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REDUCE THE STRESS OF LITIGATION

Summary: The threat of a malpractice suit, other litigation, or even an ethics hearing, is a major source of stress for many dentists. Much of this stress comes from a lack of understanding of the litigation process itself. Here's an explanation of how the process works.

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The famous French writer Voltaire once wrote, "I was never ruined but twice -- once when I lost a lawsuit and once when I won one."

Although these words were written over 200 years ago, they still ring very true today. Litigation is troublesome, at times devastating, and clearly represents a major source of stress. This is even more so in the case of dentists and other health care providers, who constantly live under the threat of a malpractice or other lawsuit.

The mere threat of a lawsuit, or even a generalized sense of anxiety stemming from the chance that a lawsuit may someday occur, can and does have a powerful emotional impact on dentists. There are so many negative "what if" scenarios, that at times it is hard to keep things in perspective and remain upbeat. In any discussion about dentists' health and well-being, the subject of litigation-induced stress always falls near the top of the list.

So many people -- professionals and lay persons alike -- lack a basic understanding of the litigation process. This in itself causes stress. But the litigation process becomes much less intimidating when one better understands the rules of the game. No doubt you've heard the expression, "knowledge is power." It's true. And when you gain more knowledge about how litigation works, you arm yourself with the power to deal with the unavoidable stress that the results from a litigious situation, or the threat of one.

Here, then, is how the litigation process works.

First, all lawsuits begin with the filing of a complaint. In Michigan, though, a health care practitioner cannot be sued for malpractice until the plaintiff gives a written "notice of intent" to the practitioner. A malpractice lawsuit cannot be filed until 182 days after the notice of intent is given. This 182-day waiting period affords the parties an opportunity to investigate the validity of the claim and to explore possible settlement before the filing of an actual complaint.

A malpractice complaint must also include an "affidavit of merit," attesting to the merits of the plaintiff's claim. The affidavit of merit must be signed under oath by a licensed health care professional of the same specialty as the defendant and who meets the other requirements of an expert witness under Michigan's expert witness statute.

After a complaint is filed, the defendant is required to answer the allegations contained in the complaint within 21 days. If a defendant fails to file an answer within the required time, a default judgment can be entered against the defendant.

Once the answer to the complaint has been filed, the discovery phase begins. During discovery, the parties can seek information and documents from each other to support their claims and defenses. Methods of discovery include written questions, called “interrogatories,” requests for documents, and depositions.

In a deposition, a party must answer questions from the opposing lawyer under oath. The questions and answers are recorded by a stenographer. Depositions are crucial to the discovery process because they present the only opportunity for a party to cross-examine his opponent before trial and test their claims or defenses. Once a person is deposed, he cannot change his testimony later at trial without damaging his credibility.

The vast majority of time and money spent in a lawsuit is spent during discovery. The discovery phase typically lasts between two to seven months, but is often extended, depending on the circumstances. Disputes involving discovery are resolved by the court through the filing of motions.

In a malpractice case, the parties are required to retain expert witnesses to testify about the proper standard of care and whether the defendant breached that standard of care. Depositions of the experts are also taken during the discovery phase. Often, the depositions are videotaped and replayed for the jury at the trial in place of the expert’s live testimony.

Upon the conclusion of discovery, all civil cases are scheduled for case evaluation. Case evaluation is a process by which each case is evaluated by a panel of three practicing attorneys. The panel, after reviewing briefs submitted by the parties and hearing short arguments from the attorneys, renders an award to the plaintiff. The award represents the amount the panel believes would be an appropriate settlement, taking into consideration the available evidence, the credibility of the witnesses, and the legal merits of the claims and defenses, among other things.

Neither party is obligated to accept the case evaluation award, but a party who rejects it may be required to pay the opposing party’s actual costs, including reasonable attorney’s fees, unless the verdict is more favorable to the rejecting party than the case evaluation. A verdict is “more favorable” to a defendant if, after adding assessable costs and interest, it is 10 percent below the evaluation. If both parties accept the award, the case is settled. The threat of paying the opponent’s legal fees creates an incentive for parties to accept the award. Indeed, the purpose of case evaluation is to foster settlements and reduce the court’s trial docket. Cases are often settled at the conclusion of case evaluation.

If case evaluation does not result in a settlement, the court schedules a settlement conference with the parties and their attorneys. During the settlement conference, the court acts as an intermediary to attempt to settle the case. If the parties are unwilling to settle at that time, the court schedules a trial date. The trial typically occurs within two to three months after the settlement conference, although the trial could be adjourned

several times if the court's docket is congested. Unfortunately, most courts do not inform the parties involved of an adjournment until the day of the trial, or shortly before the trial, causing both parties to unnecessarily prepare for trial at their client's expense.

At trial, the parties may still discuss settlement. In fact, many cases are settled on the courthouse steps during trial. Absent a settlement, the trial begins by the selection of a jury. After the jury is selected, the plaintiff begins by giving an opening statement. The defendant then gives his or her opening statement. Next, the plaintiff's witnesses testify, then the defendant's witnesses testify. At the conclusion of the testimony, the plaintiff gives his or her closing argument, and the defendant gives his or her closing argument. The jury is then left to deliberate and reach a verdict.

Sometimes that's the end of the case. But a jury's verdict is not always the end of the litigation process. For example, the plaintiff or the defendant may appeal the verdict if he or she believes the trial court has erred during the discovery process or during trial. No new testimony or new evidence can be presented on appeal. Rather, the court of appeals reviews the trial transcripts or other documents to determine if the trial court committed an error warranting reversal. An appeal in the Michigan Court of Appeals typically takes at least 12 months to resolve.

A decision by the Court of Appeals still may not end the litigation process. A party who loses an appeal may seek to appeal to the Michigan Supreme Court. The Michigan Supreme Court selects the cases it wishes to consider. If the Michigan Supreme Court decides to hear the appeal, it will take another nine to 12 months to resolve that appeal.

After all appeals have been resolved, the litigation process finally ends. It is possible, though, that an appellate court will remand the case for a new trial. In that event, the trial court conducts a new trial as if the first trial never occurred. The same rights of appeal would apply to a verdict after a retrial.

As you can see, the litigation process is neither quick nor inexpensive. Not only does it consume a litigant's resources, but it also consumes his or her time, not to mention the aggravation involved.

And yes, it is stressful. But at least if the process is understood, some of that stress can be relieved.

To sum up, I think the advice given by Abraham Lincoln back in 1850 still holds true today. Lincoln said: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses and waste of time."

Stress-Relieving Tips for Witnesses

Dentists are often called upon by the state of Michigan, MDA peer review entities, and the courts to serve as witnesses in various proceedings. Service of this nature is crucial to

the profession and public, and yet it can be a source of great stress to those serving as witnesses.

The following tips for witnesses are applicable to most witness situations. By following these tips, witnesses should be able to reduce their stress levels and provide the best quality testimony.

1. Tell the truth. In a lawsuit, as in all other matters, honesty is the best policy. Telling the truth, however, means more than refraining from telling a deliberate falsehood. Telling the truth requires that a witness must testify accurately about what he knows. If you tell the truth and tell it accurately, nobody can cross you up.
2. Don't guess. If you don't know, say you don't know.
3. Don't memorize what you are going to say. Just tell the truth, naturally.
4. Understand the question before you attempt to give an answer. You can't possibly give a truthful and accurate answer unless you understand the question. If you don't understand the question, ask the lawyer to repeat it. He will probably ask the court reporter to read it back. Keep a sharp lookout for questions with a double meaning and questions which assume you have testified to a fact when you have not done so.
5. Take your time. Give the question such thought as is required to understand it and formulate your answer, and then give the answer. However, avoid taking *excessive* time in answering each question. The jury may think you were making up an answer.
6. Stick to the facts, not hearsay, nor your conclusions, nor opinions. You usually can't testify about what someone else told you.
7. Don't be too "final." Don't say, "That's all of the conversation," or "nothing else happened." Instead, say, "That's all I recall," or "That's all I remember happening." It may be that after more thought or another question you will remember something important.
8. Give a positive answer if you can. Avoid saying "I think," "I believe," "in my opinion," and "I guess." If you do know, say so -- don't make up an answer. You can be positive about the important things that you naturally remember. If asked about little details that you don't remember (and which most persons naturally would not remember) just say you don't remember. But don't let the cross-examiner get you in the trap of answering question after question with "I don't know," or "I don't remember."
9. Don't volunteer. Answer, directly and simply, only the question asked you. Then stop. Do not volunteer information not actually asked for.
10. Correct mistakes. If your answer was wrong, correct it immediately.

11. Beware of questions involving distance and time. If you make an estimate, make sure that everyone understands that you are estimating, and make certain your estimates are reasonable.
12. Speak up. Talk loud enough so that everybody can hear you. Speak clearly and distinctly. Do not nod your head for a “yes” or “no” answer. It must be a spoken answer so that the court reporter can hear it and record it. Do not chew gum or smoke, and keep your hands away from your mouth.
13. Don’t argue. Don’t fence or argue with the lawyer on the other side. He has a right to question you, and if you give him some smart talk or give evasive answers you will make a bad impression.
14. Don’t lose your temper no matter how hard you are pressed.
15. Be courteous. Being courteous is one of the best ways to make a good impression on the jury. Be sure to answer “yes, sir” and “no, sir,” and to address the judge as “Your Honor.”
16. Don’t deny discussing the case. If asked if you have talked to the lawyer on your side, or to an investigator, admit it freely. The judge and jury know that no capable lawyer would put a witness on the stand if he didn’t know what facts the witness knows and, in a general way, what the testimony will be. Besides that, you’re sworn to tell the truth.
17. Don’t be afraid to look the jury in the eye and tell the story. Jury members are naturally sympathetic to the witness and want to hear what he has to say.
18. Give a positive answer when when you can. Don’t let the lawyer on the other side catch you by asking you whether you are willing to swear to your version of what you know by reason of seeing or hearing. If you were there and know what happened or didn’t happen, don’t be afraid to “swear” to it. You were “sworn” to tell the truth when you took the stand.
19. Wait until the judge has ruled on any question about which an objection has been made. You may never have to answer the question if the judge sustains your attorney’s objection. You should listen carefully to all objections and all rulings when you are on the witness stand so that you can avoid future problems.

After reviewing these suggestions, you’ll realize there is really nothing at all to be scared or nervous about in testifying. If you relax and remember you are just talking to some neighbors on the jury, you’ll get along fine.

--Source: MDA Committee on Peer Review/Health and Well-Being