Overview of a Malpractice Trial (and How to Survive)

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It's game day. The trial begins today and your fate will be decided by a jury of your "peers." Never mind the fact that none of them are physicians, only three have been to college, and two did not even graduate from high school; in the eyes of the law, they are your peers and will be the ones to decide if your care met the standard of care.

The typical medical practice trial usually progresses in the following way:

- *Jury selection*: Potential members of the jury are questioned by the judge and the respective attorneys. The attorneys can disqualify a prospective juror "for cause." If the judge determines it is a valid cause, the juror will not sit on the case. Each counsel is also allowed an equal number of *peremptory challenges*, which means the attorney does not need to give a reason to have a juror disqualified.
- *Opening statements by counsel*: The plaintiff's counsel makes the first opening statement, followed by the defense opening statement. The opening statements set the stage for the presentation of the facts and theories of the case. Both attorneys inform the jury about what they will attempt to prove during the course of the trial
- *Presentation of the plaintiff's case*: The accuser goes first, since he has the burden to prove the facts and the essential elements of the case. All the essential elements of the case (duty, breach, causation and damages) must be proved by a preponderance of the evidence (more likely than not, or more than 50% probability). The defense has the opportunity to cross-examine the plaintiff's witnesses in an attempt to point out inconsistencies and to reveal weaknesses or gaps in the testimony.
- *Motion for a directed verdict*: After the completion of the plaintiff's case, the defense attorney may submit a motion for a directed verdict which argues that even if the plaintiff's evidence is taken to be true, no case has been proven against the physician by a preponderance of the evidence. It is basically saying, "That's all you've got?" If the judge agrees, the case is over. If the motion is denied, the defense presents their side of the case.
- *Presentation of the defendant's case*: The defense attorney attempts to establish that some of the essential elements of the plaintiff's case are without substance. Since the burden on the plaintiff is to prove *all* the elements of the case, the defense attorney has put forth an effective defense if he or she can convince the jury that even one element is missing from the plaintiff's case in chief.
- *Closing arguments*: Both attorneys have the opportunity to give a synopsis of their case and why each believes his is the better set of facts. After their initial arguments, both sides are allowed to rebut their opponents' final statements.
- *Jury instructions*: The judge instructs the jury on the applicable laws which define the concepts that the jury will be asked to consider in reaching a verdict. Each side can submit proposed jury instructions. The judge can use part or all of the proposed instructions or can give his or her own instructions. After the jury instructions, the jury adjourns and begins to deliberate.

Despite the fact that the odds may seem stacked against you, they aren't. Physicians win 60% of the cases which make it to trial.

Moreover, most legal scholars believe that juries typically come up with the correct verdict. This means if your care did not, in fact, fall below the standard, or you had no duty to the patient, or your treatment did not cause the damage, you should be in great shape!

So, what else can you do to stack the odds even more in your favor? Read on.

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The Trial is Also a Show

As the defendant, your attire should reflect the appropriate amount of respect due to the court. This means that you should dress neither overly formally or too causally. For men, a conservative dark suit or blazer with a blue or white shirt and understated tie demonstrate a professional demeanor. For women, similar guidelines apply: understated and professional. You should refrain from wearing flashy or expensive jewelry or watches; the last thing you would want to convey is that you have money to burn.

Be Prepared

As with the deposition, it is very important for you to be prepared for the trial. This means being thoroughly familiar with the entire medical record. It may take a number of years for the case to come to trial, so it is imperative to refamiliarize yourself with all of the records and the deposition.

The plaintiff's counsel may attempt to get you to contradict your previous testimony by rephrasing or reordering questions. The best way to prepare for this is to thoroughly review the deposition before the trial. You will only harm your own defense if you allow the plaintiff's council to impeach you with your own prior testimony. If there are inconsistencies in the previous testimony, you may defuse a potentially damaging situation by addressing the inconsistencies upfront and honestly.

Humility Counts

Most people—including the jurors—respect the medical profession; however, the jurors must also find the physician likeable, honest, and genuine. Physicians who come across as pompous or arrogant often don't do well with juries. Sit up straight with your arms at your side, not folded across your chest. Your mannerisms should reflect those of a warm, caring, confident professional.

When speaking, find a balance between directing your comments toward the attorney asking the question and to the jury. Try to make eye contact with both the jury and the attorney. It is important that you not play excessively to the jury, since that may come across as you being "over-coached."

During the direct examination, your attorney will be asking questions. Typically, these questions and their answers are well-rehearsed prior to going into trial. When too much emphasis is placed on direct examination, however, the testimony can come across as "staged."

In other words, if the physician is answering before his or her attorney finishes the question, it may give the appearance of insincerity. It is important to listen to the entire question before speaking. During cross-examination, this will give your attorney a chance to object and provide you with time to actually understand the question before answering it.

Cross-examination

Often, too little time is spent preparing for cross-examination, which is conducted by the opposing attorney who will do his best to trip you up and make you appear incompetent or argumentative. This is why practicing helps; you do not want to respond to blunt questioning about the care you provided by losing your temper or confidence.

Also, if you ponder the question for an excessive period of time before answering, the jury may leave with the impression that you are attempting to deceive them or answer incompletely.

"If care was within the standard, juries typically find for the physician."

Play for Keeps

If the decision was made to not settle the case before the commencement of the trial, the trial is the time to win; do not assume that you will win on appeal before an appellate judge if you lose the jury trial. Occasionally, in a few very specific circumstances, a new trial will be granted; however, it is very rare for an appellate court to grant a new trial on the basis that the "verdict was against the weight of the evidence."

The take home point here is this: The trial is the championship game and there are no trophies for second place.

The best word to describe the right approach to the trial is *balance*. For example: The physician should dress neither too formally (see Tom Hanks' character during the holiday party scene in the movie *Big*) nor too causally (see Tom Hanks' character on the tractor in *Forrest Gump*).

- Answers should be given when the question is finished, not before the question ends or too long after the question ends.
- The physician should practice responses for both the direct and cross-examination.
- Demeanor should be relaxed and confident, not defensive or arrogant.
- Eye contact should shift between the jury and the attorney asking the questions.
- Medical terminology should be kept to a minimum; however, it is OK to use medical terms that are in most people's common vocabulary.

In the end, the odds are on our side. Physicians prevail in the majority of malpractice suits. If their care was within the standard, juries typically come up with the correct verdict and find for the physician. ■