



## ‘Why Can’t We All Get Along?’

■ JOHN SHUFELDT, MD, JD, MBA, FACEP

It’s not often you get to quote the late Rodney King, but there it is. Mr. King’s quote was made famous during the Los Angeles riots, which were arguably incited by the acquittal of the police officers accused of excessive force during Mr. King’s arrest.

In 1860, a book review on medico-legal jurisprudence argued that “law and medicine had evolved into mutually incompatible professions.”<sup>1</sup> One hundred and sixty-two years later, it appears to only have gotten worse and we, too, are still not getting along.

In 1878 a physician named Eugene Sanger wrote that medical malpractice lawyers “follow us as the shark does the emigrant ship.”<sup>2</sup> More than 100 years later, the president of the Association of American Medical Colleges reportedly told a graduating medical school class that “We’re swimming in shark infested waters where the sharks are lawyers.” Finally, in 2009, *The Wall Street Journal* published an op-ed commentary by a physician calling lawyers, “sharks” and “sleazy sneaks with shady billing practices.”<sup>3</sup>

Clearly, animus exists between the two professions and I suspect that physician animosity directed at attorneys trumps the converse. As someone who goes both ways (no, not in the Elton John sense) I believe I may be in a good position to opine upon what we can do to improve this state of mutual loathing.

First, does the state of affairs need to be improved? I believe it does. Lawyers and doctors comprise two of the most learned (and possibly well-respected) professions today. Both have similar aspirations — to help those in need of assistance. Both professions abide by ethical standards and are subject to a standard-of-care analysis if a suspected breach occurs.

What is the basis of the animosity? It is probably multifactorial. Here are some of the reasons that I believe led to it. Physicians and lawyers seek the “truth” in different ways using different standards. In health care the truth is defined as clinically proven, reproducible outcomes using rigorous scien-

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tific methodology performed in the best interest of the patient’s mental and physical well-being.

Conversely, physicians believe that “truth” in the legal sense is highly subjective and is determined using whatever means and whichever outcome—fair or unfair, the judge or jury will believe. When I ask for specifics about why physicians hate the legal system, I always hear things like “look at OJ” or “what about Casey Anthony” or, “Did you hear about the woman who won like a zillion dollars from McDonalds after she spilled coffee on herself?”

Given the above perceptions about the integrity of the legal process, physicians fear medical malpractice suits. Because, generally speaking, an attorney is usually the person who files the suit, physicians have come to loathe the entire legal profession even if only a small percentage of attorneys engage in medical malpractice law on the plaintiff side.

Maybe we have good reason to loathe attorneys. Medical malpractice suits affect medical providers very deeply. They can damage our reputations, place personal assets at risk, drive up insurance rates, and be a contributing factor for depression, thoughts of suicide, and substance abuse.

I know of more than a few providers who have never psychologically recovered after being named in a medical malpractice suit. It affected all aspects of their life, and no matter what was said, they took the suit as a personal affront on their integrity, intelligence, medical skills, and compassion. The plaintiff’s attorney became the object of continual scorn and ridicule and was by all measures “evil incarnate.”

A study published in *The New England Journal of Medicine* demonstrated “[b]y the age of 65 years, 75% of physicians in low-risk specialties and 99% of those in high-risk specialties



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were projected to face a claim. The projected career risk of making an indemnity payment was also large. Roughly 5% of physicians in low-risk specialties and 33% in high-risk specialties were projected to make their first indemnity payment by the age of 45 years; by the age of 65 years, the risks had increased to 19% and 71%, respectively.<sup>4</sup>

I can tell you from my own experience that physicians view medical malpractice suits very differently than attorneys and with statistics like these, it is no wonder attorneys for the last 160 years have been our nemesis. Robert Gillette in his article entitled “Malpractice, Why Physicians and Lawyers Differ,” had this to say: “Lawyers, I find, appear to look upon a lawsuit as the medical professional does a case of chicken pox—unpleasant perhaps, but no cause for shame and certainly not the end of the world. To an attorney, a malpractice action means another client to be listened to and another set of papers to be filed at the courthouse.”<sup>5</sup>

It also means going at risk for the costs associated with proffering a case. These costs generally are in excess of \$70,000, which comes out of the attorney’s pocket if the plaintiff does not prevail. Despite the costs and the tediousness of medical malpractice cases, filing suits is simply an attorney’s job. And they approach their job, much as we do—once they decide to accept a case they are *all in*. To be anything less would be legal malpractice.

The good news for us is that the number of medical malpractice suit filings continues to drop year over year. In Phoenix, I am told that this number has decreased by more than 40% year over year. It is to the point where even the defense lawyers are becoming more vocal about their lack of work. Why is this? Are we getting that good? Maybe. More likely is that the cost to bring a case forward has become so burdensome that most plaintiff attorneys are only taking ones they believe are “slam dunks” (a number of plaintiff attorneys have told me that they typically only take 2 to 3 cases out of the 100 that present to their office).

Why is it important to get along? From a purely business standpoint we should learn to lower the swords to protect our own pocketbooks. It does little good to rail against a profession which, during our rapidly changing health care environment, will play an integral role in our own wellbeing. The main reason is that physicians are losing their autonomy. We practice in a highly regulated environment which will only become more intrusive. Both doctors and lawyers should have an interest in protecting what is left of our autonomy to protect and improve the stature of both professions. In addition, we need each other. We need attorneys to help us navigate our highly regulated environment and lawyers need us to provide care. Not to mention the fact that attorneys are helping us clean up our own ranks. I have seen a number of instances where physicians practicing well below the standard were allowed to continue to

harm patients until a suit exposed how poorly they performed. Finally, as doctors and lawyers duke it out who, other than the insurance companies, really wins?

Here are a few things to wrap your head around regarding the relationship between the two professions.

1. Plaintiff lawyers who accept medical malpractice cases do not undertake their decisions lightly. They know they will have to spend hundreds of hours and thousands of dollars for the possibility of being paid on a contingency basis. Typical costs for bringing a case up to trial are in excess of \$70,000.
2. A plaintiff’s attorney will pursue a case with the same zeal-ousness we demonstrate when taking care of a sick patient. To do anything less would be legal malpractice.
3. As a profession we have not always done a great job of policing ourselves. If for no other reason, the threat of medical malpractice has helped us raise the bar.
4. Being sued is a cost of doing business. Sometimes bad things happen to patients and when they do, a patient deserves compensation. I have had close friends forever impaired from negligent acts that fell below the standard of care. As much as I hate to say it, I was thrilled when they received a judgment that helped them pay for long-term care.
5. Chances are you will be named in a lawsuit. When it happens, be prepared mentally. It is not career ending. It is not life altering. It is a cost of doing what we do. That is what insurance is for.
6. Physicians prevail most of the time and very few suits even make it to court. Most suits are dropped during discovery or settled.
7. Ways to avoid malpractice are to be as compassionate and as communicative as possible when dealing with patients. Give and document informed consent discussions with patients. Chart pertinent negatives particularly when their absence determines the path you take.
8. Apologize without admitting guilt and refund money when indicated.
9. Get to know some attorneys. I have found them to be a lot like us. Generally well meaning, thoughtful, and caring.
10. Act as an expert witness. You will get a birds-eye view of the legal profession and learn a lot of medicine while doing it.
11. Finally, remember Rodney King—at the end of the day, even in LA, we did all finally get along. ■

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4. Jena AB, Seabury S, Lakdawalla D, Chanda A. Malpractice risk according to physician specialty. *N Engl J Med*. 2011;365(7):629-636.
5. Gillette R. Malpractice: Why physicians and lawyers differ. *J Legal Med*. October 1976.