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Behind the White Coat: The Impact of Litigation on Physicians

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I. Introduction

99. When asked to describe a hero or list off examples of heroes, there are varying responses, but more often than not, physicians find themselves on that list. Admittedly, I cannot say the same for attorneys. Physicians have it all: respect, education, wealth, and hero status. Sounds nice, right? The issue with this perception is when physicians are faced with a claim of medical malpractice, many lawyers, both defense and plaintiff, tend to forget something important: physicians are people too.

100. This means physicians have feelings, they have flaws, and this lawsuit, whether they admit it or not, is hard on them. In order to advocate most effectively for our physician clients, it becomes less about the medicine, and really more about the physician, or the person, one is representing. Like all people, there are varying types of physicians that will need to be defended. I do not mean differing specialty types, such as, gastroenterologists, surgeons, emergency room physicians, etc. Rather, I mean personality types in stressful situations, such as sad, angry, and the ones you need to keep your eyes on the most, the ones who try to act like the suit does not bother them. Understanding

1 Brittany Hudson, Esq. currently specializes in medical malpractice at La Cava Jacobson & Goodis. Attorney Hudson received her undergraduate degree from the University of South Florida in 2015 and her law degree from Stetson College of Law in 2019. While at Stetson, she was a member of the Trial Team and competed at the National Trial Competition in Tuscaloosa, Alabama, and was also an Honor Roll recipient. Additionally, Attorney Hudson served as a Research Assistant to Professor Teresa Radwan, pro bono chair of the Florida Association of Women Lawyers at Stetson, and served on the council for the National Women's Law Student Organization. During her law school summers, Brittany was a judicial intern for the 13th Judicial Circuit, served as a Guardian Ad Litem for Hillsborough and Pinellas County, and clerked at Goodis Thompson & Miller.

physicians as people first and providers second is key in aiding physicians through the litigation process and beginning to understand the toll a medical malpractice case plays on the physician.

II. The Legal World is Foreign

101. Physician clients are accomplished, intelligent, and well-respected in their particular field: medicine. This impression, though, results in the misconception that these academic savants must also be intelligent in all other areas, including the law. This leads to the presumption that these physician clients immediately understand the ins and outs of Florida Statute § 766, the section that covers medical malpractice.[2] Unfortunately, when lawyers assume their physician clients understand the medical malpractice process, physicians are normally too afraid to admit that they do not know one thing about the law or a medical malpractice case, resulting in increasing fear and anxiety.

102. It certainly came as a surprise to learn that most practicing physicians have little to no exposure to the idea of or the possibility of a medical malpractice lawsuit. Some physicians recall only a single presentation discussing legal implications during their residency program. This is a sad and frightening realization, especially here in Florida, as Florida is arguably one of the most litigious states for physicians to practice in. As stated in a recent American Medical Association (AMA) report it is "just a matter of time" before a physician is sued. The AMA reports that in 2022, 31.2 percent of physicians had been sued during their careers so far.[3]

103. Physicians' knowledge of medical malpractice is generally limited to the basic understanding that either they or their employer pays for the required insurance limits annually. However, until a physician is faced with a claim, there is no education focused on litigation and physicians. This is why the role of a physician lawyer is so important — that lawyer is really tasked with giving this physician, who may have been practicing for twenty years, a crash course into arguably one of the most important aspects of their career — dealing with an alleged malpractice claim.

104. For instance, a particular client had been practicing for over thirty years and had just been named in a medical malpractice lawsuit. He shared that he had had a prior lawsuit a few years into his practice and that case ended in a settlement. During our initial phone call, I asked whether he would like a refresher on the medical malpractice scheme in Florida and an overview of how this "process" works. In response, he

2 Fla. Stat. § 766 (2024).

3 José R. Guardado, *Policy Research Perspectives: Medical Liability Claims Frequency Among U.S. Physicians*, AM. MED. ASSOC., at 2 (2023).

confessed that he did want a "refresher," and that it would actually be his first understanding of the process — he explained that he had been too proud those years ago to ask his lawyer to speak in terms he could understand.

105. Understanding that physicians have no working knowledge of the law, especially medical malpractice lawsuits, while it sounds basic, is one of the most important starting points when picking up a new file with a new client. This acknowledgment allows the physician to rid themselves of the presumption that society places on them, that they are "all-knowing," and allow them, instead, to serve in the role they are — client and Defendant.

III. Talking About Litigation is Taboo

106. Defense medical malpractice attorneys do not have one case file, we have many, and we talk about our cases regularly within our firm and with opposing counsel. The cases are interesting and complex, and our days are filled with depositions, research, and motions focusing on physician responsibilities and medical procedures. However, this is not the end of an advocator's role. This describes the attorney portion of the job, however, the entire title of our role is "attorney and counselor at law." The counselor portion, unfortunately, is often overlooked but is truly the most important aspect of what physician lawyers do. The reason this aspect is overlooked is because it is the hardest, least predictable, and sometimes the most uncomfortable aspect of what defense medical malpractice lawyers do. Sure, litigation is contentious; certain filings and deposition testimony can be surprising but that is our training. Law school teaches us how to respond to "legal" things — we research, think, write, and argue our response. But a person's feelings, emotions, and fear? Law school does not give any road-map to the literal hand-holding that is needed to best represent physician clients. And let's be honest, lawyers are not necessarily known for their warm and fuzzy nature. It would be beneficial for defense attorneys to learn a page from the physician playbook and focus on our bedside manner.

107. When a physician is sued, they are told not to speak with anyone about the case, as those conversations could be discoverable based on what occurs in the conversation. Then, a physician is told that they are a Defendant in a medical malpractice case and that this process can be expected to last two to three years, maybe longer. Defense lawyers are not only there to defend the case, but also to counsel these clients through the process and assist them in processing their emotions. Many physicians view a lawsuit as a scarlet letter and would never dream of sharing such intimate shame with their coworkers. This shame results in physicians commonly feeling secluded, depressed, and anxious. In fact, the common traumatic impact of litigation on physicians has resulted in the coining of the term "medical malpractice stress syndrome," (MMSS), a form of

post-traumatic stress disorder.[4] These conditions do not result in the type of client that does best during deposition or on the stand at trial. Having an open dialogue with physician clients not only builds trust, but physicians will be transparent with their attorneys, providing an emotional outlet to process their feelings and explain the impact that litigation is having on them.

108. The idea of a lawsuit being a forbidden topic in medicine is something that physician clients mention often. Some physician groups, insurance carriers, and hospital organizations have tried to institute essentially a physician support buddy to be a tool to your client during litigation. However, many times, while good intentioned, it is not taken advantage of due to scheduling between your client and the "buddy" or just a general lack of initiative on behalf of that "buddy", or even your client. A sued physician is uncomfortable and out of their element. Therefore, they are not going to go out of their way to talk to a stranger about an embarrassment to their career. While not all physician support programs are this grim, most lack the funding and interest needed to be maintained in the way physician clients need them to be. This is why the counselor role of the physician attorney cannot be understated.

109. I recently had a client who was still in her residency and was named in a medical malpractice matter. The claim dealt with a surgery where both she and her attending physician were involved. She knew that neither she nor her attending practiced below the standard of care but the thought of a lawsuit, especially this early in her career, was crippling. Her attending had a long career behind him and viewed the case differently than she, so she was left alone to stew in her own misery. At first, she was, by definition, the worst client. She was rude, unresponsive, and unwilling to take any advice. However, after many weeks, much persistence, and taking the time to understand her emotions, her attitude and her perception, she felt comfortable enough to describe these reactions. She explained that the litigation process made her feel like she was left on an island of castaways who had been sued for malpractice holding nothing but the Complaint. None of the other castaways — physicians with lawsuits — would even speak to her. Once she understood her initial reaction to litigation, she became a whole new version of herself and she was able to successfully give her deposition and confidently defend her care and treatment. Most importantly, this future doctor was able to view herself as something other than a castaway.

4 Zachary R. Paterick *et al.*, *Medical Malpractice Stress Syndrome: A "Forme Fruste" of Post-traumatic Stress Disorder*, GREENBRANCH PUBL'G (February 2017).

IV. Misconception That a Lawsuit Means a Bad Doctor

110. When a Notice of Intent is served or a Complaint is filed, physician clients have varying reactions to the idea of a medical malpractice lawsuit. Many exhibit anger and disgust, others cry and are visibly shaken. These emotions stem from the resounding belief that a lawsuit equals a bad doctor. Yet, getting sued is not necessarily "indicative of medical error;" statistics from 2016 to 2018 show that 65 percent of the medical malpractice claims that closed were dropped, dismissed or withdrawn. In fact, statistics from the same time range also demonstrate that 89 percent of claims decided by a trial verdict were won by the defendant.[5] What many physicians fail to see, what may be obvious to most, is that most lawsuits are litigated because there is the existence of a disagreement on the very topic that is the lawsuit. In other words, a lawsuit being filed does not mean that the physician was bad, negligent, or wrong — instead, it simply means there is a varying view on the patient care in this particular case and as the defense, we are going to explain why Plaintiff's view is wrong.

111. Even with this explanation, physicians struggle to rid themselves of the idea that they have caused harm, and this results in physicians changing their practice — but not for the better. For example, I represented a client who overhead an all hands on deck call for assistance needed in the operating room. There was a postpartum patient who had lost a significant amount of blood and an operation needed to be performed now to find the source of the bleeding. My client immediately asked that his patients, who had routine procedures planned, be rescheduled for later in the day so that he could assist with the emergency. My client assisted in a lifesaving procedure for over five hours however upon transfer to the ICU, the woman, a young wife and mother of four, including a newborn, died. My client was sued, and the case was ultimately settled due to downside risks associated with the number of claimants and the potential for an excess verdict should the Plaintiff prevail at trial. The settlement was a business decision, a good one, and had no regard to the merits. Following the settlement, the client indicated that he would not be putting himself in this situation again, and that he would let others respond to calls for all hands on deck moving forward.

112. Many individuals think that lawsuits will teach physicians to "do better," but those people overlook the fact that this may stop physicians from acting in a time of need or second-guessing themselves to shield themselves from potential legal exposure. Lawsuits therefore incentivize the practice of "defensive medicine," which occurs when doctors form medical decisions based on the fear of litigation and what the standard

5 José R. Guardado, *Policy Research Perspectives: Medical Liability Claims Frequency Among U.S. Physicians*, AM. MED. ASSOC. (2023).

medical approach would be "rather than on expected patient outcomes."[6] In reality, medical emergencies and health issues can just happen; and sometimes with no one to blame, doctors become dragged into litigation.

113. The crippling feeling associated with thinking someone has called you a bad doctor results in scary truths. A physician is left to question their choice to pursue a medical career. Unfortunately, this phenomenon has resulted in physician substance abuse and physician suicide.[7]

114. These topics do not get enough attention but are rampant throughout the medical community. We expect the providers to continue through their day-to-day practice — seeing patients and saving lives. We ask them to continue to be a hero while the lawsuit sits in the back of their mind, while they are told they will need to sit to answer rapid-fire questions from the accusing attorney — questions about a patient they treated years ago and whose life they could not save. This expectation from physicians is unreasonable and understanding that is the first step in understanding physician clients better.

V. The Reality for Physicians Who Find Themselves in Litigation

115. A common misconception is that a settlement of a medical malpractice claim is an admission of guilt or wrongdoing. This belief could not be further from the truth, which is why settlement is the source of most confusion among physician defendants. Attorneys can improve their advocacy by thoroughly explaining the benefits and downfalls of settlements.

116. In reality, and what most physicians fail to appreciate, is that litigating a medical malpractice claim solely on its merits is not the best way to analyze a case. Most physicians in Florida hold medical malpractice policies that include consent provisions, meaning that their insurance carrier cannot make any settlement offers without written consent by the physician. To physicians these consent provisions seem simple enough; if a physician did nothing wrong, then they should never consent to settling; however, this is not the end of the analysis.

117. While a physician's failure to consent to settlement allows them the control to ensure they get their day in court, this also exposes them to a scary financial reality — responsibility for an excess verdict, or a verdict that is above and beyond their policy

6 Eric D. Katz, *Defensive Medicine: A Case and Review of Its Status and Possible Solutions*, CLINICAL PRACTICE AND CASES IN EMERGENCY MED. (October 2019).

7 Tait D. Shanafelt, *Suicidal Ideation and Attitudes Regarding Help Seeking in U.S. Physicians Relative to the U.S. Working Population*, 96.8 MAYO CLINIC PROCEEDINGS (August 2021).

limits. While many physicians earn a nice living, the verdicts in Florida, especially the "nuclear" verdicts, have the potential to disseminate even the wealthiest. For example, I had a client who had a $250,000 medical malpractice policy. It was alleged that she misread a CT scan and her misread led to the death of the patient. The patient was young, there was a large lien for past medical bills, he was a high-income earner, he had three children who were minors, and a wife. In short, the damages that would be presented at trial for the jury's consideration would far exceed $250,000. While my client maintained that she interpreted the scan correctly, we ensured that she was aware of the downside risk associated with rolling the dice with the Jury.

118. So where does this leave physicians? The choice that is put before them is either ensuring that the defense of their care and treatment continues because they did everything right for this patient or consenting to ensure financial stability and placing the decision-making in the hands of the insurance carrier. This decision results in an internal conflict for the physician — either admit I am a "bad physician" or risk my financial future by hoping that six jurors find in my favor. This decision truly does not have a "right" answer.

119. One particular client struggled with this decision for many years over the course of his litigation. A case was brought against him involving injury to the patient's lower extremity following a surgery he performed. The prior records for this particular patient supported that the case should be defended, and the evidence could show the jury that the patient's credibility should be questioned. The case, however, was not perfect and had documentation issues that could negatively impact the way a Jury viewed the physician. For many years of litigation, the physician was unable to come to terms with the idea that a Jury could find against him — he became immersed in the litigation process and obsessed with proving that this patient was a liar. This physician would write emails and call at all hours expressing his absolute refusal to settle "ever!" However, the Court ordered that the matter be referred to non-binding arbitration prior to trial. At arbitration, the evidence was presented from both sides, and the arbitrator ultimately entered an award; the award was for the Plaintiff. This award sent almost visible shock waves through the client as it was his first realization that the case could possibly be lost at trial. Following the award, the client reconsidered his position on settlement and became open to the idea. Even if a physician client has a strong case and prevails at trial, the impact of dealing with a medical malpractice claim "is a losing proposition. . . the losses of time, reputation, and serenity are for the physician alone to bear."[8]

8 Joseph Bernstein, *Malpractice: Problems and Solutions*, 471.3 CLINICAL ORTHOPEDICS & RELATED RESEARCH (January 2013).

VI. A Lawsuit is Not the Only Concern

120. In addition to the pending lawsuit, if the physician did not have enough to deal with already, their care can also be the subject of an investigation by the Department of Health. This investigation is a thorough inquiry into the care and treatment rendered by the physician. The Department of Health can investigate claims in a number of ways including pursuant to Fla. Stat. § 766.102(2)(d) which provides that:

121. "Following the initiation of a suit alleging medical negligence with a court of competent jurisdiction, and service of the complaint upon a prospective defendant, the claimant shall provide a copy of the complaint to the Department of Health and, if the complaint involves a facility licensed under chapter 395, the Agency for Health Care Administration. The requirement of providing the complaint to the Department of Health or the Agency for Health Care Administration does not impair the claimant's legal rights or ability to seek relief for his or her claim. The Department of Health or the Agency for Health Care Administration shall review each incident that is the subject of the complaint and determine whether it involved conduct by a licensee which is potentially subject to disciplinary action, in which case, for a licensed health care practitioner, s. 456.073 applies and, for a licensed facility, part I of chapter 395 applies."[9]

122. Many clients deal with both a civil suit and an administrative action simultaneously, and admittingly, I do not know how they do it. I had a client who ran a very successful practice and a disgruntled patient filed suit against her alleging that she improperly prescribed a certain medication. The records disproved the claims at issue and the case was being actively defended. However, in the midst of the lawsuit she was also put on notice of an investigation by the Department of Health pertaining to the same care and treatment. The story did not end there, she was also going through a divorce and her mother had recently died. Not only was she balancing the turmoil associated with a failed marriage and the loss of a key family member, but both the patient and the Department of Health, simultaneously, were questioning whether she was a "good doctor." We spent hours talking over the life of her case, and really none of the time was spent on the medicine, instead, the time was spent discussing her emotional well-being and the toll being a physician in litigation had placed on her in addition to balancing the pitfalls of just being a person.

VII. Conclusion

123. The takeaway from this?

9 Fla. Stat. § 766.102(2)(d) (2024).

124. It is true; physicians are heroes, and their capes are white coats. However, when it comes to physicians and medical malpractice lawsuits, the cape is taken off. What is left is a person who has emotions and who is processing, to the very best of their ability, the idea that someone has questioned their selfless dedication to patient care. While there are always some bad apples, understanding what physicians are going through will make litigation more palatable and less anxiety-ridden for the overwhelming majority of physician defendants, who truly are heroes.