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## Doctor-Patient Communication: Some Suggestions from a Plaintiff's Trial Lawyer

*Curt N. Rodin\**



There is probably no issue in health law more contentious than medical negligence litigation. Although the term “medical malpractice” is the term commonly used by the public to describe this particular tort, medical negligence litigation is no different than any other cause of action for negligence. It requires a duty, a breach of that duty, proximate cause, and damages. The evidence necessary to prove medical negligence, however, is far different from other forms of negligence. In medical negligence litigation, expert testimony is not only recommended, it is required. The determination of a breach of duty, commonly called a “deviation from the standard of care,” can only be proven through the testimony of a qualified expert witness. Standards, treatises, rules and regulations, although helpful, are not decisive. Therefore, if expert testimony is presented by both sides, why should there be a dispute that must be resolved by a jury of lay people? The easy answer is that experts do not always agree. However, the reality goes far deeper. We have all heard the same arguments. Litigation is too expensive. It is. Litigation turns doctors into adversaries. It may. Litigation takes too much time. It does.

Given these seemingly innate characteristics of medical negligence litigation, wouldn't it be helpful to everyone involved if some of these cases could be avoided? That statement may sound strange coming from a plaintiff's trial lawyer. We are presumed to be greedy attorneys willing to file frivolous lawsuits at the drop of a hat. The truth is, however, given the current state of the law, the expenses involved, and the likelihood of recovery, most lawyers would prefer to see fewer medical negligence cases filed. In fact, we would much prefer to see less medical negligence—period.

I have been a practicing plaintiff's trial lawyer for thirty-five years, and yet each medical negligence case that I have handled remains among the

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most interesting and complex of my career. The cases range from newborn deliveries to abusive treatment of the elderly in nursing homes. To best represent my clients, I have had to become an expert (at least for the duration of the case) in obstetrics, gynecology, neurosurgery, orthopedic surgery, cardiovascular surgery, pain management, psychiatry, pathology, urology, oncology, and, for good measure, family practice. Although I do not hold myself out as possessing the ability to heal, my career has required me to learn a great deal about those who do. These cases have taught me that health care professionals, in general, are dedicated, caring, competent and intelligent. On the other hand, however, I have also learned that they are notoriously poor communicators. Without doubt, the primary reason that prospective clients contact me after a bad result within the health care system is that no one would tell them what went wrong. It should never be the responsibility of an attorney to communicate this information to the patient, or the patient's family. But too often, it is.

Until the middle of the last century, medical negligence litigation was rare. People were treated by doctors they knew and trusted. If something went wrong, patients could count on the doctor to explain what happened and why. The family doctor never promised perfect care, only his best effort. The patient would never sue that doctor for a bad result—he lived up to his name as ‘The Family Doctor’ and really was like family. Today, the public is bombarded by commercials for miracle drugs, scans that seem to see and do everything and revolutionary surgical procedures that cure without pain or undue invasion of the body. Patients' expectations have been raised, perhaps too high. These heightened expectations can and should be managed with proper counseling. However, that does not mean signing a consent form given to the patient by a nurse who has neither training nor the knowledge to explain the risks and benefits of the procedure. Today, the medical field is comprised of busy specialists who do not have the time nor, in some cases, the inclination, to counsel as well as heal. As a result, the patient becomes a client and the doctor becomes an adversary. There is something wrong with this picture.

I have maintained for some time now that more attention should be paid to proper communication in medical training. An area where much attention is paid, however, is defensive medicine, as it is blamed for being one of the key reasons for our country's high medical costs. Perhaps it would be better to use a good offense rather than a good defense. The offense would be communication, both before and after the procedure. Instead of leaving it up to a resident or a nurse to explain what went wrong, the doctor should take responsibility and spend whatever time is necessary with the patient or the patient's family to explain fully what happened. Furthermore, if negligence was involved, fess up and let the patient know. It is their right. It is the health professional's obligation. After all, isn't the

first rule “do no harm”? In order to truly fulfill professional responsibility, an attorney is required to inform the client if any negligence on the part of the attorney contributed to an adverse result. Why should the standard be any different in medicine?

The discussion devoted to communication, or rather the lack thereof, comes easily to me because it is something that I have had to deal with more times than I can count. In our office, and we are not unique, we turn down over 90% of the medical negligence cases that come through our door. Granted, some of these cases are rejected for reasons other than lack of communication. Minimal damages, obvious lack of liability, insufficient insurance or assets are some examples. But far and away, the number one reason a case is rejected is a lack of communication—a client brings a case where there was in fact no negligence involved, yet this was never explained to the patient. Almost every time we review records and consult with experts and explain the circumstances to the client, the response is the same: “If only the doctor would have told me that I wouldn’t have had to come and see you.” Furthermore, medical professionals should realize that this communication breakdown is counter-productive in trying to avoid medical negligence lawsuits. There are a percentage of those cases that we review and find that there was, in fact, negligence. We further find that negligence to be a proximate cause of the damages, and we further find that the damages have been substantial. In some cases, with proper communication, that patient would never have become a client.

When I teach law students at Loyola University about their responsibilities as a lawyer, I always begin with the admonition that the first thing they need to do with a new client is establish a relationship of trust and confidence. That requires mutual respect and communication. It requires on the part of the lawyer honest and fair dealings with the client. It requires the lawyer to act at all times in a professional manner and to use the skill and training received both in school and advanced training for the benefit of the client. It should be no different in medicine. That same relationship of trust and confidence is the reason the old-time family doctor didn’t have to worry about defensive medicine or malpractice cases. I am not deluding the reader or myself to expect that establishing this relationship of trust and confidence will make medical negligence litigation go away. I am, however, convinced that such communication between doctor and patient will go a long way to relieve the adversarial relationship that can often times develop after an adverse result. Furthermore, I am not nearly skilled enough in medical training to detail when and how this communication training should be done. I know in law it is frequently done in classes that are devoted to practical aspects of the legal profession. In some schools these classes are taught by practicing attorneys rather than law professors, with these attorneys acting as either guest lecturers or

adjunct professors.

With all of that said, it is true that some doctors are better communicators than others. Perhaps the ones who are better skilled will volunteer to teach this important aspect of patient care at the medical school level. It may be that this type of program is already in use at some medical schools. If it is, fine. If not, however, it should be, because based on my practice and over thirty years of experience, it is surely needed.