

Addressing Juror Expectations in Everyday Practice: MEDIC

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As a trial consultant, I am involved in conducting mock trials in all types of cases, including medical malpractice cases. In each case, I am looking for the problems and opportunities to help the team develop the best strategies for the case with the goal of prevailing at trial.

In addition to the case-specific work, I am always listening to the mock jurors and paying careful attention to trends based on what they say about the case and the parties. I pay close attention to what upsets mock jurors, which often centers on how a patient was treated, or how that treatment was communicated to the patient and in the medical record. I share what I learn from these mock jurors with medical professionals and the lawyers trying these types of cases so that they can better understand jurors' expectations.

Lessons may be learned about what a healthcare provider can do proactively to avoid litigation in the first instance.

I've boiled these lessons down into the acronym MEDIC. It's a very simple, hopefully memorable, acronym of the expectations that jurors have in medical malpractice cases.

The "M" is for medicine; "E" for education, "D" for documentation, "I" for informed consent; and "C" for caring. The following breaks down each component of MEDIC.

Medicine

Let's start with medicine. In a medical malpractice case, it seems all things should begin and end with the medicine, i.e. did the medical professional meet the standard of care?

If a case actually gets to trial, whether or not the standard of care was met will be in dispute. There will be an expert on the plaintiff side and an expert on the defense side, which amounts to a "battle of the experts" in the minds of jurors. Additionally, the medicine is complex from a juror's standpoint, so they very often turn to other elements to evaluate the provided care. While the medicine matters, part of the assessment of the medicine for jurors is asking themselves, "what do I think about this medical professional? Do I trust this medical professional? Is this someone that I would want to go to or want my family to go to?" This is where all other expectations come into play, and are the important components

that jurors understand and gravitate toward when answering those questions.

Education

After the medicine, is education. In the context of medical malpractice litigation, education is really about communication - communication to the patient about their medical condition and treatment plan, and communication within a medical practice. The more you inform a patient about the aspects of their medical care, the more likely the patient will become an active participant in that care.

Medical professionals are the experts. They have greater knowledge than a patient. But, jurors want to see that a patient was informed and was given information from the moment they meet with the medical team through their treatment and then their follow-up care. This empowers the patient, which is important to the defense of a medical malpractice case. Jurors want to know that the patient, or the family of the patient, actively participated in his or her care, made informed decisions about that care, and had the opportunity to ask questions of their provider. At trial, an empowered patient reduces jurors' motivations to take care of a plaintiff/patient who has been harmed in some way.

By way of an example, consider a mother who was a very vigilant parent and took her child for all of his well-care visits. She was an active participant in her son's care. When the family filed a lawsuit against the treating pediatrician alleging failure to diagnose, their lawyer attempted to argue that the family trusted this doctor and the doctor breached the plaintiff/patient's trust. But an examination of the record supported the argument that the doctor provided good, conscientious care based upon detailed documentation that included conversations with the parents, observations associated with physical examinations, and numerous referrals to specialists when needed.

Additionally, the mother requested the same doctor every time she brought the child to the office. Based upon all of the evidence, the defendant physician's attorney argued that the mother did indeed trust this doctor, and she was armed with all pertinent information that allowed her to actively participate in her child's care. Further, it was argued that if she felt that there was bad care, she would have gone elsewhere. In this situation, the vigilant, empowered patient is a much better plaintiff for the defense than the patient who doesn't play an active role in his care and who doesn't know what his care entails.

On the other side of the coin, we have seen situations where the patient was not informed to the point of angering the jury. For example, consider a surgical complication case where, in the process of trying to remove a tumor, the surgeon cut into the pancreas. It was not a medical error, but rather a complication of how the tumor was situated. The complication itself did not upset the jurors at the mock trial. Instead, the jurors were upset about the failure to adequately educate the patient about what happened post-surgery.

In this case, jurors believed that the patient did not have a clear understanding of what happened during the surgery or how he should care for and monitor the complication during the recovery process. Jurors were focused on the failed communication, rather than

any failure in the medicine. Good communication and good education can empower a patient/plaintiff. On the other hand, failures in communication can give jurors the motivation to find against the medical provider, even when the jurors are not particularly critical of the medicine.

Documentation

Jurors look for evidence of both communication and medical care in the medical documentation.

Time and time again, documentation is raised as an issue in medical malpractice cases. Jurors often believe if it's not in the record, it did not happen. They have very high expectations for medical documentation. Most are unwilling to take doctors and other medical staff (or anyone) at their word, but do tend to rely heavily on what was documented contemporaneously.

The expectation for clear and thorough documentation includes documenting conversations and information provided to the patient and the patient's family. Without such documentation, whether the patient was well informed is simply a matter of he-said, she-said.

Because documentation is evidence, what is not documented is as important as what is documented. Just as jurors have a difficult time believing something happened if it is not documented, anything that is documented can take on a life of its own at trial.

Such documented evidence can be put up in front of a jury for their study and scrutiny.

This is especially troublesome in cases of inappropriate documentation. Noting opinions in the medical records, particularly unflattering opinions of patients, staff, or other doctors, is likely to be problematic at trial. Factual and objective documentation of the medical care is key.

Thoughtful and thorough documentation can greatly help in the defense of a case. Going back to the example of the mother who was vigilant about her child's care, the documentation in that case not only empowered the mother as an active participant in the eyes of the jury, but it supported the defense position that the doctor provided attentive and conscientious care.

One of the plaintiff's allegations in that case was that the doctor was simply electronically checking boxes as a matter of routine without really doing her job as a doctor. We asked to look at the electronic medical records more closely and when examining the documentation, we found that the doctor had documented numerous conversations with the mother along with medical observations made during her examinations of the infant patient and referrals made to outside specialists.

That documentation not only showed what the doctor did, but also that the doctor took time with her patient, was attentive, and she cared. The documentation really helped the mock

jurors understand what kind of a doctor she is. Was this a doctor who just checks boxes, or was this a doctor who cares? Documentation in that case was critical.

Informed Consent

One specific aspect of communication to which jurors pay very close attention is the informed consent process. Jurors want the patient to be informed about what the medical treatment entails and what to expect, including potential side effects and complications. Remember - an informed patient is an empowered patient.

Establishing that a patient has been properly informed may help with legal defenses as well as with portraying the doctor and staff as educating and caring providers.

Establishing good informed consent is abundantly easier if the process is well documented. A thorough note in the chart or a signed consent form can make all the difference in a medical malpractice case. Going a step further, jurors want to know that the information given was understandable to the patient and that the patient had the opportunity to ask questions and discuss it with the medical team. A medical team that takes the time to explain the medicine to the patient demonstrates that they care.

Caring

When evaluating what happened in a medical malpractice case, jurors are looking for evidence that will help them answer the ultimate question - did this medical professional care? The vast majority of jurors believe that medical professionals go into the medical field to help and heal people because they care.

From the moment they met the patient, through the entire course of treatment, jurors are looking for evidence that the medical professional cared about the patient. If the situation results in litigation, jurors will also be evaluating how caring the medical professional is based on how they come across in their deposition, as well as on the witness stand when they are testifying in court. Even the manner in which the medical professional handles him/herself in and around the courthouse factors into whether the jurors believe this is a caring medical professional.

Jurors take all the information that they can gather about that professional and determine, "is this someone I would want caring for me? Is this someone I would want caring for my family member?"

Jurors also evaluate how caring the medical professional is based on how they respond to adverse outcomes. A provider who promptly and honestly discusses the adverse event with the patient and family, shows empathy for the difficult situation, takes appropriate action to deal with the situation, and keeps the family informed is viewed as caring by jurors. Contrast that with a provider who was evasive and defensive in the event of an adverse outcome. Such provider is not viewed favorably and, in fact, can incite anger in jurors. Anger, in turn, is what can drive and motivate jurors to find against the defendant

provider. Jurors understand that there can be bad outcomes associated with medical care, but they are unforgiving when a healthcare professional responds in an uncaring manner.

At the end of the day, the medicine is important but will be debated by the experts. Jurors do not know the medicine, but they do know people and they want to know that the doctor and the staff cared about the patient in the case. If the treatment resulted in a lawsuit, obviously there was a negative outcome of some sort. The difference between a good, bad and an ugly verdict can come down to how the jurors feel about the patient/plaintiff's care. Following the principles outlined in MEDIC will help ensure that jurors will have a positive feeling about the patient's care.

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