

# The Game Part 3

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Wouldn't this be a lot more fun if the opposing attorney made some of these statements while you were on the stand?

***Lawyer:*** *Now doctor, isn't it true that when a person dies in his sleep, he doesn't know about it until the next morning?*
***Lawyer:*** *Doctor, how many autopsies have you performed on dead people?*
***Witness:*** *All my autopsies are performed on dead people.*
***Lawyer:*** *Do you recall the time that you examined the body?*
***Witness:*** *The autopsy started around 8:30 p.m.*
***Lawyer:*** *And Mr. Johnson was dead at the time?*
***Witness:*** *No, he was sitting on the table wondering why I was doing an autopsy.*
***Lawyer:*** *Doctor, before you performed the autopsy, did you check for a pulse?*
***Witness:*** *No.*
***Lawyer:*** *Did you check for blood pressure?*
***Witness:*** *No.*
***Lawyer:*** *Did you check for breathing?*
***Witness:*** *No.*
***Lawyer:*** *So, then it is possible that the patient was alive then you began the autopsy?*
***Witness:*** *No.*
***Lawyer:*** *How can you be so sure, Doctor?*
***Witness:*** *Because his brain was sitting on my desk in a jar.*
***Lawyer:*** *But could the patient have still been alive nevertheless?*
***Witness:*** *It is possible that he could have been alive and practicing law somewhere.*

It's game time. The big day is finally here. The trial *is* a bit like a sporting event: The judge is a referee, the parties are like opposing teams, and each team has a number of support staff. The referee applies the rules of the game impartially and helps move the process along. The score or deciding who ultimately wins the game, i.e. the verdict, rests with the jury. Although on very rare occasions the judge may render the verdict, the defendant should focus his or her attention on the jury.

If the opportunity ever presents itself, it's a good idea to sit in on a medical malpractice trial so that the first one you witness isn't your own. As an impartial observer, one thing you will notice is that the jury spends a lot of time looking at the defendant-provider. They notice everything about him or her—tThe defendant's clothes, body language, facial expressions and gestures. The jury also observes the defendant's interaction with his or her spouse (if one is present and attorneys and his or her overall attentiveness.

The jurors watch the defendant in the hall, the cafeteria, and the parking lot and even look to see what kind of car the person drives. The implication of all these observations is very clear. The jury is attempting to see beyond the facts of the case. They are trying to ascertain the character, the integrity, the humility, and the empathy of the provider.

## Jury Selection

The first part of this process begins with jury selection. The potential jurors are brought into the courtroom, where the attorneys have the chance to ask both broad and sometimes very specific questions. Each side has the ability to strike a certain number of jurors. The attorneys try to determine which jurors will be most empathetic to their cause. Before selection, you should discuss with your attorney the jury selection process they use to determine which jurors best fit for the case.

## Opening Statement

Opening statements are given after jury selection. These statements can take anywhere from a few minutes to as many as a few hours. During the opening statement, the attorneys essentially tell the jury about the case in the best possible light. Opening statements can be a simple recitation of the facts or a highly emotional story about pain-and-suffering.

Opening statements are the jury's first opportunity to see the attorneys in action. In addition they will be watching your face to see how you react. Despite the pressure and despite the

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emotional toll this process is taking, it is important that you always remain confident and impassive in court. Although it is incredibly difficult, try to view the proceedings with as much detachment as possible. I call it "putting on the spacesuit." When you're in the spacesuit you are protected from the outside world. It may sound cliché but your demeanor may be the most important thing that you can add to the trial.

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**The Evidence**

After the opening statement, the plaintiff presents their case. The plaintiff calls witnesses and takes them through the direct examination. Your attorney gets the chance to cross examine each and every witness the plaintiff presents. The objective of the cross examination is to point out weaknesses in the testimony or highlight points more favorable to your side. Not all witnesses are subject to cross-examination. Sometimes the cross-examination may be extensive and other times it may just be one or two questions.

Plaintiff's counsel will likely call the patient (if able to testify), his or her family members, other treating physicians, and expert witnesses. Expert witnesses are generally providers who practice in your specialty. Other experts may be called for damage calculations and causation.

Again, the plaintiff has to prove that your care fell below the standard of care (negligence), that there was a compensable injury, and that the injury was caused by your negligent care. The standard of care will be defined by the physician experts.

You may also be called to appear as an adverse witness for the opposition. As one of the treating providers, you have intimate knowledge about the patient and the care you rendered. Thus, the plaintiff's counsel has a right to question you without being constrained by the rules of direct examination. In other words, the court will allow counsel to cross examine you using leading questions. The goal of leading questions is to box you in with yes or no answers. For example, "Doctor, isn't it true that the patient complained of chest pain when he presented to your center?" And, "Isn't it true, Doctor, that chest pain is often a sign of a heart attack?"

This is when the proverbial rubber meets the road. The verdict may in fact depend upon how well you do during this difficult portion of the trial. The following are some tips to help you navigate through the questions:

1. Do your best to not get locked into only being able to answer with a yes or no. In other words make your answers complete. Try to provide the jury with enough information so that they can make an informed decision, not just a simple "yes" or "no."
2. Although the opposing counsel will be the one questioning you, when you respond, always talk to the jury. Speak as though you are speaking to a patient. Your voice should convey empathy, kindness, and integrity. Use terms that a lay person would understand. The opposing counsel may try to distract you by walking around to try to get in your line site and by acting aggressive. No matter the attorney's demeanor or tone, keep your voice calm, cool, and concerned. Most importantly, address the jury.
3. The opposing counsel may try to put words in your mouth. When this happens, it is okay to politely say, "That is not what I said." Counsel may ask you to agree with a chain of questions using a hypothetical. Do your best to avoid answering those questions. In addition, you may be unable to complete your answers without the opposing attorney cutting you off. Don't let this bother you. Get your head around the fact that opposing counsel is trying to bolster their case not help you with yours and there is no way they will let you expound on an answer they don't like.
4. It is extremely important not to contradict testimony you gave in your deposition. Know that plaintiff's counsel will have your deposition nearly memorized. The moment you contradict yourself the plaintiffs' attorney will use it to impeach you, which will cast doubt upon your credibility.
5. I cannot stress enough that you have to control your emotions. Despite the fact that opposing counsel will be argumentative, contradictory and in-your-face, you have to remember that you are wearing a spacesuit that nothing obnoxious can get through to harm you. If you're able to do this, the opposing counsel will most likely look like an obnoxious jerk and you will come off as the caring, empathetic, compassionate provider that you are.
6. If your attorney objects to a question, listen to the objection and don't continue speaking if your attorney objects. Wait until the judge rules on the objection before you start speaking again.

**The Defense**

After the plaintiff concludes, it is your turn to present a defense. Although you will have very credible defense experts

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who will support your care, it is your testimony that is most important. It is likely that your attorney will prepare a list of questions he or she plans to ask you. The questions and possible responses may actually change during the course of the trial, depending upon the strengths and weaknesses of the plaintiff's case. Even when your attorney questions you, speak to the jury. Relate to the jury like they are your patients. Remember to put your answers in terms that are easily comprehensible. Do not surprise your attorney during this phase by adding additional facts or opinions not already in evidence, i.e., stick to the script.

**The Defense Rests!**

After you present your witnesses, the plaintiff may offer rebuttal evidence. After rebuttal evidence is presented the judge will give the jury instructions that outline their responsibilities and also define concepts such as standard of care, negligence, and damages. These instructions are read to the jury from standard forms and are presented for use during their deliberations. After the jury instructions both sides are allowed to give their closing arguments. The closing arguments essentially go over all the evidence that has been offered in the case. Much like the opening statement, closing statements can be highly charged and very emotional. Again you must sit there passively and listen intently. Do not show emotion or use body language to suggest emotion. After the closing arguments the jury begins their deliberation. This can take anywhere from a few hours to a few days,after which they will return to the court and present their verdict.

If the jury renders a verdict against you that is not ultimately overturned, plaintiff's counsel has a statutory duty to report the verdict and the amount of the award to the National Practitioner Data Bank. If you prevail the plaintiff has a chance to appeal. However, in appellate court, the process is much different than the trial court process and from this point forward, most of the work will be done by attorneys who draft motions and then argue in front of a three-judge panel.

To recap: Good providers get named in medical malpractice suits and although this process is very time consuming and angst provoking, we do prevail more often than not. So, when it happens to you, put your spacesuit on and gear up for battle! ■