

Defending Good Medicine

An attorney’s insights on helping clinicians overcome fear, stay focused and see a bigger picture— all while being sued.

By Liz Lacey-Gotz

One time, a physician refused to read mail related to a lawsuit, so Attorney Shawn McGarry scheduled an actual patient appointment just to get time with him. Surprised, the doctor exclaimed, “What are you doing here?” and confessed that the situation was just too emotionally charged for him. The physician then opened a drawer, revealing a pile of unopened letters.

“I’ll make you a deal,” McGarry said. “I’m going to call you if I need anything pressing, but you have to call me back. Go sit on your patio or some place you can relax, and open and read my letters.” The physician continued to open up, sharing his concerns, including his wife’s worries about the case. McGarry went to dinner with the couple to hear more. “After that,” he says, “the doctor started seeing me as part of the family versus part of the problem.”

As an attorney defending health care professionals, Shawn McGarry knows there's more to his job than the legal aspects. Emotional tension and self-doubt run high when a clinician is served with a claim, making it hard for them to engage in the process of planning their defense. Clients may even try to deny the reality of a claim or lawsuit, which can seriously hinder a case.

It takes a team

It's critical for defendants to know the case details and to be practiced in their responses to key questions. They need to be able to be themselves in a courtroom and use clear body language and a calm demeanor to prevent negative interpretations by jurors.

That's where McGarry comes in. An attorney and president of Kipp & Christian in Salt Lake City, UT, he has spent 31 years in the legal profession, 25 of them devoted to defending clinicians. He's seen a lot over that time, and has helped many clients make it through lawsuits.

McGarry sees himself as a part of the larger UMIA team when he takes a case, which is why he loves working with UMIA exclusively. With a team approach, he knows clients will get the support they need, whether it's through a claim consultant, the lawyer or legal team, or wellbeing resources like Constellation's Clinician Peer Support program. Says McGarry, "Whatever level they need, the people who get support and are fully prepared do a much better job presenting themselves in an honest and candid way—which is always the best at trial."

Good Reads for Clinicians Facing a Claim

As an attorney focused on malpractice law who works primarily with UMIA policyholders, Shawn McGarry's approach extends beyond the facts of the case. One way he offers support is sharing books that can help clinicians navigate the troubling waters of a claim or lawsuit. Here are his picks:

- ✓ "When Good Doctors Get Sued: A Practical Guide for Physicians Involved in Malpractice Lawsuits" by Angela M. Dodge, PhD, with Steven F. Fitzer, JD
- ✓ "Adverse Events, Stress and Litigation: A Physician's Guide" by Sara C. Charles, MD, and Paul R. Frisch, JD
- ✓ "How to Survive a Medical Malpractice Lawsuit: The Physician's Road Map for Success" by Ilene R. Brenner, MD

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The emotional and professional support a clinician needs can vary widely. McGarry observes that some clients may seem fine, but find they benefit from talking with a peer about the case as it progresses. Others appear to need help but resist the resources available to them. "I had a case with a certified nurse midwife who couldn't make it through any aspect of the case without crying," he recounts. "She cried at every preparation meeting, and when we referred her to the peer support program, she said, 'I'm just going to cry.' But she made the call, and the support was invaluable for her."

A lawsuit can change you

Toward the end of a case—when a clinician least expects it—sometimes they begin to see a bigger picture, McGarry says. They've been challenged, their work has been questioned, and yet they got through it. They learned something.

"What happens to a lot of people is that they're frightened, they're concerned, they're threatened by a lawsuit. They think the worst—they question why they even became a doctor," says McGarry. But through the process, he says, clinicians can learn something that allows them to see the events of the case more objectively, and their practice can benefit over the long term. "Actually, the whole litigation process can be somewhat cathartic. They can say, 'Wait a minute, I actually lived through this.'"

In McGarry's experience, this can happen whether a case is won or lost. "I've seen it dozens and dozens of times, that clinicians say, 'This is painful, this is irritating, but wait a minute—I provided good care and at the end of the day what matters is the quality of care I provided.'"

Shawn McGarry is an attorney-and-counselor-at-law specializing in malpractice cases, and president of Kipp & Christian in Salt Lake City. His primary focus is defending UMIA clinicians.



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Top Five Behaviors to Improve Trial Outcomes

These behaviors and practices promote success in defending good medicine. When a case goes well, clinicians have considered the following factors, according to malpractice attorney Shawn McGarry.

- 1. Relationship. Relationship.**
Relationship. “The number one thing that makes a difference in who gets sued and the defensibility of the case is the relationship the clinician and the patient have. If you are compassionate, if you are involved, if you communicate with the patient, it is more difficult for those patients to pursue and maintain a lawsuit against you.”
- 2. Be sincere and compassionate, and be prepared to apologize for any adverse/unexpected outcome.**
“Respond how your heart tells you to respond.” You need to be professional, cordial, thoughtful and empathetic with your apology. If you are unable to respond accordingly, get your team—which may include help and advice from your Constellation claim and/or patient safety consultant—involved to assist you with the apology.
- 3. Maintain good charting.** Go beyond using EHR autofill/dropdown options. “Add freehand, add things that aren’t just boilerplate for a certain condition.

You may have provided attentive, excellent care during your interaction, but by the time you get around to charting it, you are exhausted or you have another patient, and you just click those buttons. It’s not fair to judge the care given by rote entries in a stale, cold chart, but it’s the reality if that’s all you included.”

- 4. Say “Yes” if you have some memory.**
“Every plaintiff wants to push a doctor to say they have no memory of what happened, and that allows them to refer to the chart, which may not show the compassion, interest and care you actually provided. It’s a dangerous response because then the plaintiff’s lawyer can repeatedly remind you that you didn’t remember anything.”
- 5. Be yourself in the courtroom.** A lot of immaterial things turn out to be very influential in a case. “Jurors make a lot of decisions on appearances. Not like how your hair looks, but appearance in terms of body language, eye contact, how you behave. I had one juror criticize a doctor because the doctor was very combative with the plaintiff’s lawyer. They thought, ‘If he was that angry, we wondered what he had to hide.’ You have to realize you are on stage every minute that jury is in the courtroom. Once you recognize that, it can be empowering.”

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