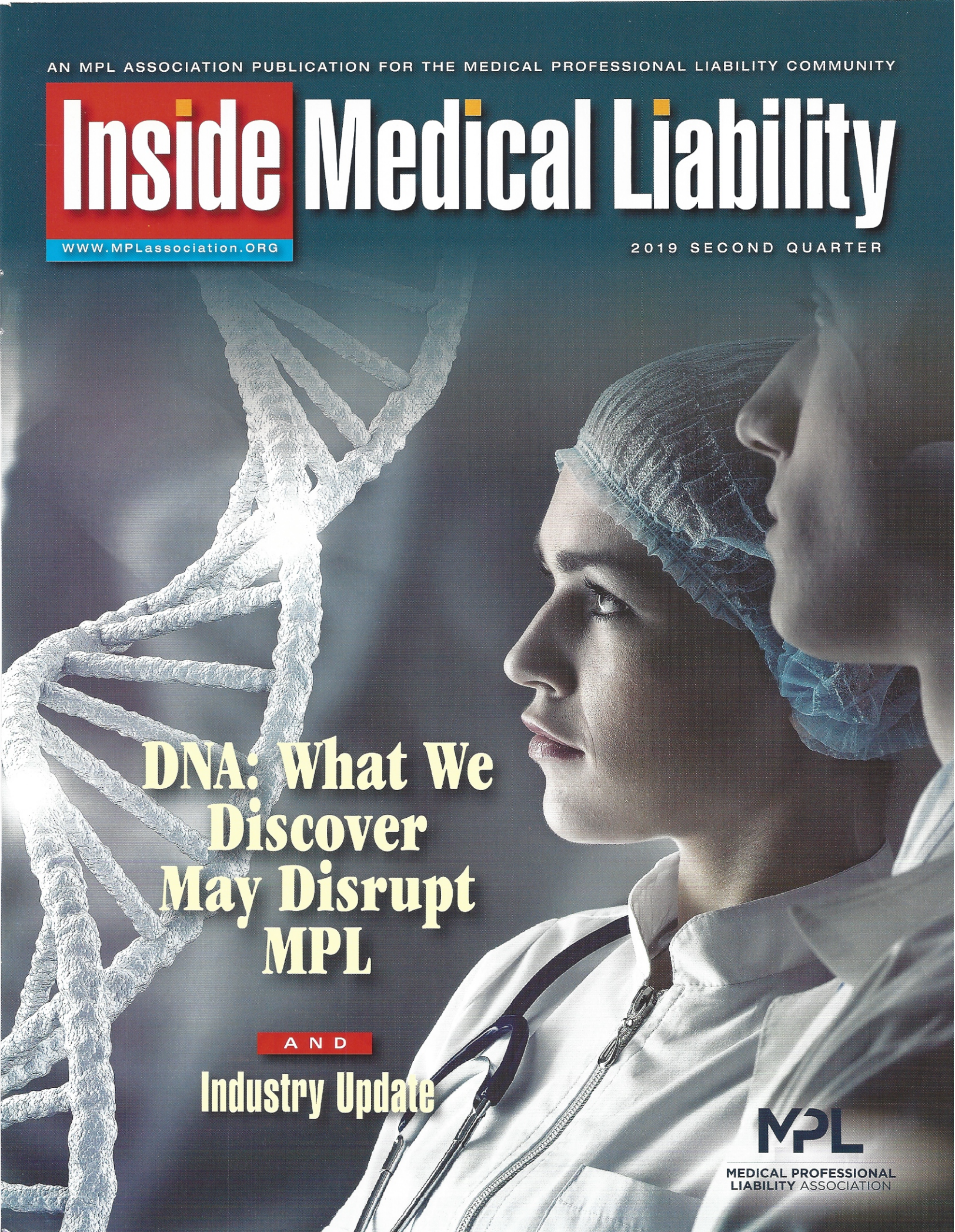


AN MPL ASSOCIATION PUBLICATION FOR THE MEDICAL PROFESSIONAL LIABILITY COMMUNITY

Inside Medical Liability

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2019 SECOND QUARTER



**DNA: What We
Discover
May Disrupt
MPL**

AND

Industry Update

MPL

MEDICAL PROFESSIONAL
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"In addition, because new pathogenic mutations continue to be discovered, many of these patients may be candidates for additional genetic testing in the future."

—Cover story

How Medical Professionals Can Tell the Truth in an Upside-Down World

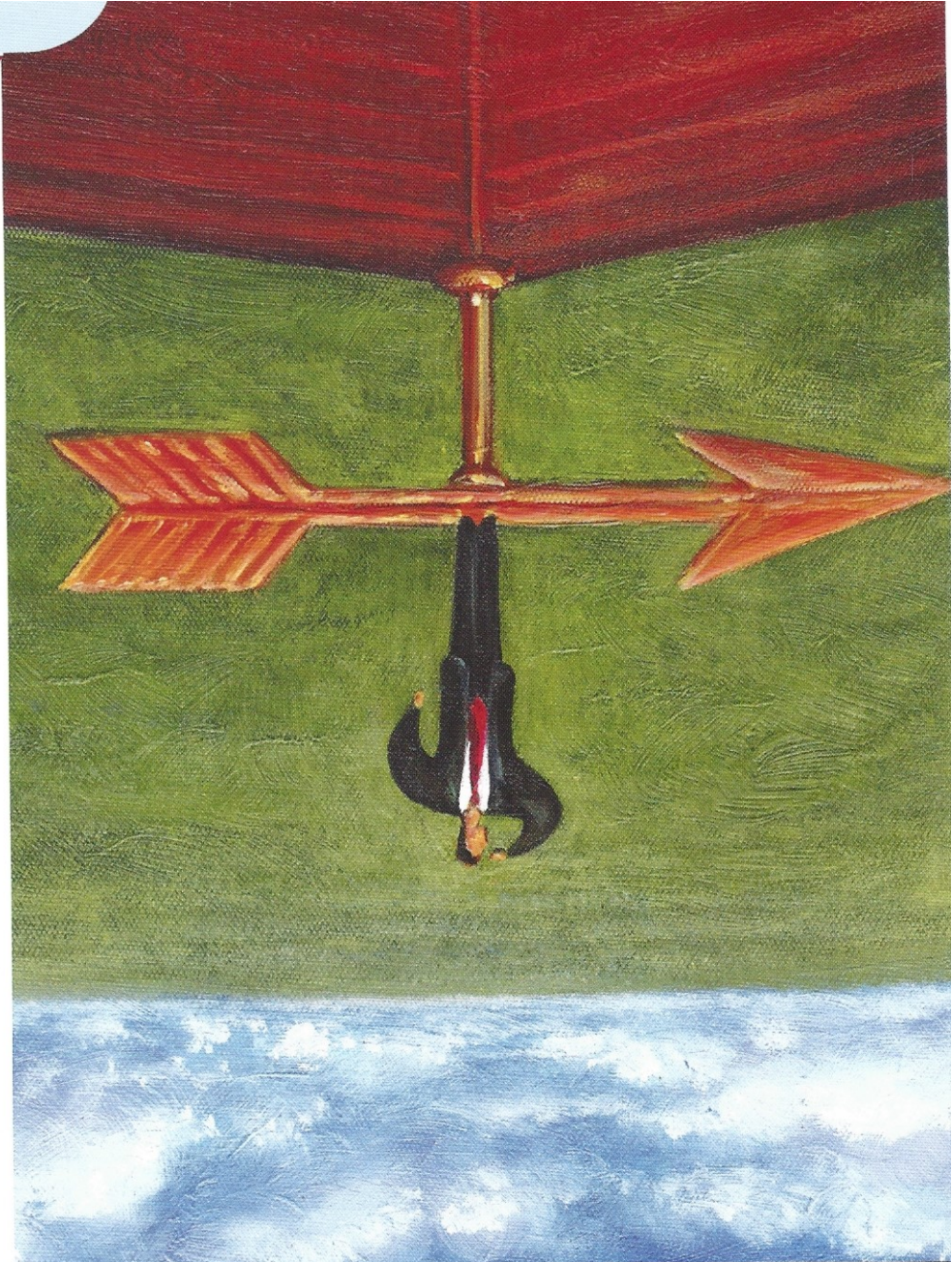
If you are a medical professional liability (MPL) defense attorney, have you ever wondered why your MPL witnesses sometimes do puzzling things in depositions or under cross-examination:

- Agree with things that aren't true.
- Volunteer information when you instructed them not to.
- Agree with something you know they don't believe.
- Keep trying to explain answers when no explanation was needed.
- Agree with the opposing lawyer's characterizations of what the facts meant.
- Agree they should have done something different.
- Argue with opposing counsel.
- Act defensive.
- Acquiesce so easily.
- Look "guilty."
- Admit they were negligent when they really weren't.
- Keep second-guessing or changing their answers, etc.

Why do witnesses do these things?

We all have a set of communication skills we use with friends, family, and coworkers. When speaking with another, it's important to know how to interpret and understand communication cues in various situations, which also includes knowing how to respond to the cues appropriately

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BY JEFF DOUGHERTY

depending on the specific environment. Some examples of cues we receive from people we speak with include tone of voice, facial expressions, body language, and emotional responses. Because the objectives of communicating in the various settings can differ, our feedback also differs in response.

This is especially poignant for medical professionals because their interactions with patients and their families require a special sensitivity and understanding due to the nature of the communication environment.

While medical professionals may have communication rules that work for them as professionals, none has developed a set of communication skills and rules that work in the litigation setting—particularly under adverse questioning. So, what happens to the medical witness with no knowledge of litigation cues? They borrow the communication skills and rules that work for them professionally and then apply them in the litigation setting—and they fail miserably. Why? Because cues and

Table 1. Communication in the Medical World, versus the Litigation World

When the receiver seems CONFUSED

Setting	Meaning	Correct Response	Wrong Response
Medical World	Your answer was probably unclear.	Start explaining.	Stop talking.
Litigation World	Your answer was good.	Stop talking.	Start explaining.

When the receiver seems ANNOYED

Setting	Meaning	Correct Response	Wrong Response
Medical World	Your answer was bad or unclear.	Start explaining.	Stop talking.
Litigation World	Your answer was good.	Stop talking.	Become annoyed and start explaining.

When the receiver remains SILENT

Setting	Meaning	Correct Response	Wrong Response
Medical World	Your answer was probably incomplete, the person needs more information	Start explaining.	Stop talking.
Litigation World	Your answer was good.	Stop talking.	Fill in the silence with more information.

When the receiver seems SURPRISED

Setting	Meaning	Correct Response	Wrong Response
Medical World	Your answer needs an explanation.	Start explaining.	Stop talking.
Litigation World	Your answer was good.	Stop talking.	Second-guess your answer and start explaining.

When the receiver reacts with SARCASM

Setting	Meaning	Correct Response	Wrong Response
Medical World	You might have said something in an insensitive way.	Apologize and explain.	Stop talking.
Litigation World	Your answer was good.	Stop talking.	Become sarcastic and reemphasize your answer.

rules of communication in the litigation setting aren't just different from what applies in the medical world; they can mean the exact opposite and for that reason, require a counterintuitive response.

How it works

Table 1 presents some examples of types of communication cues medical professionals might encounter during the course of a communication interaction with a patient or his or her family member, or that a witness might encounter while under cross-examination. Note how the meaning of the same cues and the appropriate responses to those cues differ dramatically, depending on whether the interactions occur in the medical world or the litigation world.

It's easy to see how even the most sophisticated witness can unwittingly play into the hands of opposing counsel, simply by attempting to communicate like a normal and rational and caring medical professional.

What can be done?

Before witnesses in the medical profession will be able to understand why the communication cues in litigation aren't what they seem, they need to understand how the communication objectives in litigation differ from any other environment they've ever experienced. This is a vital step to effective witness preparation and one that is often underappreciated and sometimes skipped completely.

For example, if not taught otherwise, witnesses will assume that the more information they provide to opposing counsel, the better. They will think: "If I can just explain things more clearly, I can convince this lawyer of 'X,' and he will get it and move on." The problem with this thinking is that witnesses don't intuitively realize that the opposing lawyer will advocate for his client no matter what the witness says. So, what might be a perfect answer to any given question will never "satisfy" the opposing lawyer; he will never change his mind, and explana-

tions will only make things worse.

Compounding this misperception is the fact that all the cues the witnesses receive from opposing counsel suggest the opposite (more information will help), resulting in a futile attempt by witnesses to clear up the seeming miscommunication with more and lengthier explanations, which only makes things worse. This is a major challenge for medical professionals because many of them are helpers by nature, and when they try to “help” in the litigation setting, things just continue to get worse, their anxiety and frustration increase, and the deposition becomes a catastrophe.

Conclusion

The good news is that medical professionals can be taught how to communicate effectively in the litigation world, but it takes a substantial amount of time due to the required drastic changes in both thinking and behavior. And it goes even further. After teaching such witnesses how to communicate under adverse questioning, you must never believe a witness who says, “I get it,” or “I understand.” Real understanding only comes after doing. This is why one of the most important components of a proper witness preparation session must include having the witness perform under a rigorous and realistic question-and-answer simulation, with targeted feedback. When this is done correctly, even the most challenging medical professional witnesses can avoid some of the major snares of deposition and cross-examination testimony and not only survive adverse questioning but thrive. **MPL**

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