The Truth Told Well: Medical Malpractice Witness Preparation

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Nuclear verdicts are an ever-present peril looming over today's medical malpractice trials. In 2022's *Thapa v. St. Cloud Orthopedic Associates*, jurors handed down one of the most shocking med-mal verdicts to that point: $111 million. In the same year, there were at least six other verdicts over $50 million. And yet, soon enough in 2023, med-mal verdicts around the country began breaking state records: Florida saw a $261 million verdict in *Kowalski v. Johns Hopkins All Children's Hospital, Inc., et al*. In Pennsylvania, jurors awarded $183 million against the Hospital of the University of Pennsylvania. Westchester Medical Center in New York was hit for $120 million.

While not new, the trend is surely worsening. But among all these bleak verdicts and the continued downward trajectory for medical malpractice defendants, what solutions exist to reduce the risk of huge damage awards?

One crucial answer lies at the start and the heart of the issue—the deposition of the accused medical professional(s).

Medical Malpractice Is Personal

We have seen an increased focus on the realistic preparation of medical professionals for their depositions. Insurance companies and healthcare institutions are devoting important resources to their team members so they feel more in control (more confident) and more prepared (more competent) to face the challenges of a deposition.

That preparation is a very good thing. For one, medical professionals accused of causing

harm to a patient can suffer from intense guilt or self-doubt, regardless of fault. The mere act of being accused can lead them to judge their own actions in hindsight—based on knowing the outcome—and forget that they did not have complete information *at the time* (Metz, D., & Pitera, M.J. Witness Preparation: Helping Your Witness Avoid Hindsight Bias. *JD Supra*, 2023). Unaddressed feelings like these can produce ruinous deposition soundbites for defense counsel to overcome.

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From a jury standpoint, nearly every juror in the venire enters with personal experiences and attitudes regarding the healthcare system. This means the seated jury on a med-mal case will have the means to evaluate medical professionals' actions in emotional terms, but most likely not in legal terms. That is, they are prone to favor their feelings about the conduct over the legal standards governing it. And with the negative cultural attitude toward "Big Business" and "Big Healthcare" as an uncaring mechanism, jurors are even more motivated to empathize with individual accounts of poor medical care and let loose their anger toward the system that allowed it—feeding their damages motivations in turn.

Further, much like with health and safety product liability, medical malpractice claims can remind jurors of their own vulnerability. It is uncomfortable to live in a world where they or a loved one could experience a bad medical outcome. Discomfort can trigger denial that such a result could have happened without someone's negligence; instead, jurors set unachievable expectations for a doctor's or nurse's actions—augmented once again by hindsight bias. This vulnerability means that, in a world of unrealistically high juror expectations, medical professionals fall among those who endure some of the highest.

Adding more fuel to this fire is the burgeoning "safety-ism" trend that our IMS colleagues Dr. Jill Leibold and Dr. Nick Polavin have researched in detail. Among other findings, they revealed that a concerning number of jurors favor complete risk avoidance—and expect manufacturers and providers to ensure safety 100 percent of the time. This attitude can lead jurors to conclude, as one mock juror phrased it, "I don't care about the data; if it happens once, it has happened one too many times." Safety-ist jurors raise the already high bar even higher (Leibold, J., & Polavin, N. A Strange New Litigation World: Safetyism, Plaintiff Verdicts, and High Damages. *DRI: For The Defense*, September 2023, 41-44).

The natural result of factors like these is that jurors will be closely judging the defense's testifying medical professionals, looking for ways to compare and contrast these professionals with their beliefs about how the system is and how it should be.

Witness Prep Foundations for Medical Professionals

Successful witness preparation is focused on the principle of "telling the truth well." This principle has two primary goals: First, how the truth is told should reduce the chance of misunderstanding. Second, it should reduce the chance of mischaracterization or misuse. With a medical malpractice witness, however, a third goal emerges: demonstrating the professional's commitment to caring about patients' wellbeing.

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Provide Clear Context

The conventional wisdom of deposition preparation teaches that a witness should listen to the question and answer only that question and nothing more. But with the prominent role of "reptile strategy" and leading questions in depositions, medical professionals need to be armed to tell their truth and not get led into agreeing to oversimplifications, adopting ambiguous or strategic language, or speaking in absolutes. The danger of the conventional approach, therefore, is that the transcript would likely depict a pattern of the plaintiff attorney's characterizations followed by "yes" and "no"—at which point the witness is no longer testifying; the attorney is.

Consider this simple example:

> Q: *"Doctor, isn't it true that you did not consider a DVT in this case?"*
> A: *"Yes, that is correct."*

So, does this response mean the possibility of a DVT never crossed the doctor's mind? That is certainly how it can be misunderstood, and it is how the plaintiff could characterize it in a brief or the opening statement of a jury trial or arbitration hearing. Jurors with elevated expectations can interpret this ambiguity as evidence of the doctor's negligence.

Enter the importance of the preparation session. Asked if she meant that she never considered the possibility of a DVT, the witness's response was, "No, it is always on my mind, but the clinical presentation did not point to a DVT, so I did not feel that was going on."

So, the issue was all context in the doctor's mind—the internal conversation she was having. In her mind, she answered the question reasonably, having imposed an unspoken temporal context (she had meant, "*After my evaluation*, I did not consider a DVT likely"). As any doctor might, she presumed that this context was implied. On the contrary, the interpretation of opposing counsel could well frame her simple "yes" response as an admission that she had already ruled out DVT before performing a clinical evaluation, thereby suggesting negligence. The right questions were not asked; the right assessments were not made.

Telling the truth well, in the example above, is as follows: "That is always on my mind, but based on my clinical evaluation, I considered it highly unlikely. So yes, in that regard, you are correct." This answer reduces the potential for misunderstanding and the possibility of mischaracterization.

Now, going beyond the strict confines of a leading question is a rhetorical art requiring an understanding of how much is too much. It is about adding just the right amount of context to one's answer to minimize misunderstandings and mischaracterizations—without overshooting the mark by volunteering excessive information or sending a message of defensiveness or aggressive correction. Quality witness preparation helps witnesses understand this method so they can tell the truth well.

Demonstrate Caring, Not Just Care

The more overlooked aspect of witness preparation in med-mal cases is the importance of the attitude and character of the medical professional. This character needs to be a central point of evaluating their abilities as a witness. The provider may have performed patient care, but are they showing they care *about* the patient?

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In Words and Tone

Medical professionals are put in an unfair situation—often testifying about their past medical care in an attorney's conference room years after the events in question. Even if they avoid becoming defensive in reaction to being accused of causing harm, the distance between the incident and the deposition can cause them to come off as matter-of-fact, even callous, in response to serious alleged injuries that jurors will be hearing about, in uncomfortable detail, for the first time.

"Safety-ism" research also demonstrates that strong safety-ist beliefs are linked to highly emotional reasoning. These jurors tend to trust their gut reactions and intuitions over facts and logic. They are primed to evaluate the evidence through a lens constructed by fear and distrust and look for ways to categorize parties in terms of good versus evil (Leibold & Polavin, 2023).

Effective witness preparation addresses these problems. Medical professionals must testify as dedicated medical professionals first and witnesses in a conference room second. They must have the tools to express their character as competent and compassionate providers for patients in need—the medical *caring* behind their care.

Here is an example:

> Q: *"Doctor, how is it true that you provide world-class care when your patient died?"*

This question from the "plaintiff" attorney in one practice Q&A session threw our witness for a loop every time. She would become defensive and uncertain, using powerless speech like "I think" and "maybe" and vocal fillers like "um" and "you know." But by working through the guilt she felt, she was able to recall that the loss of this patient was not an inherent reflection of the care that patient received. Knowing what she knew at the time, she would not have changed a thing. In doing so, she found the words and tone to best describe the truth of the situation: When asked again, she responded with calm, confidence, and compassion, "Unfortunately, some patients die, even when we give them the best of care."

In Body Language

Demonstrating caring does not come down to the witness's words alone. If not backed by appropriate body language, a witness suggesting they "care" appears hollow or disingenuous.

Of course, public speaking is highly stressful to begin with, and being brought to testify with regard to claims that you were directly or indirectly involved in malpractice can crank that pressure to eleven. But in the eyes of a juror, a witness's nervous speech and behaviors (including fidgeting, shifting, tapping their nails, or drinking lots of water) can mar their credibility. As many jurors have declared in mock trials and post-trial interviews, "the truth is the truth," and a witness telling the truth has no reason to be nervous. Jurors are natural observers, so witnesses must remain aware that their body language emits strong signals (Pitera, M.J. How Body Language Can Impact Witness Credibility. *IMS Insights*, 2021).

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Through proper preparation, a witness can learn over time how to exert control over their body language. Perhaps one of the most helpful ways we might frame a medical provider's non-verbal testimony goals is to ask them to think of jurors as they would their patients. For example, research has shown the power of active listening, eye contact, and positioning the body toward the patient (rather than the computer) when conducting consultations in the examination room (Silverman, J., & Kinnersley, P. Doctors' non-verbal behaviour in consultations: look at the patient before you look at the computer. *The British Journal of General Practice*, 60(571), 76-78). A medical provider's testimony should evoke the very same body language they would display to help patients feel welcome, heard, comfortable, and confident that their health is in good hands. After all, their behavior on the stand—and in videotaped depositions—offers jurors a reflection of their behavior as a provider of care and their adherence to the standard of care. It is their most direct window into how the provider feels about their patients, and, more importantly, how they may have made their patients feel.

A well-prepared witness should aim to mirror their words with positive body language and uncover and minimize negative body language. They should breathe and appear relaxed, remove or substitute likely distractions, keep open arms, sit up straight, and focus on eye contact (within reason). In the courtroom, that means speaking to the jury box rather than merely to the attorney. Positive or negative, most body language can be improved through identification, acknowledgment, and practice.

In Conclusion

Referencing a 2023 Harris Poll commissioned by the American Academy of Physician Associates, TIME reported that "more than 70 percent of U.S. adults feel the health care system is failing to meet their needs in at least one way." The poll found that social factors like high healthcare costs, inaccessibility, and confusing logistics have affected overall patient satisfaction (Ducharme, J. Exclusive: More than 70% of Americans Feel Failed by the Health Care System. *TIME*, May 2023). What's more, we are living in a post-COVID era of political polarization, conspiracism, and rising safety-ism, all of which have damaged public trust in corporations and the sciences—the very spot at which medical malpractice defendants converge.

Healthcare providers are challenged to combat these factors and the negative associations that mark their industry as uncaring and strictly liable. While by no means an easy feat, medical professionals prepared to "tell the truth well" can be the defense's greatest asset in this fight.

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