



MISTAKES PHYSICIANS MAKE THAT HURT THEIR DEFENSE

Contributing factors and recommendations to address these

How physicians come across during a trial can have a significant impact on the outcome of a medical liability lawsuit. A 2017 *Medscape* article¹ explored this issue by asking several defense attorneys for advice they would give physicians facing a lawsuit and current practice considerations that reinforce the ability to provide defensible care.

✓ **Don't come across as arrogant in a deposition or trial setting.**

“Juries expect attorneys to be accusatory and sometimes nasty. They give them some leeway. But they expect different behavior from physicians in a case involving a patient whom they may have injured,” said Mark Fogg, COPIC’s General Counsel.

✓ **Physicians who show no concern for an injured patient can appear unempathetic and insensitive.**

“Trials are a form of theater,” said Rick Boothman, chief risk officer at the University of Michigan Health System and a malpractice defense attorney. “What happens in a courtroom often turns on whether the jury likes the defendant doctor. Jurors know that expert witness testimony can be bought, and dueling experts can cancel each other out. But jurors want to like the doctor. That’s sad, because we’re litigating intensively complex medical matters and a doctor’s likability is a pretty iffy threshold.”

✓ **Poor documentation can cause jurors to question the physician’s actions.**

This can include failure to document key instructions, noncompliance, significant signs/symptoms as well as altering past records, noted the article. “A mistake isn’t malpractice,” said Fogg. “You don’t have to be perfect. In most cases I defended, there was some mistake. But if

the documentation evinces a reasonable thought process, we can defend the doctor. The records should show their rationale for treatment, what options they considered, and what they ruled out.”

✓ **EHRs can unintentionally create liability issues.**

“Electronic records don’t always allow doctors to provide a narrative that describes their thought process,” said Fogg. He added that templates can be a problem when physicians are forced to pick the closest thing to what they are looking for or they mistakenly check a wrong box. In addition, overuse of copying and pasting that leads to inaccuracies can undermine credibility. Fogg noted that “Most electronic records have a box where the physician can write a narrative. If you looked at the record 2 or 3 years later, could you reconstruct your thought process? That should be the goal.”

✓ **If you work with allied health professionals, be aware of the liability risks.**

“Doctors are liable for supervising their physician assistants (PAs). In most practices, they’ll set parameters on what the PA should do. For example, every patient complaining of chest pain must be seen by the physician as well. There’s often miscommunication. Perhaps the PA didn’t follow the parameters, and that led to a heart attack that wasn’t diagnosed. Physicians need to be clear about what they expect, and they must supervise appropriately,” said Fogg.

¹ Mark Crane. *Ways to Avoid Sabotaging Your Malpractice Defense-Medscape-Jul 05, 2017*