WHITE PAPER

THE MEDICAL MALPRACTICE TRIAL

[From First Service - to Final Verdict and Emotional Relief]

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Primum non nocere

This Latin phrase is axiomatic in intent and is one of the earliest inoculations students of medicine receive. It dovetails the Hippocratic Oath to provide both a moral and ethical foundation for physicians in furtherance of their mission to heal the sick. It asks little in objective terms but demands an immense measure of dedication and knowledge from those who practice their profession. Yet, it is roughly estimated that one of every five practicing health care professionals will confront the enigmatic process of medical malpractice within a twelve-month span. Despite the fact that most health care practitioners will never see the inside of a courtroom, the sequelae of the event itself can scar the psyche forever after. What can be done when the inevitable happens and what can you as a practicing doctor do to confront the process?

"Even among the sciences, medicine occupies a special position. Its practitioners come into direct and intimate contact with people in their daily lives; they are present at the critical transitional moments of existence. For many people, they are the only contact with a world that otherwise stands at a forbidding distance. Often in pain, fearful of death, the sick have a special thirst for reassurance and vulnerability to belief."[1]

When this trust is violated, whether rooted in factual substance or merely a conclusion lacking in reality, American jurisprudence offers several remedies with the core being civil litigation. We have personally witnessed a vast spectrum of reasons that prompts a patient to seek the counsel of an attorney. Whether it be an untoward result of treatment or surgery, an outstanding invoice being mailed to a less than happy patient who decides that the doctor's treatment did not measure up to expectations, a physician's wife employed as the office manager charging a patient eighty-five dollars to complete a medical leave authorization form, or simply a perceived lack of concern on the part of the doctor or his personnel, patients can be motivated to seek redress outside the realm of the doctor's office. Compound any of the above scenarios with well-meaning friends and family and the proverbial prescription for litigation has been certified.

Woven throughout this discourse will be suggestions that might obviate the foregoing. While it is not a panacea, nor a cure-all for medical negligence cases, we believe it to be an effective methodology for resolving those differences that see the growth of a medical malpractice lawsuit....honest communications.

UNDERSTANDING WHAT IS AT STAKE

At times, medical malpractice can be attributed to simple misdiagnosis on the part of the medical fraternity, but at other times it may be some serious medical or criminal offense done on purpose. In either case, it's difficult to forget and forgive a mistake that can spoil someone's life.

Medical malpractice is a specific legal term which defines an act of negligence on the part of a professional health care provider, which may result in further complications in the condition of the patient, even resulting in death. It can occur when the health care providers deviate from the accepted standards either by mistake or on purpose. Cases may range from a misdiagnosis of disease, such as cancer, to botched birthing delivery, which results in physical or mental damage to the child.

Here are some of the most common instances of wrongful activities in the medical field.

- Anesthesia Errors
- Birth Injury
- Cancer Misdiagnosis
- Dental Malpractice
- Institutional Sexual Abuse
- Medical Errors
- Nursing Home Abuse
- Surgery Mistakes

[1] Paul Starr, *The Social Transformation of American Medicine*, Basic Books, 1982, pgs. 4-5.

Medical malpractice lawsuits are proceedings pertaining to the allegation in the court of law, wherein the plaintiff, most often the patient or the relative of the patient, is expected to prove that the injury or casualty was caused due to negligence on the part of the medical fraternity. The defendant, most often the representative of the health care facility, is expected to defend the institute against these allegations.

According to Thomas H. Cohen JD PhD, of the 1,156 medical malpractice trials litigated in the nation's 75 most populous counties during 2001, most were disposed of by jury trial (96%). In an estimated 9 out of 10 medical malpractice trials, the alleged harm involved either a permanent injury (57%) or a death claim (33%).

About half of the sampled medical malpractice trials were brought against surgeons, while a third was against non-surgeons. Dentists accounted for 5% of medical malpractice defendants. Medical malpractice trials with non-surgeons had the highest estimated percentage of injuries involving a death claim (43%). Death claims arose in 30% of trials with a surgeon defendant.

The overall win rate for medical malpractice plaintiffs (27%) were about half of that found among plaintiffs in all tort trials (52%). Plaintiffs prevailed in nearly 39% of trials against dentists and in about a quarter of trials against non-surgeon (23%) and surgeon (27%) defendants. The median award of $425,000 in medical malpractice trials was nearly 16 times greater than the overall median award in all tort trials ($27,000). Median award amounts were higher among plaintiffs who won malpractice trials against medical doctors, both surgeons ($575,000) and non-surgeons ($511,000), than against dentists ($53,000).

Plaintiff winners were awarded $1 million or more in approximately a third of medical malpractice trials brought against non-surgeon and surgeon defendants. The type of injury giving rise to a medical malpractice trial also had an impact on damage awards. Median award amounts for medical malpractice trials arising from death claims ($837,000) and permanent injuries ($412,000) were higher than the median awards for medical malpractice trials that stemmed from temporary injuries ($77,000).

The number of medical malpractice jury trials since 1992 has remained stable as the reported differences were not statistically significant. Since 1992 the percentage of plaintiff winners ranged from 22% to 30%. After remaining stable in 1992 and 1996, the median amount awarded in jury trials to plaintiff winners increased from $287,000 in 1996 to $431,000 in 2001. The percentage of plaintiff winners receiving awards of $1 million or more also rose from an estimated 25% in 1992 and 1996 to 32% in 2001. Punitive damages remained rare in medical malpractice jury trials. From 1992 to 2001, 1% to 4% of plaintiff winners in medical malpractice jury trials received punitive damages. The median punitive damage awards for medical malpractice jury trials in two of the three study periods (1992 and 2001) were $250,000.

More recently, according to Becker’s Hospital Review, statistics show that the number of medical malpractice cases being filed in the United States is increasing every year. In 2011, there were over 12,000 payouts made for medical malpractice. The majority of claims were settled outside of court. Statistics showed that 93 percent of payouts resulted from settlements in 2011. And; most recent statistics from Diederich Healthcare's "2013 Medical Malpractice Payout

Analysis" are based on data from the National Practitioner Data Bank are noted below.

Medical malpractice payouts:

- Dollars in payouts: $3.6 billion (3.4 percent less than in 2011)
- Total payouts for medical malpractice: 12,142 (one every 43 minutes)
- Payouts resulting from judgments: 5 percent
- Payouts resulting from settlements: 93 percent

Payouts by patient type:

- Inpatient: 45 percent
- Outpatient: 41 percent
- Both: 9 percent

Top five states for medical malpractice payouts:

- New York: $763,088,250
- Pennsylvania: $316,167,500
- California: $222,926,200
- New Jersey: $206,668,250
- Florida: $203,671,100

Severity of alleged injury in medical malpractice claims:

- Death: 31 percent
- Significant permanent injury: 19 percent
- Major permanent injury: 18 percent
- Quadriplegic, brain damage, lifelong care: 12 percent
- Minor permanent injury: 8 percent
- Major temporary injury: 7 percent
- Minor temporary injury: 3 percent
- Emotional injury only: 1 percent
- Insignificant injury: 0.4 percent

Types of allegations medical malpractice claims:

- Related to diagnosis: 33 percent
- Related to surgery: 24 percent
- Related to treatment: 18 percent
- Related to obstetrics: 11 percent
- Related to medication: 4 percent
- Related to monitoring: 3 percent
- Related to anesthesia: 3 percent
- Other: 4 percent

More poignantly, in late 2014, The Dallas / Fort Worth Healthcare Daily ran a fascinating excerpt from the Steve Jacob's book: *So Long, Marcus Welby, M.D.* The excerpt contained some very interesting assertions and statistics:

- Consultant PwC, relying on a Congressional Budget Office (CBO) report estimated that malpractice insurance and defensive medicine accounted for 10 percent of total health-care costs. A 2010 *Health Affairs* article more conservatively pegged those costs at 2.4 percent of healthcare spending.

- In a 2010 survey, U.S. orthopedic surgeons bluntly admitted that about 30 percent of tests and referrals were medically unnecessary and done to reduce physician vulnerability to lawsuits.

- A 2011 analysis by the AMA found that the average amount to defend a lawsuit in 2010 was $47,158, compared with $28,981 in 2001. The average cost to pay a medical liability claim—whether it was a settlement, jury award or some other disposition—was $331,947, compared with $297,682 in 2001.

- Doctors spend significant time fighting lawsuits, regardless of outcome. The average litigated claim lingered for 25 months. Doctors spent 20 months defending cases that were ultimately dismissed, while claims going to trial took 39 months. Physicians who were victorious in court spent an average of 44 months in litigation.

- A study in *The New England Journal of Medicine* estimated that by age 65 about 75 percent of physicians in low-risk specialties have been the target of at least one lawsuit, compared with about 99 percent of those in high-risk specialties.

- According to Brian Atchinson, president of the Physician Insurers Association of America [PIAA], 70 percent of legal claims do not result in payments to patients, and physician defendants prevail 80 percent of time in claims resolved by verdict.

WHAT EVERY DOCTOR MUST REALIZE …

Doctors depend on their trusted advisors to be a source of information on a wide variety of complex topics. As we have seen, one of the areas in which physicians are increasingly seeking guidance from their attorney, accountant, consultant or financial advisor is in the area of risk management, insurance planning and asset protection.

The best experts and consultants seek to create safe steady growth and avoid losses and exposures to things like malpractice judgments integrated with asset protection. A natural extension of this stewardship is making sure that the growth and balance of assets are safe from exposure to an increasingly predatory and hostile litigation system. Most doctors have obvious daily risks like malpractice exposures. Other sources of exposure are more insidious, such as merely being affluent and visible, owning income property, or something as simple as owning and driving a car every day. The numbers are staggering; we are at a point in our litigation system where we have 70,000 lawsuits filed per day in the United States alone, many without any real merit. Unfortunately being “right” is not enough to keep physicians safe.

Why doctors are concerned?

As illustrated by the numbers above and below, awards continue to spiral out of control, fueled by litigation attorneys who have become partners in lawsuits and who are economically incentivized to create and magnify adversarial relations between parties who might otherwise reach some reasonable, if not amicable, settlement. So, here are additional facts about our litigation system to consider, for 2016:

- The average medical malpractice award is now $3.9 MM, and some authorities put this number substantially higher;

- The average legal costs of settling a frivolous lawsuit is $91,000 – plus the actual settlement amount itself.

The average sexual harassment suit against a small medical practice produces a verdict of $530,000. Employees are suing more often, winning more often and winning proportionally larger judgments. They win 75% of the time. Moreover, only the top 5% of Americans has a net worth of over $1MM. Using this baseline, it's pretty easy to see where even a doctor who is worth only a few million dollars fits in on the food chain.

Here is more proof why doctors and allied medical providers are sued:

- MDs are high net-worth, high liability, or they will be soon (i.e. new practitioners)
- DOs have assets that would be difficult to replace if lost or reduced
- DPMs have professional surgical liability
- DDSs have employees and own their own practice
- CRNs are highly visible, traceable, and or collectible
- ODs own liability generating assets, i.e. rental property
- NPs and ANPs have a spouse and/or children.

What doctors and all medical professionals must take to heart is that litigation attorneys are in business. Just like any business, including a medical practice, they have weekly meetings in which they examine growth, cash flow, revenue goals and new leads or opportunities. This economic motivation is a key and explains in part why we see awards rising and why plaintiffs' attorneys regularly seek and obtain awards above the limits of applicable liability insurance policies.

§ DEAR DOCTOR, YOU HAVE BEEN SERVED A LAWSUIT... NOW WHAT?

In the United States, a trial is thought to be the most common manner in which disputes are resolved. Contrary to what we see on television, very few cases actually make it to trial with most be either dismissed or resolved through mediation or arbitration. The U.S. Department of Justice recently reported that only about three percent of all civil cases are resolved by a trial. The vast majority of civil lawsuits, and in particular medical malpractice cases, are settled or dismissed before any of the litigants see a courtroom.

So, when served, don't run to the nearest bridge or fly into an explosive tantrum. Don't throw your hands up in the air and blame the world. It is estimated that one in every 2 health care professions will be the recipient of such news at some time during their professional careers.

[A] First Steps:

Take a deep breath and exhale. Devastation isn't knocking at your door but at the same time, Perry Mason is not your attorney. Finish the day and when things are subdued, sit down and slowly assess what has happened. If you read and believe the complaint that the Plaintiff's lawyer has served upon you, likely you will conclude that as a health care professional, not only are you negligent but, you border upon the criminal. Our advice: do not read it but who among us won't?

At this point, take the patient/ plaintiff's medical records and make exact copies of every single document contained within. Copy your computer files that reference this patient onto a portable medium of your choosing. Put the originals in an envelope and seal it. *Do not make any changes to the medical records or to the computer data*. Your patient's medical records are your best evidence and in the world of medical-legal jurisprudence, an inference of truth and fact immediately attach to these which can be permanently shattered by any changes, well meaning or otherwise.

[B] Call Your Medical Malpractice Insurance Company:

At this time, contact your medical malpractice insurance company. Speak to a representative in the claims department, advise them of the current situation, and follow their instructions as to reporting the claim. Your cooperation with your carrier is essential in order to conform to most policies and to insure that you do not do anything to waive the coverage subscribed to. At some time in the immediate future, your insurer will assign your case to a defense attorney who will become your constant companion for the next several years. It is this person who will undertake the investigation of your case and the study of your patient's allegations. At times your lawyer will appear to be your therapist, knight in shining armor, and at times may even seem to be working against your best interests. None of this is factual. Your lawyer is an expert assigned to investigate your case and to provide you with the best defense and advice available, all the time looking through the lens of objectivity. Remember, your view is tinted with emotion and the passion that you have done nothing wrong. But make no mistake about it; it is this person who will tell you when you should hold them and when you should fold them.

[C] Personal Counsel:

What is personal counsel? Personal counsel is an attorney with extensive experience in the management of medical negligence cases and one that does so on a daily basis. Personal counsel should be an attorney who has been researched by you and/or your associates so that you feel comfortable knowing that this person has the understanding and skill necessary to represent your interests. It is a lawyer whom you may retain *independent of* counsel assigned by your insurance carrier. In the vast majority of cases, personal counsel is an attorney whom you will retain to represent your interests at your cost.

The essential difference to appreciate is that counsel assigned to you by your insurance company will be retained and re-imbursed by your insurer but personal counsel is an attorney of your choosing whom you agree to retain and compensate.

Is this necessary? If you are a health care professional who has no insurance coverage, chances are your decision to go bare will necessitate the retaining of personal counsel. Of course, those who have adeptly concealed their personal assets so as to be judgment proof might not deem it necessary but in that event, the doctor must be ready to accept the possibility of an adverse final money judgment and the necessity of a bankruptcy proceeding if legally applicable. While those doctors going bare might consider the fact that they have no insurance to be the best insurance against a Plaintiff's lawyer filing suit, do remember that it takes only one compassionate Plaintiff's lawyer to upset that apple cart.

Those doctors who have malpractice insurance have a different type of decision to make in retaining personal counsel. The malpractice insurance company has assigned an attorney to you and will be compensating that attorney for her efforts in defending you. That same attorney and/or her law firm may have numerous other doctors they are representing who maintain coverage with the same insurance company. Some view this as a conflict of interest. Is the assigned attorney representing your interests or that of the insurance company? Despite the best efforts of the assigned defense counsel, it is not out of the question for that counsel to appreciate the financial realities of the situation. Once your case is over, new business is dependent upon the insurance company and not you. So the dilemma of the personal counsel evolves as to whether you deem it prudent to retain and compensate an attorney to solely and without question represent your interests, even at the expense of your assigned counsel and the insurance company. The decision is solely an individual one but in all fairness, a decision we feel necessary. In those case where we have been retained as personal counsel, our job has been to review the case and decide whether the Plaintiff's case has merit and if we decide it does, whether or not our client, the Defendant doctor, is at risk of an adverse judgment greater than the amount of insurance coverage available. If deemed a possibility, it becomes our job to insure that the client does not face that eventuality and our exclusive duty is to the doctor who has retained us.

§ THE TRIAL PLAYERS

In every civil trial, besides there generally being counsel for the respective parties, there is a Plaintiff (patient) and a Defendant (doctor). While it is not mandatory that the Plaintiff be represented by an-attorney, an un-represented plaintiff who is *Pro Se* most likely will find the course difficult to traverse. The Plaintiff is the aggrieved party, or accuser who files a complaint, and the Defendant is the party against whom a complaint is lodged, or the accused. Some cases may involve multiple Plaintiffs, multiple Defendants, or both. Regardless of the numbers of parties involved, there must be *de facto* two opposing sides to a lawsuit. Often those respective sides make for interesting bedfellows, such as where several of the named Defendants each perceive the other as being at fault. In those cases, the finger pointing often is directed away from the Plaintiff and toward the other Defendant(s) in the case. At those times, the mentality can often shift toward a Darwinian one of survival, leaving the Plaintiff the sole benefactor.

In addition to the parties and their respective counsel, witnesses, both lay and expert, form the main body of testimony that will be elicited and heard by the Judge and jury. The respective parties both present their witnesses in a procedural order as determined by the venue of the litigation. Both lay and expert witnesses serve to tell the story of the parties to the court. In a medical malpractice case, a lay witness generally explains the facts of specific events which they have witnessed, or more likely, how the Plaintiff has been affected by the alleged negligence. The parties may also call a special kind of witness, called a medical expert, to testify on their behalf. An expert witness is simply a witness with experience in a particular field, whose testimony will aide the lay jury in understanding the medical aspects of the case. Often times, the expert witness can be the trump card necessary for that party to prevail but all too often medical experts tend to "cancel each other out" leaving a jury to decide based upon the remaining evidence presented.

In most medical malpractice cases, the Plaintiff must present expert testimony from a health care practitioner that the Defendant fell below the standard of care required and caused injury to the patient. These are the two essential prongs which when conjoined equate to negligence in legal terminology; liability being a breach in the standard of care and causation being that the negligence caused the Plaintiff damages. It is essential to understand that a Plaintiff cannot prevail in litigation if only one of these two prongs has been left unsatisfied. For example, if a physician failed to diagnose cancer in a terminally ill patient, the fact that the diagnosis was not made can be deemed negligent but the negligence in the failure to diagnose did not damage the patient in that she was terminal when she initially presented. It is this two pronged test which delineates legal negligence from commonly expressed negligence or a bad result from the care and treatment provided.

In rare instances, and in ever diminishing jurisdictions, expert testimony is not required in medical negligence matters. In those instances, the legal doctrine of *Res Ipsa Loquitur*, or "the thing speaks for itself" often will attach to obviate the expert's place. Normally, in a medical malpractice case, a Plaintiff is required to establish: (1) a breach in the standard of care or that an act or omission by the Defendant that was not in keeping with the degree of skill and learning ordinarily used under the same or similar circumstances by members of defendant's profession; and (2) causation or that such negligence or omission caused the plaintiff's injury. However, the doctrine of *Res Ipsa Loquitur* exists to preclude the need for direct proof of negligence through medical testimony, and allows cases submitted under the doctrine to proceed to the jury even in the absence of testimony as to negligence because a jury is permitted to draw an inference of negligence from the specific act itself. The classic example of such an incident would be the leaving of a surgical instrument inside a patient's body, or operating upon the wrong eye, kidney, hand, foot or limb, etc.

The judge and jury are the final participants in a trial. The judge presides over the trial and makes rulings regarding the law and its application to the case. Only the judge is permitted to rule upon issues of law. The jury members are called the triers of fact in that the body listens to the evidence, and determine the facts, based upon their collective wisdom. For example, when two parties tell different versions of an-event the jury must decide which side it believes is true. In cases where there is no jury, the judge decides both the law and the facts.

§ BURDEN OF PROOF

In all civil trials, the Plaintiff, as the accuser, has the burden of proving his case. Much like a criminal Defendant, a civil Defendant has no burden of proof and is presumed "innocent" of any claim as alleged by the Plaintiff. As a result, if the Plaintiff presents insufficient evidence to support his claim, the Defendant's counsel will likely seek a directed verdict pursuant to the prevailing law from the judge. Should the judge conclude that the Plaintiff has failed to establish those elements of medical negligence as required, the judge will order the directed verdict in favor of the Defendant doctor. In other words, the Defendant wins without having to present his case. The burden the Plaintiff carries in a civil arena is that s/he must prove his/her case by what is called a preponderance of the evidence. In other words, the Plaintiff must prove it is more likely than not that the facts as presented prove his case. The burden is distinct from that in criminal law where beyond a reasonable doubt is necessary. The best way to visualize this burden is to imagine a set of scales. If the scales are even, or tipped in favor of the Defendant, then the Plaintiff has not carried his burden, and loses. In order to prevail, the Plaintiff must tip the scales in his favor. And it can be tipped by no more than 50.1% to 49.9%.

To succeed in a case of alleged medical malpractice, a Plaintiff-patient must present evidence that the Defendant-doctor was negligent, and the Plaintiff does this by proving the treatment provided was below the applicable standard of care. This phrase is often misapplied and misunderstood but in essence means that the health care provider failed to use the degree of care and skill that a reasonably prudent practitioner under similar circumstances would have used in treating a patient. While the standard of care has a fairly universal legal meaning, it has variances throughout the different states. In some jurisdictions a national standard of care is the accepted norm while in others, it can be a locality rule. The difference is of vital significance because when expert testimony is sought, that expert must be knowledgeable and able to testify as to the standard of care pursuant to that jurisdiction, regardless of whether it be local or otherwise. In those minority areas where the locality rule remains in effect, often an expert must be from that specific community or have discussed the standard of care with a local doctor so as to be sufficiently versed in it.[1] In addition, the standard of care, while established by the medical community at large, is constantly evolving. Care that violates the standard of care today may not necessarily violate the standard of care several years ago. This distinction is an important one, since most cases take several years to reach trial readiness. Of critical importance is to appreciate that while the public at large often will equate a bad result as negligence, legally it may not be a violation of the standard of care.

For the Plaintiff to succeed in tipping those scales in her favor, expert medical testimony is required to establish a violation of the standard of care in virtually all medical malpractice cases. A Plaintiff that fails to present the required expert medical testimony in a medical malpractice case, but for those instances where *Res Ipsa Loquitur* is applicable will lose. As noted above, the Plaintiff must also produce expert medical testimony as to a violation of the standard of care and that the alleged negligence caused the injury.

[1] Idaho is an example of such a jurisdiction.

Finally, it is an unfortunate reality that the jury often does not have the medical knowledge necessary to appreciate the nuances of medicine and the clinical judgment afforded doctors. That is not to say that juries do not do their utmost to reach a reasoned verdict but medicine can be a difficult proposition for the trained individual, let alone a layman. In a case several years ago in California, a jury listened to the evidence in a medical malpractice case for several weeks. Following a Plaintiff's verdict, several of the jurors agreed to discuss their deliberations with the parties' counsels. When asked for a reason that the jury found for the Plaintiff against the physician, one specific juror admitted it was because of the expert medical testimony. When probed further, the juror stated that he believed the Plaintiff's medical expert to be most credible and knowledgeable because while the Defendant's expert had charged $500.00 per hour to testify in court, the Plaintiff's expert had charged $650.00 per hour.

§ TYPES OF TRIAL

There are two types of trials available to the parties, trial by jury or a bench trial exclusively by the judge. In a trial by jury, the judge determines the law and the jury determines the facts. In a bench trial, the judge wears both the hats of being the trier of law and the trier of fact. The U.S. Constitution guarantees a trial by jury. If a party does not request a jury trial that right may be deemed forfeit and by the same token, both sides must agree to waive a jury trial.

So why would anyone choose to have a case heard by a judge as opposed to a jury, or vice versa? The reasons are mainly based on preconceived notions about judge and juror biases. Generally, most litigants favor a jury over a judge because the decision is put into the hands of many rather than in the hands of one.[2] Plaintiffs usually like juries because lay individuals are believed to be more sympathetic, and a Plaintiff can appeal to the emotions of a jury. Conversely, Defendants usually prefer bench trials because a judge is thought to be more objective in deciding a case. Requesting a bench trial can also result in a much quicker trial date. Since court dockets in most large cities are becoming increasingly congested, the time difference between a jury trial date and a bench trial date can be literally years.

None of the perceptions about the benefits of a jury trial or a bench trial apply to all situations—every case is different. There is at least some empirical evidence that some of the commonly held conceptions about bench and jury trials are actually misconceptions. For example, while it is almost universally believed that juries tend to favor Plaintiffs and award much higher monetary amounts, a study by the Department of Justice[3] suggests that *judges* favor Plaintiffs and return higher verdicts. Still, jury trials outnumber bench trials by about two to one.

§ DISCOVERY PROCESS

In that most medical negligence cases are fact driven, the topic of discovery demands a specific and integral role in the trial process. Discovery simply is the methodology used in American jurisprudence for each side to discover all of the evidence that is available in the case and to have

[2] The actual number of jurors can vary from state to state in civil trials.
[3] See Civil Jury Cases and Verdicts in Large Counties, Civil Justice Survey of State Courts at: www.usdoj.gov/bjs/abstract/cjcavilc.htm.

that documentation analyzed. While specific states have rules that may limit discovery, the purpose is to prevent trial by ambush.[4]

According to the Federal Rules of Civil Procedure, discovery can include written interrogatories or questions, requests for production, deposition, either oral or through written statements, request for examination, request for inspection of evidence, requests for admission, and finally independent, or as Plaintiffs' lawyers commonly label them, compulsory medical examinations.

The scope of the above discovery methods is generally a book onto itself, so suffice it to say, discovery is the process where each party exchanges information so the merit of their respective cases can be evaluated. Lawyers will use this evidence in developing the theory of their case and the order in which that evidence will be presented to the trier of fact. While discovery is often viewed as a mundane part of the process, in reality, it is the very topic that often proves dispositive in the ultimate outcome of the case, whether it be tried, settled, or rejected.

§ DEPOSITIONS

One of the discovery methods listed above does deserve specific discussion because the deposition, or oral statement under oath, is such a vital piece of the puzzle. In general, either party may depose any other person but in general, a deponent has some relevance to the case, whether it be as a fact witness, an expert witness, or a before and after witness (a person who can testify as to the state of affairs of a person before and after the incident in question).

Depositions are taken to gain an insight into what information will be necessary in order to prosecute or defend a case. Even more important is that the oral deposition provides the respective lawyer with a chance to evaluate that person's reactions to stress, to personally see for the temperament of the witness, to view the witness' demeanor, and to analyze how that person responds to spontaneous events. The format is typically oral and in person question and answer dialogue although recent technology has permitted depositions via telephone conference, video-conference, and internet medium exchanges; like Skype®. Depositions can be taken via written question format but often this type has limited value because the deponent will not be asked any follow-up questions and a statement cannot be investigated further.

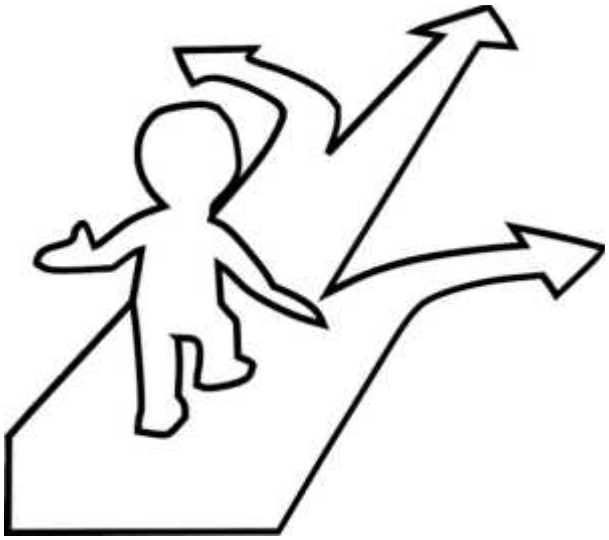
There are lists of do's and don'ts that lawyers provide their clients but the fundamental character of the deposition is for the deponent to tell the truth. While it is rare that a trial sees the Perry Mason moment, these do in fact happen and when it does, the result is often exactly what viewers of that classical television series see. As a rule, in light of the attorney client privilege, we insist upon knowing whatever skeletons are in a client's closet, past or present. It is of ultimate importance that a client confides the truth to their lawyer so that the any adverse issue can be addressed through cognizant decision, rather than surprise. In one case, our client was being deposed and admitted that she was a lesbian. Her sexual preferences did not matter but the fact that she disclosed a misdemeanor arrest for marijuana did. She was advised her to tell the truth about both issues and explained why this was important.

[4] It is interesting to note that in New York State, the identity and/or deposition of a medical expert is not disclosed until the time of trial so in this venue, ambush can be a tactical weapon.

During her deposition, when the homophobic defense counsel abrasively probed her sexuality, she readily admitted her own sexual preference. That was fine but the defense lawyer continued to "push her buttons' until she finally screamed at him to "shut the f... up". The die was cast because the next line of questioning involved her arrest record as to the marijuana. When she client denied any other arrests but for the drugs, it was simple for the defense counsel to show her documentation of four earlier felony arrests including one for fraud, which ultimately cost her the case. The important fact to remember is that we all have a past and that being truthful as to its content can often dictate a successful outcome of a case.

§ MOTIONS *IN LIMINE*

Motions *in limine* are one of the many weapons lawyers use to limit the jurors hearing evidence that is deemed to be irrelevant or too prejudicial to a party. A lawyer must be tactical in this area so that the jury never can appreciate that information is being withheld, thereby creating doubt as to the honesty of that lawyer. A typical example and one that we confront is whether to permit the jury to know that in addition to being a lawyer, the attorney may also be a doctor; for example. In every case we must gauge the advisability of disclosing this to the jury or simply using a motion *in limine* to prevent that fact from being disclosed. Can you imagine the impact upon the jury if the fact that the trial attorney-doctor was withheld and a witness, expert or lay, through intention or true neglect, testified something to the fact of "come on now, you are a doctor, you know it's true." The jury might interpret this as a conspiracy to have a special "hired gun" doing that party's bidding rather than as a simple advocate of the truth. Or the jury may interpret this as part of a game plan to protect one of our own physician colleagues despite the apparent negligence.



§ JURY SELECTION

The selection process for a jury begins with what is called the jury pool. A number of citizens are selected as potential jurors, usually several times the number of jurors needed for a trial. From this pool of potential jurors, the jury panel is selected.

The size of the jury panel varies by state and locale. Most juries consist of six to twelve individuals on a panel. In addition, one or more alternate jurors may also be selected. Alternate jurors sit with the jury and hear evidence just as all the other jurors. In some states, they also sit in on jury deliberations, though they are not allowed to participate. If for some reason a member of the selected jury is unable to continue with the trial or deliberations, the alternate juror fills in. The number of alternate jurors varies, and determining that number is usually left to the discretion of the judge. Generally, the longer the trial, the more alternate jurors are sworn in.

Before any potential juror appears at the courthouse for a trial, usually a questionnaire form is mailed for the individual to complete and return to the court. Such forms generally request demographic information such as name, age, occupation, educational background, participation as a party or witness in previous litigation, previous jury service, etc. Attorneys for the parties are able to obtain and review these questionnaires in advance of the trial date.

On the day of trial, when the potential jurors arrive at the courthouse, the judge typically asks some generic questions about their ability to serve. The judge may ask whether any potential juror has a problem staying for the duration of the trial, or whether the potential jurors know any of the parties or their attorneys. The purpose of these questions is for the judge to determine which, if any, of the potential jurors will be excused immediately from service.

Many juries tend to be comprised of citizens with little or no college education. One of the possible reasons for this result is that many professionals, especially medical professionals, request to be excused from jury service, citing their professional commitments as justification. Ironically, professionals are usually the first to complain when juries who lack any representatives with advanced education hear their own cases. Once the judge is finished with the preliminary screening of the jury pool, *voir dire* begins.

[A] *Voir Dire*: Questioning of the Jurors

Voir dire literally means, "to speak the truth." It is the term used to represent the preliminary questioning of potential jurors. The purpose of *voir dire* is to uncover any prejudice or bias in potential jurors. Plaintiffs' attorneys in medical malpractice cases will try to determine if the potential jurors have any strong connection to a health care provider that might make the juror favor the Defendant-doctor. Similarly, medical malpractice defense attorneys will try to uncover any bad experiences the potential jurors may have had with a healthcare practitioner, which may make the juror biased in favor of the patient. The judge, the attorneys, or both can conduct the questioning. Most jurisdictions allow the attorneys to conduct *voir dire*. The key to successful voir dire is not changing an avowed racist into a liberal but to discover that juror's attitudes and position as to issues, and thereafter appropriately respond to that disclosure.

Voir dire is such an important aspect of the trial process that often, studies conclude that the trial is over when *voir dire* ends. Attorneys will spend a great deal of time toward *voir dire* preparation in order to detect juror bias, adverse attitudes and thoughts, as well as prejudice, be it overt or covert. This is simply a human exercise using intuition, gut feelings, and common sense where the input from a Plaintiff or Defendant often has as much influence as that of counsel.

In some cases, jury specialists and consultants such as psychologists are retained to provide an expertise into the process. These experts often provide invaluable insight into the process but as any consultant worth her salt will admit, it is an inexact science. The essence of the process is to identify those potential jurors who tend to exhibit a positive identity toward your case facts or those who react adversely, while at the same time, not being so blatant as to tip your hand to the opposition.

Beyond trying to eliminate bias against their clients, attorneys often use the *voir dire* process to try to "educate" the jury along with developing a rapport in their favor. They also use *voir dire* to begin placing before the potential jurors the theories of the complaint and defense thereto to try to gauge their reactions. Skillful attorneys will tacitly use the questioning process of *voir dire* to prepare the jury to find in favor of their clients.

[B] Challenges of Jurors

When the attorneys and/or the judge have finished *voir dire* of the potential jurors, challenges may be made to remove potential jurors from serving on the sworn jury panel. Attorneys use the challenge phase of jury selection to remove jurors who may favor the other side's case. To remove potential jurors, two types of challenges may be made to "strike" the individual from the jury.

The first type of challenge is a challenge for cause. A "for cause" challenge is one in which the attorneys are required to state and present reasons for removing the potential juror. The rationale given is usually that the challenged juror cannot hear the case fairly for one reason or another. For example, a juror may have stated that he or she will not abide by a judge's instructions as to application of the law because he or she does not think the instruction is fair. Such a situation is a clear case to have the juror removed for cause. The number of "for cause" challenges are unlimited, and the judge decides whether to excuse the challenged potential juror. Other challenges for cause may be based on a claim of juror bias. In practice, however, very few for cause challenges based on alleged bias are sustained. In the famous Attica prison riot trial in New York, Ernie Goodman, counsel for one of the alleged rioting prisoners was fortunate enough to have law students use questionnaires, canvas the neighborhoods of potential jurors, and provide insight into what make of automobile was in the driveways and whether any bumper stickers were attached. That information, along with the typical television habits of the potential jurors, and the complexion of the neighborhood environment served the purpose such that a majority of racial predisposition might be ferreted out. Discovering that persons living in a certain neighborhood were more prone to racial bigotry served Goodman well during the *voir dir*e process. The process is inexact and a juror can fool the system.

The second type of challenge is a peremptory challenge (note the challenge is *per*emptory, meaning absolute, not *pre*emptory). Each party is given a certain number of peremptory challenges in which to remove any potential juror from the panel. In civil trials, each side generally has two or more peremptory challenges.

No reason is needed to strike a potential juror when using a peremptory challenge and the individual is automatically excused. The only exception is the strike must be race and gender neutral. Where a pattern of strikes suggests peremptory challenges were used to remove potential jurors because of their race or gender, the entire process must be restarted. Volumes of law journal articles have been written about race- and gender-based peremptory challenges, and an extensive discussion is beyond the scope of this chapter. Suffice to say; objecting to peremptory challenges because they are race- or gender-based is the exception rather than the rule. In most cases, the number of challenges allowed is too small to show any pattern.

Challenging a juror can often be a tactical decision which often entertains far reaching issues. Certainly it seems simple enough to strike a juror who has voiced concerns that doctors are all quacks but caution must be exercised so that the opinion of that one potential juryperson will not poison the attitudes of the remaining jury panel. It could be catastrophic for an attorney to continue questioning and to elicit responses from that potential juror so that persons in the court-room can all listen to it. On those occasions, counsel may request that the court permit the examination of that juror "in camera," or outside the hearing of the remaining jury panel. In this manner, an attorney can more freely delve into the prospective biases that juror may harbor and if necessary, establish a for-cause strike rather than a peremptory strike.

[C] Jury Selection Logistics

Ordinarily, the jury box is filled with potential jury panel members by randomly selecting names from the pool of potential jurors. When a potential juror is removed by a challenge, that juror is replaced with another member of the jury pool. Each newly selected potential juror is questioned, and then, if appropriate, challenged. When each side has exhausted all of its challenges, the jury selection is complete.

The time to conduct jury selection varies. Supposedly, in the "old days," jury questioning would take many days. In our current heavily congested court system, however, most judges limit the *voir dire* process to just a few hours.

[D] Preliminary Instructions to the Jury

Once the jury is selected, the judge will swear in those selected and give them preliminary instructions. These instructions usually involve statements of the law and the case such as the basic allegations in the lawsuit, which side carries the burden of proof, and the presentation of evidence. The judge will also instruct the jury regarding more general issues such as note taking, limitations on discussing the case, and breaks in the trial. Of course, in a bench trial, no preliminary instructions are necessary. After the judge gives the jury preliminary instructions, the formal presentation of the case begins with opening statements.

§ OPENING STATEMENTS

The opening statement phase of a civil trial is when the case really begins. Some lawyers very firmly believe that cases are won or lost during opening statements and *voir dire*. In this phase, attorneys provide a road map of the trial by telling their client's side of the story, while at the same time trying to convince the jury to find in their client's favor. Lawyers will use this opportunity to build upon the rapport developed during *voir dire* so that the jury will appreciate the theory of the case in factual terms.

Arguments are not allowed during opening statements. Rather, attorneys are only allowed to state what the evidence will show. Most attorneys find this to be a distinction without much of a difference. For example, the statement "Dr. Smith crippled Mrs. Jones by performing unnecessary surgery," could be considered argument, and not allowed during opening statements. Stating "the evidence will show that Dr. Smith crippled Mrs. Jones when he performed unnecessary surgery," however, is not considered argument because the attorney is merely stating what he believes the evidence will show.

Depending on the complexity of the case, attorneys may use exhibits during opening statements. Such exhibits are not considered evidence, but only illustrative of what each side intends to prove. Some attorneys may even use very technical computerized presentations during opening statements. Any such "props" are fair game as long as the information presented can be described fairly as "what the evidence will show."

The time length for opening statements varies from jurisdiction to jurisdiction, and from case to case. Cases that take several weeks to try may involve half-day long or longer opening statements. Cases that take a few days to try—which is probably most cases—involve an hour or so per side for opening statements.

During the *voir dire* process and again during the opening statement, jurors will take measure of the attorney's credibility and use this later in the decision making process to see whether that attorney really did establish those points of fact as promised. Gaining the trust of the jury can often times trump the factual evidence elicited during the trial. It is important to remember that the jury has the role as trier of the facts, and it is the attorney who presents these to the jury throughout the trial process.

§ PRESENTATION OF EVIDENCE (How Lawyers Tell a Story)

[A] Order of Evidence Presentation

Since the Plaintiff has the burden of proof, the Plaintiff presents his case first. The presentation of the Plaintiff's case is called the Plaintiff's case-in-chief. The Plaintiff's case-in-chief includes what are called the essential elements of the complaint. These elements are what the law requires every Plaintiff to prove in order to prevail in his case. It is the minimum amount of evidence necessary for the Court to permit the case to proceed.

For example, and in very general terms, in a medical malpractice or tort case, the Plaintiff must prove that there was a duty owed by the Defendant to the Plaintiff, that the Defendant breached that duty or standard of care, that the breach in the standard of care proximally or directly caused damage or injury to the Plaintiff, and the extent of damages sustained by the Plaintiff. A failure to present evidence on any one essential element produces a failure of the Plaintiff to carry his burden. When the Plaintiff finishes presenting his evidence, the Defendant has the opportunity to make a motion for what is called a directed verdict.

When a Defendant moves for a directed verdict, he is asking the judge to enter a judgment in his favor because the Plaintiff has failed to present evidence essential to the elements of the Plaintiff's case. If the Plaintiff has in fact failed to present evidence on a crucial aspect of his case, the judge will enter a verdict in favor of the defense. The case is over, and the Defendant need not present his case.

If, however, the Plaintiff has presented sufficient evidence, regardless of how weak that evidence may be, then a directed verdict motion will be denied. The judge will not substitute his judgment for that of the jury in determining whether evidence is strong enough for the Plaintiff to win. In that situation, the Defendant will have to present his case-in-chief.

Following the Defendant's case-in-chief, the formal presentation of evidence is usually concluded, unless the Plaintiff wants to present rebuttal evidence. Rebuttal evidence is evidence that may be presented to address any new issues raised by the defense that were not previously addressed by or disclosed to the Plaintiff. The decision of whether to allow rebuttal evidence lies in the judge's discretion. In some cases, rebuttal evidence, the Defendant's "response" to rebuttal evidence, may even be allowed.

[B] Witnesses

After the attorneys finish telling the jurors what the evidence will show in opening statements, the formal presentation of evidence begins. Trial evidence is presented primarily by calling witnesses to testify on the client's behalf. The party calling the witness first asks questions during what is called direct examination, or "direct." The opposing party then gets an opportunity to ask questions of the witness during cross examination, or "cross."

Questions on cross must be limited in scope to those asked on direct. Issues not raised during the direct examination may not be raised exclusively during cross. Cross-examination is not required but is generally a part of the witness examination. In some instances, an opposing party may have no questions at all for tactical reasons or because the witness testified to unimportant or uncontested issues. During cross-examination, the attorney will try to show how that witness' testimony should not be given the authority for which it was elicited. Television is a wonderful medium for showing how cross-examination is used to discredit, weaken, impeach, and undermine a witness' testimony but a good attorney will often use this time to simultaneously curry favorable opinions from the witness toward that attorney's client's position. Through the strategic use of leading questions, that are questions which call for a yes or no response, an attorney can often use the opponents' witness to limit issues if not actually help their own cause. Don't you agree?

Following cross-examination, the party calling the witness has an opportunity to conduct redirect examination, or "redirect," and following any redirect, re-cross examination may take place. Each subsequent examination, however, is limited in scope by the subject matter of the previous examination. Lawyers use redirect to rehabilitate their own witness who may have been weakening during cross-examination. The idea is that as each round of questioning is concluded, the focus gets narrower and narrower. Consequently, for example, if no questions were asked on cross, redirect is not allowed. After re-cross, the process is usually concluded, although on rare occasions a judge may allow further direct and cross if circumstances so warrant.

[C] Exhibits

Exhibits are tangible pieces of evidence that are relevant to the case. Medical records, photographs, and diagrams are common examples of exhibits that may be used during a civil trial. Basically, any tangible object may be used as an exhibit if it will aid the trier of fact in understanding the issues of the case.

The introduction of exhibits at trial is done primarily through witnesses. In order for an exhibit to be introduced into evidence, a witness must testify that the exhibit to be introduced is authentic, true, and accurate, and it must be relevant to an issue in the case. Such testimony is called foundation testimony. Before any exhibit can be introduced into evidence, a foundation must be laid.

Not all exhibits are introduced into evidence. For example, a skeletal model of the skull may be offered as an exhibit in a neurosurgery injury case because it might aid the jury in understanding the case. The skull model, however, may not be relevant to any issue in the case, and therefore cannot be introduced into evidence. Such an exhibit is called a demonstrative exhibit.

In contemporary trial presentations, parties are using computer generated exhibits to assist in the telling of their stories. Studies have often conflicted but in general conclude that juries retain only 10% of the oral evidence which they hear, 20% of the visual evidence, but almost 70% of evidence which combines the two aspects into a common presentation. PowerPoint and Excel[5] presentations provide a mechanism wherein a party can present visual explanations of what a lawyer is orally describing to a jury so that the picture adds the thousand extra words to that said in court. A day in the life video is a short ten minute or so presentation that Plaintiffs' counsel use to show the tragedy of the Plaintiff's daily travails to the jury. Overhead projections and computer-generated graphics can vividly exclaim the importance of the evidence. The impact of this type of demonstrative evidence should not be mistaken because despite the lofty cost for the preparation of these types of exhibits, the impact can be dispositive.

In a case from Mississippi, a Plaintiff claimed that since the Defendant's orthopedic ankle surgery, she was essentially disabled from doing those activities that she deemed essential. For three years, discovery and depositions tested those claims and she always maintained them under oath and before God. The weekend or so prior to trial, defense counsel contacted the Plaintiff's lawyer and asked that she come over to view video surveillance that would be used at trial.

[5] Microsoft incorporated.

Sure enough, there was the Plaintiff parking in a handicapped parking space, walking into the gym in a work-out uniform, and thereafter, doing aerobics. When confronted, her explanation was that she could do this only at times when she had taken sufficient doses of pain medication and that was the case in the surveillance videos. It took the jury only twenty minutes to decide otherwise.

[D] Objections

During the course of witness testimony or the attempted introduction of an exhibit into evidence, an attorney may state an objection. The main purpose of an objection is to prevent the presentation of certain information to a jury. Information that is not relevant or otherwise prohibited from being presented to a jury is objectionable. It is important to know that the conduct of a trial is not a wide-open search for the truth. Rather, it is a decision-making process in which the parties present their cases according to rules of evidence and procedure.

For routine objections, the attorneys will make brief statements in open court in support of or in opposition to an objection. The judge will then issue a ruling out loud from the bench. In some situations, however, an attorney may object to potentially damaging testimony that he or she wants to keep from the jury, in which case arguing the objection in open court may reveal the damaging information. In such an instance, the attorneys may ask to approach the bench for a "sidebar." Each attorney then approaches the judge's bench, and will discreetly argue the objection out of the jury's earshot. If the objection involves a major issue that requires extensive argument, the judge will excuse the jury from the courtroom so the attorneys can present their arguments out loud and on the record.

If evidence is excluded and an attorney feels the judge's ruling was incorrect, the attorney may make what is called an offer of proof. In this instance, the excluded evidence is presented on the record, but out of the presence of the jury. In this way, the evidence is preserved if the party decides to appeal the decision. An offer of proof is rare, but effective if an appeal is contemplated.

§ SUMMATION

When each side has concluded its case, closing arguments begin. As with opening statements, the time length allowed varies from case to case and court to court. Unlike opening statements, summation provides the attorney with a final opportunity to convince those jurors who may be in limbo as to the merits of their case as presented. In addition, skillful counsel will focus upon those jurors whom they perceive to be aligned with their position and provide these jurors with the ammunition or evidence necessary to convince other potentially undecided jurors during deliberations. It is the lawyer's final occasion to argue all of the elements of their case, from proving liability to maximizing damages. Conversely, defense counsel will use this opportunity to debunk the Plaintiff's case and argue for a defense verdict.

The Court does limit exactly what an attorney can argue in closing but latitude is generally the name of the game. Counsel may draw inferences from the evidence and while these inferences may be less than factual, if they are grounded in the truth, they are not improper. Courts often advise the attorneys that the final summation is meant as a time to convince the jury of the truth of their argument.[6] Lawyers do this through a skilled recitation of the evidence but there is the one "Golden Rule" which is considered a closing taboo. Lawyers for the patient are not permitted to ask the jurors to put themselves in the place of the Plaintiff and ask the jurors to decide the matter at hand based upon that perception. Similarly, it is improper for defense counsel to ask the jurors to be the Defendant. Lawyers are skilled orators who use their abilities to persuade a jury to accept their version of the facts. Yet, fairness and objectivity are the goals that the Court should strive to maintain and most lawyers work within those parameters.

§ FINAL INSTRUCTIONS

Following closing arguments, the judge usually excuses the jury so that the attorneys can argue over final instructions. Final instructions are the instructions on the law the judge gives to the jury to guide them in reaching a decision. Only instructions of law that are supported by evidence in the case are given, and that is what the attorneys argue about. Each side will try to persuade the judge to read an instruction to the jury that is favorable to its case.

As noted above, the jury, as the fact finders, will determine what they believe to be the true version of the facts presented at the trial. The jury will then apply those facts to the law as provided in the final instructions. For example, a final instruction may read as follows:

In order for the Plaintiff to prevail, the Plaintiff must prove that A, B, and C occurred. If you find the Plaintiff has proven each of these elements, your verdict must be for the Plaintiff. If you find the Plaintiff patient has failed to prove even one of these elements, your verdict must be for the Defendant doctor.

As with preliminary instructions, final instructions are omitted in a bench trial.

When the judge has decided which final instructions he or she is going to give, the jury is brought back into the courtroom and the final instructions are read. The judge also instructs the jury on the logistics of reaching a decision, such as choosing a foreman and taking breaks. The jury then retires to the jury room to deliberate.

§ JURY DELIBERATIONS

During jury deliberations, the jury is allowed to discuss the case among them-selves. If the jury members have followed the judge's preliminary instructions, this will be the first time they discuss the case. Jury research shows that the process of reaching a decision varies widely from jury to jury, as does the time to reach a decision. Like many aspects of the trial process, a lot of conceptions exist about jury deliberations. If the jury deliberates for a relatively short period of time, it is believed they will return a verdict in favor of the defense.

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[6] *O'Barr vs. United States*, 105 p 938 (Oklahoma 1910).

This conception comes from the belief that even if the jury quickly decided in favor of the Plaintiff, it usually takes a long time to calculate damages. This conception, however, has proven to be a misconception in many cases.

While the jury is deliberating, the parties and their attorneys usually leave the courthouse and wait at a more comfortable location (usually a nearby restaurant, because, for some reason, most jury trials conclude at the end of the day). When the jury returns with a verdict, the parties are contacted to return to the courtroom.

If the jury is unable to reach a verdict, then the jury is considered to be a hung jury. The remedy in the case of a hung jury is a new trial. Because most judges, parties, and Plaintiffs' attorneys would rather crawl across a room full of broken glass than re-try a case, judges will pressure the jury to keep deliberating until they are able to reach a decision. Can you see any reason why a defense attorney might not mind a hung jury or retrial? If that fails, the judge declares a mistrial, and a new case is eventually scheduled.

§ THE VERDICT

When the jury returns to the courtroom to announce its verdict, the collective hearts of the parties and their attorneys can probably generate a registration on a Richter scale. It is the moment of truth, the climax of the entire trial process. After the verdict is read, either party may poll the jury to "verify" that each juror supports the decision, though a polling of the jury is always done, if at all, by the losing party.

Once the jury is polled, the losing party can also ask the judge to overturn the jury decision, called a motion for judgment notwithstanding the verdict, or JNOV (judgment *non obstante veredicto*). A motion for JNOV is only granted if the judge, in hindsight, believes the case should not have been submitted to a jury because there was no evidence that a reasonable person would have credited on an essential element of the Plaintiff's case. The judge has the discretion to enter a JNOV, but such discretion is rarely invoked. In most situations, judges are very hesitant to substitute their own judgment for that of the jurors. Once the judge enters a verdict, the trial is over. In a 2002 case involving a professional football player, the jury returned a 5.2 million dollar verdict in favor of the player but the trial judge, stating at that late date that the Plaintiff had failed to prove his case, and awarded the Defendant a JNOV. As is often the case in that situation, the parties compromised the jury verdict so that neither side was happy with the result.

A medical malpractice trial is nearly always a roller coaster ride of emotions. When the opposing side is putting on its case, you can feel as though you are being pummeled over the head with a baseball bat, and defeat is inevitable. Moments later, your attorney can perform a stunning cross-examination, and victory seems certain. Such is life in our adversarial system, where two parties present the case in a punch, counter-punch format. When the verdict is finally entered, regardless of the outcome, most parties are relieved that it is over. All have a more thorough understanding as to why 97 percent of civil cases never make it this far.

§ PREVENTING / REDUCING INCIDENTS OF MALPRACTICE

As a practicing medical professional, it is important to realize that while you can accept your position in a malpractice case as a passive victim, alternatively there are numerous methods at your disposal to protect you, your practice, and your family from potential litigation. Certainly there is not any one approach currently available that would guarantee that a health care practitioner might never become involved in malpractice litigation. Despite this lack of assurance, there remain alternatives that might well be the divining wand as to whether a potential case spouts success.

[A] Honesty

At each and every risk management conference, the universal principle promoted by insurance carriers and the foundation that cements a successful doctor-patient relationship is honesty. The ability to honesty communicate with a patient is of such fundamental importance that it is often taken for granted. It is a simple truism that we as human beings want to be told the truth and be told it in such a way that it is beyond reproach. As Paul Starr wrote, patients are often marginalized when they seek the care and treatment of a physician and look up toward that person for those words of reassurance and certainty. In no way are we suggesting that doctors should simply tell the patient the truth that the patient wants to hear. The communication should be one that displays a sense of reality, credibility, compassion, and earnestness. *It can't be stressed to any degree more than this.*

All too often, clients whom we interview ask why their doctor did not tell them the truth. It might not be presented in such a straightforward manner but it often is as simple as that. On numerous occasions, clients have told me that "if only my doctor had told me the truth, I would never have sued him," or "why didn't my doctor tell me that there was a problem following surgery," or "why did my doctor not tell me that the nerve in my arm was cut by mistake," or "if only my doctor had fessed up." Patients want to know the truth and despite any hesitance that you might harbor, tell them the truth. Patients are human beings as are doctors. Patients make mistakes, as do doctors. Car mechanics often don't fix a problem the first time they try and plumbers often return to fix a leak in a pipe they just soldered closed. Patients know and understand this so don't sell them short.

We know that at first blush you are sitting here saying to yourselves that there is no way I can tell the patient what really happened because, if I tell them, they will think I am admitting I was negligent, run to a lawyer, and sue me. Honesty is not the best policy you conclude. Sorry to rain on your parade but you are dead wrong. We only wish that we could statistically recount to you the times where we did exactly as we have advised and told the truth. We will say it again and again. Look the patient in the eyes and simply explain to them what happened, why it happened, and what you plan to do to help them overcome the complications which they perceive are existent. Candor is a must yet the same must be dosed with a touch of caution. While not admitting liability *per se*, don't sugarcoat it so as to appear condescending. Speak up in a timely manner because avoidance can readily be misconstrued. It is not a contest of wills but a willingness to provide a person with the reality of their condition and the assurance that you as their physician care, will listen, and will work with them to resolve the crisis.

Yes, we will admit that there are those instances where a patient will do the exact opposite of what we suggest will be their reaction. If that is the case, then we would submit to you that the patient would have jumped in their car, run and looked in the yellow pages, consulted a lawyer, and filed a lawsuit regardless of the fact. Tell the truth and the truth will set you free.

[B] Medical Records

Not only are the patient's medical records [paper or electronic] a legal document, these documents remain the central focus of any competent medical malpractice investigation. The records should honestly and in detail reflect the care and treatment provided to that patient based upon the presenting circumstances. Self-serving statements about what the patient did to cause the current complications not only wave a red flag, they hoist it high. This can't be emphasized beyond underscoring the fact that the medical records create the very nature of one's credibility.

In one case, the Defendant doctor's notes stated that post-operative problems were caused by chasing after a cat that escaped, in the house. The records stated that the patient came into the office the following day with tree bark and dirt all over the operative bandages. The doctor wrote that her patient told her that she had to climb a tree in the patient's yard to rescue the cat. The problem faced was that the patient/Plaintiff denied the entire episode ever happened. While admitting she did have a pet cat run out of the house, she steadfastly denied climbing tress or running to catch the animal. The case in question settled within a few weeks after the doctor's deposition following the doctor's averment that her notes were truthful and accurate. Why? It was simply because we showed the doctor pictures of the patient's home and yard and, as you might have surmised, there were not any trees to be found.

The proverbial SOAP[IER] (subjective, objective, assessment and plan) method of charting still reflects a professionalism that is so imperative when case records are reviewed. Medical records should be typewritten or computer generated if at all possible; EMRs non-withstanding. Each entry should be dated and endorsed by the treating doctor. Notes that are still handwritten need to be legible. Despite any situation that you may encounter and even under the most careful of conditions, do not, we repeat do not ever modify or alter your medical chart. Scientific advancements in time dating of paper and ink make alterations the easiest way to assure a Plaintiff's success. Any paper record can be changed to modify an error but you should simply draw a line through the errant portion, note the correction, and date both entries. Not only does this insure the integrity of your medical chart it also presents a reviewer with the image of a conscientious and honest practitioner. EMRs are date stamped.

ASSESSMENT

As hard as it might be for you as a Defendant doctor to accept, every trial lawyer will tell you that despite the jury's most earnest efforts, there are those cases which you should win and those cases which you should lose that turn out exactly opposite. Despite the best efforts of all concerned, sometimes the decision is not the proper one. We leave you with this thought.

During one jury trial, the Defendant was a well known hospital affiliated with the community's largest church. In fact, the name of the hospital reflected the church's denomination. During *voir dire,* the Plaintiff's lawyer was specific in asking the jury panel about their religious affiliations, their membership in church related groups, and almost every other conceivable situation that might have a root into jury prejudice in support of the hospital. The Judge provided unlimited *voir dire* and there were numerous in camera examinations of prospective jurors. The jury was selected and the case was set to begin that following Monday morning. With a packed courtroom, and with the Judge and parties all present, the jury was escorted into their respective seats. Juror number two, a middle aged female, took out a pink Bible, put it between her hands, and prayed during the entire trial.

We think you can appreciate the significance and the regrettable outcome for the Plaintiff whose seven week old child died during an anesthesia related incident at the hospital.

CONCLUSION

As a medical provider it is important to realize that while you can accept your position in a medical malpractice case as a passive victim, you can also study the more active trial defense methods in this chapter to help protect your practice, family and professional reputation from harm during litigation.

ANONYMITY

Examples are from actual legal cases but the venue and details of the parties were modified to enhance confidentiality and protect the privacy of participants.

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TIPS FOR LOOKING MEDICAL PROFESSIONAL LIABILITY COVERAGE

The following are buying tips for healthcare professionals who are shopping for medical professional liability insurance coverage:

- Shop well in advance of your renewal or expiration date. Your agent should have all of the necessary information to the insurer at least six to eight weeks before your coverage expires. See the attached checklist for the types of information your agent will need.
- If you do not know an agent who can place your coverage, the Bureau of Insurance has a list of agencies that are licensed and appointed with at least one of the insurers on the Bureau's list of "Insurers Writing New Business for Physicians and Surgeons."
- Contact one or two agents and be sure to ask each agent which insurer will be contacted for a quote. Ask the agent if an application will also be submitted to a surplus lines broker. If so, ask for the name of the surplus lines broker and ask which surplus lines insurers will be contacted. Provide this information to the other agent to avoid multiple applications being submitted to one insurer from different agents. If the application is being submitted to a surplus lines broker, be sure to ask the agent for information on the coverage provided and specifically request information on exclusions.
- If the agent recommends coverage through an unlicensed company (such as a surplus lines insurer or a risk retention group), be aware that, in the case of insolvency, the insured will not have coverage through the [State] Property and Casualty Insurance Guaranty Association. However, if the healthcare professional has had several claims or an open claim, they may only be able to obtain coverage through a company not licensed in their state.
- Ask the agent for information on the financial rating of the company and if the surplus lines insurer has its own guaranty fund. Also, if shopping, the medical professional should feel free to check with the Insurance Bureau of their respective state to see if the company and agent are licensed or authorized to do business.
- The agent should fully understand the healthcare professional's business. If incorporated, ask the agent what coverage is needed to protect the corporation as well as any individual doctors.
- Ask the agent about the availability of "tail coverage" or if the new insurer will provide coverage for "prior acts." If coverage is offered with two insurers, ask the agent what each insurer charges for "tail coverage." This information may help in deciding which insurer has the most competitive price.
- Complete the application for coverage in its entirety. Don't omit any information and be sure to provide as much detail as possible, especially about prior claims. Many insurance companies want 10 years of information. They may also request information about any risk management practices and procedures.

- Discuss deductible options with your agent. These may help lower your premium.
- Find out if the insurance company offers any risk management or loss prevention programs. Such programs may lower the premium and help reduce exposure to losses.

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INFORMATION CHECKLIST FOR PHYSICIANS SEEKING INSURANCE

[The following are sample questions and information gathered for Professional Liability Coverage]

Background, Education, and Certifications

- Medical specialty information by percentage of practice.
- Information on medical education, including information on medical school attended; internship information, residency information, and fellowship information, if any.
- Information on medical experience, including information on military discharge (DD214), public health service, moonlighting, 'locum tenens', and private practice information.

Have dates and locations available:

- Information on completed continuing education hours in the past two years.
- Publications, speeches, instruction, etc.
- Information on medical licenses, including state, license number, expiration dates, and current status.
- Information on board certifications.
  The above information may be contained in a Curriculum Vita, if you have one.
- On an "as applicable" basis:
  Complete details including dates and outcomes of any board certification revocations or suspensions, license revocations or suspensions, alcohol or drug addictions and treatments, criminal or sexual misconduct charges, or Medicare or Medicaid charges.
- Previous Insurance Information
  Insurance history, including the name, policy number, whether the coverage form was occurrence or claims made, policy period, limits of liability, deductible amount, and prior acts date, for your current carrier, and your first, second, third, and fourth prior carrier, if applicable.
- Information on any insurance company cancellations or non-renewals.
- If the current policy is a claims-made policy, whether you are obtaining tail coverage from your current insurance company.
- Copies of prior policies, if available.

Current Medical Practice Information

- Information on supervision and employment of residents, physician assistants, nurse practitioners, CRNAs, nurse midwives, and other physicians.
- Information on networks or managed care organizations associated with (IPA, PHO, MSO, etc.), including group name, type of organization, and relationship.
- Information on other contractual relationships, other than PPOs, HMOs, IPA, etc.

- Full information on all hospital privileges, including hospital name, location, and type of privilege.
- If any, information on any suspension, denial, revocation, restriction, or other sanctioning of hospital privileges.

Classification and Specialty Identification

Full information on procedures performed, including details of surgeries, average number of patients seen weekly, specialty practice areas, etc.

Prior Claims History (if any)

For each claim, patient's name; date of occurrence; insurance carrier; location of occurrence; date claim was reported; date claim was closed (if applicable); copies of subpoenas, pleadings, or judgments; amount reserved on your behalf; and amount paid on your behalf. Provide as complete a description of the allegations as possible.

Important Note

This is provided as a guide to assist the healthcare professional in gathering the information that insurance companies typically request. Discuss this checklist with your insurance agent, attorney or councilor to identify additional information as needed**.**

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THE END