Doctors, Lawyers, and “The Talk”: Emotional Impact of Being a Defendant

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I. Introduction

The financial and professional implications are front of mind in interactions between attorneys and their clients in litigated matters. Attorneys are focused on defending and winning the case, and that requires the lawyer to investigate and develop the facts which support the medical provider's decision-making. The questions asked by the lawyer during the initial and subsequent interviews necessarily are the who, what, when, where, why and how of the provider-patient encounter that led to the medical issue in the case. Accordingly, when lawyers talk to their medical provider clients, there are few questions related to how the provider feels and what the provider is doing to cope with those feelings. There are even fewer – if any – questions asked that would help the provider resolve or manage those feelings.

There can be no doubt that medical providers experience an emotional crisis when they are sued. Surprise, shock, anger and fear are very common reactions to getting sued for malpractice. Minimizing – or completely ignoring – the emotional implications of the lawsuit on the medical provider can not only leave the medical provider feeling alone and abandoned, it can ultimately have a devastating impact on the defense of your case.

Below we will outline some of the more common emotions that are experienced by providers and how to identify them. Then we will explore some techniques that you can use to help your providers navigate, cope and even resolve the emotions they are feeling so that your provider is empowered to provide the best possible testimony in the case.

II. Statistics

More than ninety-five percent of doctors experience some form of emotional distress in reaction to the medical malpractice lawsuit. (Charles, Sara C. “Coping With A Medical Malpractice Lawsuit”, Western Journal of Medicine, January 2011) In a study of 1400 physicians done in 2013, three out of four doctors experienced surprise and shock when they first learned of the lawsuit. (Kane, Leslie “Did They Deserve to Get Sued”, July 2013, medscape.com) Moreover, nearly four out of every ten doctors rate the experience of being sued as humiliating or as one of the worst experiences of their lives. (Kane, July 2013).

The long term effects of being sued cannot be underestimated. Three out of ten doctors report that being involved in a lawsuit changed the way they think and act as providers, with many treating their patients as adversaries. (Kane, July 2013) This number should open some eyes given that ninety-three percent of doctors had developed a good rapport with their attorneys and were satisfied with the representation they received. (Kane, July 2013) Even though the lawsuit may end well, the fact of being sued and the process that goes with it is changing how medical providers approach the practice of medicine.

III. The Range of Emotions

Medical providers can experience a wide range of feelings when they are sued. While some of these feelings are the result of a misunderstanding of their role in the legal process, many providers have core character and personality traits that often trigger a severe and overwhelming emotional response. While the emotions felt by medical providers can vary in both type and depth, at the core are two base emotions – anger and fear.
Out of anger and fear a variety of different concerns and feelings can be present. The attorney must help the medical provider identify what they are angry about, what they are afraid of, or both. The most common feelings of anger and fear relate to feeling:

- Unduly responsible or guilty for the outcome
- Like they tried to do good, but they feel like no good deed goes unpunished
- Ashamed about the incident
- Everyone is against them
- The lawsuit is a personal attack against them
- Afraid of an adverse verdict
- Like they are the victim
- Angry at the plaintiff/patient for suing them
- That their reputation has now been damaged
- That their career is at risk
- That they could go bankrupt
- That the legal system is out of control
- That the judicial system is corrupt and unfair
- That huge verdicts are the norm
- That the public will see the lawsuit and they will not want to hire them
- That they will be reported to a licensing board or other entity that could impact his/her reputation/job/licensing status.
- That no good can come out of the case.
- That there is no hope

This is not an exhaustive list of emotions. Moreover, the medical provider can be feeling many of these emotions at the same time.

**IV. How to Identify the Emotions**

While some clients will freely share how they are feeling and what is bothering them, many of them will not easily share their feelings and others may not even be prepared to admit that anything is bothering them. From the very first meeting with your client, there are clues that can help you identify the specific anger, fear and anxiety that your client is burdened with. Here are a few clues:

- Is your client afraid of testifying at deposition or at trial? This might reveal itself in subtle ways. For example, does your client come up with last minute excuses to postpone the deposition?

- Is your client angry about being sued? This may manifest itself by your client repeatedly casting blame on the patient. The client may express to you that the lawsuit is “frivolous” or that they “went the extra mile” to help the patient and the family.

- Your client expresses feelings of guilt or shame about the incident. Does your client second guess his or her decision-making? Does your client consistently review the case through the lens of hindsight? Does your client cry or get quiet when the substance of the case is discussed?
• The client refuses to participate in his or her own defense or has a poor relationship with the defense attorney. This avoidance is likely evidence of some level of fear about the case and uncertainty about how to handle it.

• The client expresses shock and disbelief that the plaintiff is allowed to go forward and sue. The client may ask you – how is the plaintiff or plaintiff’s attorney allowed to get away with this?

• The client consistently expresses uncertainty and a lack of understanding of the legal process, what is happening in the case, and his or her role in it. Perhaps your client is new to the litigation process?

Sometimes the anxiety, fear or anger is hidden deeper and only shows itself in the way the client answers your questions. When these problems become evident the defense attorney should explore the underlying source of the problem. Some of the more understated clues include:

• Does your client ramble on and on in response to simple, direct questions?

• Does the witness interrupt you or answer questions too quickly?

• Does your client unwilling to stand up and defend his or her own actions?

Identifying these issues is not always easy. Above all it requires skillful listening. The listener must pay attention not only to the words, but the manner in which they are said. Moreover, it requires the listener to ask more probing questions so that the etiology of the emotion can be revealed.

V. Tools You Can Use to Help the Medical Provider Manage Their Feelings

Most lawyers and claims representatives working with medical providers all too often lecture them on what to say and how to feel. How many times have you told a client: “Don’t take this personally – it’s just the cost of doing business,” or “Don’t feel guilty – you didn’t do anything wrong.” These statements may certainly be true, but they do little to nothing to help the medical provider overcome their anger, fear and anxiety.

Instead, let the client come up with the answers. This starts by asking an open ended question that can help you identify the emotional state of the client. How did you feel the moment you learned you were being sued for medical malpractice?” “How do you feel about the upcoming deposition?” “When you walked into my office you said, ‘I just want this to be over with,’ what is it you are feeling that caused you to say that?”

Once you identify the specific emotion, the next step is to guide the witness down the path – with questions – to learn what is driving the emotion and to resolve it.

For example, what if your client is fearful of an adverse verdict? It is easy to say to the client – don’t worry about – but that is typically not effective. Instead, you can guide the client to deconstruct the problem and resolve the issue on their own. So after the client tells you he or she is afraid of adverse verdict, you might ask:

• What if jury finds against you?

• How does this change your life?

• Do you know of doctors who have lost their practice because of a lawsuit?

• What are the important things in your life? (Family, Friends, Job)

• Will you lose any of these things because of this lawsuit – even if you lose?

You will know your objective is achieved when the client realizes – in his or her own mind – that life will not change because of adverse verdict.
On every emotional issue and concern you will continue to explore the source of the emotion/feeling and resolve it with reason, logic and evidence. Each client is different, so the questions and approach used will also be different.

What about more difficult issues? For example, many medical providers express guilt about the outcome that resulted in the lawsuit. One approach is to explore whether guilt – a very powerful and damaging emotion – is really what the client is feeling.

- What does it mean to be guilty of something?
- Since to be guilty of something requires that you act with an intent to harm someone, tell me, did you intentionally hurt anyone?
- So what is it that you are really feeling?
- When we feel bad for what has happened to someone, what do we call that? (sympathy or empathy)
- Is it ok to feel sympathy or empathy?
- What does it say about you that you can feel sympathy and empathy?

### VI. The Result

Going through this process of identifying and resolving these emotions and concerns will help the witness release the negative emotions that burden them. The most important benefit is that the medical provider will feel better about themselves as providers and as human beings. It will, perhaps for the first time, give them an ear that will listen to them. Moreover, it will also empower your client to be a better advocate. When the negative emotions are gone and their concerns are addressed, your medical provider clients will be more confident. They will learn that they are powerful, knowledgeable, thoughtful and capable of taking control of their own case, their deposition and their trial testimony.