad outcome. Many prospective jurors tell us in voir dire about a bad medical outcome their family member has had, but that they simply never considered filing suit. The real issue here, and the point of this article, is how to avoid getting sued by those who might otherwise be quick on the litigation trigger.

Taking Time With the Patient Builds Goodwill

Bedside manner is critical. Over one hundred years ago an article in *JAMA* stated "The true basis of good bedside manner is a big heart."¹ A physician who speaks in a friendly manner, explains things calmly and sympathetically, sits with the patient, takes time to listen to their concerns and questions—perhaps even reading between the lines—is going to be seen as a "Marcus Welby" type to their patients, and even if the outcome is bad, the patients may not consider litigation. On the other hand, a physician who runs in and out of the room quickly, doesn't really make eye contact with the patient, speaks in a condescending tone or with a flippant or sarcastic demeanor, is going to be viewed more like Dr. House of the "House" TV series—perhaps a genius, but a rude one for whom no patient will have any sympathy if things go wrong.

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This isn't news. Various studies have been done over the years in an attempt to correlate why certain patients sue. Ultimately, communication and bedside manner have been found to have a role. In one study, funded by the Agency for Health Care Policy and Research (AHCPR), the researchers recorded interactions between a number of physicians and their patients, and found distinct differences in the communication styles between those physicians who had claims brought against them and those who did not.²



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No matter how many times I encourage physicians to take more time with their patients, the standard response I hear from nearly all of them is that they are simply too busy, often with a schedule that runs an hour or more behind (which certainly doesn't endear them to their patients). They also say insurance and Medicare reimbursements have been cut back substantially over the past several years to the point where it is hard to break even unless they squeeze in as many patients as possible. But statistics and studies support the notion that a cold demeanor or giving patients "short shrift" continues to lead some patients to consider litigation when they might not have otherwise.

Avoiding Litigation

So what can the harried, overworked physician do to avoid litigation? Some things that may help don't really take any extra time:

1. Simply smiling and looking the patient in the eye when you walk into the exam room or see them in their hospital bed is a big help. Sit down next to them; don't stand over them, or sit behind a desk, in other words, be at their level.
2. Know a little bit about them—most EHR systems now have a place where you can make some general notes. Know things like whether they go by a nickname or a name other than their first name (call him "Bob" instead of "Robert").
3. Let them call **you** by your first name. Instead of introducing yourself to new patients as "Dr. Jones," say "Hi, Mrs. Smith, I'm Tom," and let them call you that. I know some physicians feel that they've earned their title of "doctor," and others feel it is important to keep that professional stature in dealings with patients, but I recommend physicians get over that ego issue. Do you know how much harder it will be for a patient to consider suing their friend "Tom" than it will be to sue that somewhat distant "Dr. Jones?"
4. Have your staff update your office personal "notes" about patients when they are in the news, when they lose a loved one, or when they've received an accolade. Look at those notes for a moment before you walk into the room, so that you can say "Hi, Bob. I hear your son just got accepted to the Naval Academy," or so you don't ask "How's your family?" only to be told that the patient's wife was just killed in an accident. Needless to say, you'll never be able to keep up completely, but knowing something about your patients' lives is better than knowing nothing.

Be Considerate During the Exam

A common complaint we hear in depositions of plaintiffs in malpractice suits is that the doctor "only spent a minute or two with me." Granted, that is likely a gross exaggeration in most cases, but the **patient's** perception is that it was a nominal amount of time. To the extent you can, sit with them and listen to their complaints, issues and stories. Many patients will vaguely touch on something they want to discuss when they are seeing you for something else. Listen to those subtle

cues and ask about them. Engage them in enough "non-clinical" conversation to demonstrate that you care about them personally, but don't miss the details of why they are there.

Likewise, many plaintiffs will say that the doctor's exam was cursory, when the doctor knows it was very thorough. Proving that at trial isn't difficult, assuming your records are complete, but why ever put yourself in that position? As you examine the patient, take a moment occasionally to tell them what you are doing. They'll remember a lot more about what your exam entailed if you talk to them as you do it.

But don't turn your back on them to make your notes. To the extent possible, face them (and talk to them) as you enter information or data in your EHR or paper chart. There are pros and cons to having a nurse or scribe in the room with you. Needless to say, record keeping is better.

Taking extra time with your patients, changing your communication style when necessary, and finding a way to be friendly no matter how hectic a day you are having personally, are bound to save you from at least one lawsuit at some point in your career.



Likewise, speaking out loud about the various physical exam findings to your assistant helps show the patient how much you are doing, but keep in mind that some patients don't like you talking about them in the third person to someone else (you can almost hear them thinking "you do know I'm right here, don't you?"). Some just feel that their issues are personal between you and the patient. Ask them if they mind someone taking notes for you as you do your exam. Again, this is what a "nice doctor" would do, and they'll likely remember you considering their point of view. Needless to say, if they don't want anyone else in the room, agree to that, but then it falls to you to make a good record of the visit. However, as noted above, don't turn your back on the patient just because you have had to assume the "charting" responsibility.

A friendly demeanor with patients can be most easily achieved by finding things to laugh about. However, use humor carefully. For every patient who likes your jokes and your sarcasm there may be another who is offended. Admittedly, it can be difficult to figure that out, but you have to do so. When you first encounter a patient, let them talk about their problems. Those who joke with you are probably the ones with whom you can joke and develop a good rapport. Those who are very serious probably won't like your sense of humor and will take your jokes as insulting. To them, speak politely, calmly and reassuringly, but avoid the stand-up comedy, or at least keep your jokes self-deprecating, and to a minimum.

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Nothing beats a follow-up call from you (not your nurse) later in the day after you've performed a procedure of some sort on a patient, especially if that call comes at night when they don't expect to hear from you. If the patient isn't home, leave a HIPAA-compliant message and encourage them to call if there are any problems. Document that you made the call (if you are sued later, it is great evidence to show the jury that you took the time to follow up, even if the patient doesn't recall it). That should be your routine, not something you do just occasionally for the more "serious" cases.

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It also goes without saying that you should try to encourage your office staff to take the same friendly, interested approach to your patients. It is not unusual to hear patients complain about a physician's staff members, but I surmise that it is less likely

that any doctor is going to be sued because his/her nurse shows a poor attitude than they ever would be if the doctor is rude, disinterested or communicates poorly. Nevertheless, the more any patient feels comfortable in your office—from their initial encounter at the desk until you release them from your exam—the less likely you will be sued.

You don't want to think of them this way, but realistically, every patient you see is a potential future malpractice plaintiff. There is no way that simply being a "nice doctor" is going to prevent you from ever being sued. However, taking extra time with your patients, changing your communication style when necessary, and finding a way to be friendly no matter how hectic a day you are having personally, are bound to save you from at least one lawsuit at some point in your career. The truth is, you'll never really know—if you **aren't** sued you won't know that a patient considered it. But I can guarantee that the investment of time in changing up your practice procedures a little bit will be a far better use of your time—and far less stressful—than spending a week or two in trial some day in the future. —

References

1. *JAMA* 189; 18(7) 203-204.
2. "Physician Bedside Manner Linked to Malpractice Suit," AHC Media, May 1, 1997.

Free Educational Programs Offered by League of Healthcare Experts

SLMMS physicians and their practice administrators are invited to participate in an ongoing series of free health care education programs provided by the League of Healthcare Experts. The programs are scheduled throughout the year and will be promoted in the monthly SLMMS electronic member updates and at slmms.org.

The League of Healthcare Experts began eight years ago with a single seminar on the health care stimulus bill. It was so successful that it grew into more events with various sponsors on a variety of health care topics.

"Our programs are strictly educational in nature, with no marketing of services, just an introduction to those experts who can help physician practices with a myriad of services," explains Ann Grana, program coordinator. "We focus on current topics and have recently presented programs on Meaningful Use, electronic health records, malpractice and risk management, banking updates, new payment models, HIPAA compliance, and more recently MACRA and MIPS. Participants are surveyed and we create programs from what our attendees request."

Participating organizations in the League of Healthcare Experts

include Keystone Technologies, Keane Insurance Group, HealthCore Value Advisors, GBS Information Systems, Enterprise Bank & Trust, Datafile Technologies, and Anders CPA + Advisors.

On Friday, April 21, LHE will present a daylong workshop, "Updates from Washington," discussing legislative updates and how the new administration may affect health care. The program will be presented in partnership with the Healthcare Financial Management Association of St. Louis at the Lodge Des Peres from 9:00 a.m. to 2:00 p.m.

The next lunch and learn workshop, "Fog Computing," is scheduled for Thursday, May 18 from 11:30 a.m. to 1:00 p.m. at Keane Insurance Group, 135 West Adams in Kirkwood. The featured speaker will be Aaron Jackson, vice president of solutions architecture with Keystone Technologies. Lunch is provided by the sponsors.

All League of Healthcare Experts programming is free of charge, but advance registration is required. View the schedule of programs and register by visiting www.leagueofhealthcareexperts.com. You may also subscribe to their online newsletter. —