You've been sued. There's help

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Litigation "retreats" help physicians cope with lawsuits, and offer advice on how to be your own best witness.

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When a medical malpractice insurance company slapped anesthesiologist Gary A. Fletcher of Medford, OR, with a $10 million lawsuit, his emotions went into overdrive. "I developed hypertension and experienced frequent PVCs," he says. "I also felt guilty, as if I had failed in some way."

Fletcher's suit was unusual—the plaintiff was an insurance company rather than a patient—but his anguish mirrored that of other physicians whose lives have been disrupted by litigation.

Because distraught doctors rarely make credible defense witnesses, and because even poised physicians can unravel during a grueling deposition, it's in a malpractice insurer's best interests to prepare doctor-defendants as thoroughly as possible. That's why two providers of medical liability coverage—the Cooperative of American Physicians-Mutual Protection Trust (CAP-MPT) in California and Northwest Physicians Mutual (NPM) in Oregon—invite policyholders who have been sued to daylong seminars called litigation education retreats. The companies hold several joint and solo retreats annually; each is limited to about 30 doctors and their spouses.

Fletcher, an NPM policyholder, called the retreat that he attended "very informative," and credits it with helping him weather the litigation ordeal. (His case ended with a whimper—the company that sued him settled for a small fraction of the millions it had tried to collect.)

The retreats were developed in the early 1990s by family practitioner Robert E. Taylor, then NPM's medical director. Waldene Drake, CAP-MPT's vice president of risk management, describes a typical retreat: "A psychiatrist discusses the emotions a lawsuit elicits and coping mechanisms the physician can use to deal with them, an attorney outlines the litigation process, and a trial consultant instructs doctors on how to present themselves during deposition and trial. Finally, each doctor goes through a mock deposition."

To maintain confidentiality and avoid stepping into legal mine fields, participants are instructed not to discuss specifics of their cases.

Getting a grip when the rug's been pulled out
If you've been named in a malpractice suit, you're probably suffering from litigation stress syndrome. Symptoms include anger, fear, frustration, anxiety, reduced concentration, and insomnia.

"We try to take away some of the shame and the sense of, 'What's wrong with me that I've been sued?'" says Salem, OR, psychiatrist Ronald L. Hofeldt, who gives the retreat's opening lecture. "And we try to normalize the process," he adds, "by telling participants how the litigation game is played, its rules, and its pitfalls."

In his presentation, Hofeldt talks about how lawsuits can wreak havoc with a doctor's self image, and tap into fears that all the years of hard work and dedication are going to be washed away in a flood of stinging allegations. "The culture of medicine propagates the belief that doctors should be perfect," he says.

Physicians who've been sued display a set of fears that Hofeldt calls "the 5 Rs." That is, they worry about their Reputation, Referrals, Recredentialing, Reinsurability, and Remuneration. Hofeldt encourages retreat participants to acknowledge these fears—to themselves, family members, and colleagues. "Doctors in litigation often withdraw from social and professional activities," he says. "Instead of taking elevators, they take back stairs. They get to meetings late and leave early. They feel that the outside world is judging them harshly, so they avoid interaction with others."

Other common reactions to a suit, Hofeldt says, include:

• Denial—the sense that this can't be happening to you.

• Avoidance—cutting back on the procedures you do to lessen the possibility of another suit. Hofeldt knows of an orthopedist who refused to operate on left knees after being sued for a left-knee procedure.

• Overwork—seeing more patients in an effort to show yourself and everyone else that you haven't lost your touch. "During this stressful time," Hofeldt says, "we advise physicians to do what they tell their patients to do: Slow down, get perspective, connect with family, don't drink or overuse chemicals."

• Self-doubt—thinking you should have done something differently, acted sooner, done more research, gotten more CME credits, gone to more conferences, spent more time with patients.

"A malpractice suit isn't about being a bad doctor," Hofeldt emphasizes. "It's about a bad event." He mentions a retreat participant who told him that the meeting had been terrific—not just because of the content, but because he looked around the room and saw that he was surrounded by some of the best doctors in town.

**It helps to know what to expect**

"We find that the more a physician understands litigation, the better he does in court," says Waldene Drake.

That's the message of the retreat's second hour, during which a defense attorney talks about the legal process and the attorney-client relationship.

"The most important thing attorneys need is candor," Drake notes. "Physician attendees are encouraged to share everything about the case—favorable and unfavorable—so their attorney can be prepared to address all issues."

And don't underestimate the need for your own advance work. "Many physicians feel that they can just walk into their deposition and reel off facts about the case," Drake says. "But they don't take into account the passage of time and the fallibility of human memory. At deposition, even a small misstatement can cost you because anything you say can be read verbatim or shown on videotape to a jury. You don't want to seem uncertain, make an error, or be caught off guard."

Woe, especially, to the doctor who says one thing at deposition and another at trial. Efforts to explain inconsistencies or to "clarify" points made earlier are usually about as effective as trying to unscramble an
egg, Drake says.

You don’t want to do anything during—or before—the trial that makes you look underhanded, Drake continues. "Our attorneys emphasize that one of the most common impulses doctors who’ve been sued have is to alter the medical record. Restrain the urge to do this, even if you’re just trying to add information that you forgot to write earlier."

**It’s not what you say, it’s how you say it**

Being a compassionate, talented physician is one thing. Projecting that to a plaintiff’s attorney or to a jury is another. That’s where Shelley Spiecker comes in. A senior litigation consultant with Persuasion Strategies, a service of the law firm of Holland & Hart in Denver, Spiecker advises retreat participants on how to come across well while in the litigation hot seat.

"Communication research shows that a message is transmitted in three channels: visual, verbal, and vocal," says Spiecker, who has a doctorate in legal communications. "The visual channel, which encompasses body language, posture, facial expressions, and gestures, accounts for about 50 percent of how a message is perceived. The vocal channel—things like pitch, tone of voice, speed, volume, and use of pauses—accounts for approximately 30 percent. The verbal channel—what is actually said—accounts for only 20 percent. So how you say something usually carries more weight than what you say."

During her presentation, Spiecker focuses on the visual and vocal channels. Among the tips she offers:

- Make eye contact throughout the entire answer. If the deposition is being taped, make eye contact with the camera, not the plaintiff’s attorney. "Then, when the tape is played back to a jury, you'll look like you’re making eye contact with the jurors. Otherwise, it seems as if you’re looking to the side—and perhaps getting cues from your attorney," Spiecker says.

- Try to control your nervous habits. "When we’re nervous we speak too quickly," she notes. "We fidget with our fingers. Women often play with their hair. Men play with a ring or watch. We try to close ourselves off from others by crossing our arms in front of our body, or by clapping and unclapping our hands. All these gestures make us look rigid, scared, and untruthful."

- Don’t slouch. If you sit forward and lean on the deposition table you'll look active, engaged, and interested.

- Dress professionally but comfortably. "I usually recommend that men wear a jacket and tie," Spiecker says, "unless they practice in a community where casual dress is commonplace. A doctor does himself no good if he spends an entire deposition tugging at a buttoned-up shirt and tie."

- Pause before answering a question. "A deponent who jumps in and replies too quickly can come across as abrupt and defensive," she observes. "Pausing just for a couple of seconds makes you look more thoughtful and conscientious."

**Mock deposition: prepping for the real thing**

In the final part of litigation retreats, each participant takes a turn responding to a lawyer’s questions about a hypothetical case. These exercises highlight the pitfalls of testifying and serve as a springboard for more in-depth instruction on deponents’ rights.

"Few deponents realize that they can request as many breaks as they need, or that they can ask that the room temperature be adjusted," Spiecker says. "A doctor may be sweating simply because it’s hot, but on the videotape that the jury sees he'll look stressed out."

Physician deponents are also permitted to have their chart notes on hand, and to refer to them as often as needed. "This could be a patient a doctor saw several years ago. Remembering details can be very difficult,"
Spiecker says. "I recommend that physicians look at the record and any documentation they might have before answering a question."

The lawyers who oversee the mock depositions warn doctors to stifle any instinct to argue the case. "Limit your answer to the scope of the question," Waldene Drake advises.

"One of the things the plaintiff's attorney is doing at a deposition is sizing you up to see what you're going to look like on the witness stand," Drake continues. "If you come across as caring, competent, knowledgeable about the case, and very clear about your medical care and the rationale that you had for giving it, you're probably going to win.

"In fact, the better you do at deposition, the greater the likelihood that the plaintiff's attorney will drop the case, or settle out of court for much less money than he originally expected."