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Inserted in this issue: Anatomy of the Discovery Process

Don't be unprepared: Chronology of a medical negligence case

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The volume of substantive, procedural, and tactical issues that surround the litigation of a medical malpractice case increase the confusion and stress confronting a physician or nurse defendant in such a case. With this article, I will attempt to illustrate the issues that will be faced at each stage of the process, what is expected of a physician or nurse defendant, when and where certain activities take place in the legal process, and where that legal process is going. This article will discuss many of the procedural issues that arise in the litigation of a medical malpractice case. It is my hope that the article will illuminate where particular — and often familiar-sounding — components of the malpractice case fit into the larger legal picture. The more knowledge a health professional has of the process, the better prepared he or she will be to be an effective member of the defense team.

Brief Overview of the Law Governing Medical Malpractice

We begin with an overview of the substantive — as opposed to procedural — law of the tort of professional malpractice (almost always a negligence action) by a health professional. Following this brief and general review, the article will present in a relatively chronological fashion the events that will transpire as a malpractice lawsuit continues.

Each legal *cause of action or claim*, be it professional negligence, assault, or breach of contract, is divided into elements, and a plaintiff must "prove" each element in order to prevail on the claim. Most malpractice suits will be based upon a claim of negligence. Negligence, generally, is the failure to exercise that degree of care that a reasonable person would exercise under the circumstances. In the medical context, negligence often is stated as the "failure to use that degree of skill and learning ordinarily used in the same or similar circumstances by members of the defendant's profession."[1] There are

four elements to a negligence claim:

1. Duty.

In all medical malpractice suits, to establish a cause of action, the plaintiff must first show the existence of a practitioner-patient relationship. From this relationship arises a duty, owed by the physician or nurse to the patient (plaintiff) to act according to the standard of care.

2. Breach.

The plaintiff must establish not only the standard of care, but also that the physician or nurse failed to conform to the applicable standard of care. In other words, the health professional breached his or her duty to the plaintiff.

3. Causation.

The plaintiff must show a causal connection between the health professional's failure to conform to the applicable standard of care (his or her negligence) and the injury sustained by the plaintiff.

4. Harm.

Finally, the plaintiff must prove that he or she actually sustained a compensable injury. The jury also will determine the damages, which is the term for the monetary compensation the plaintiff seeks.[2]

Duty

The first element is duty. The practitioner-defendant must owe a duty (also called *duty of care)* to the plaintiff, usually the patient. A health professional's duty to his or her patient generally is defined and limited by the nature of the professional relationship between the two. Absent a professional relationship, there generally will be no duty to provide care that meets the required standard. Thus, before the issue of "standard of care" arises in a medical negligence case, it must first be determined whether a relationship existed between the doctor or nurse and the patient that triggered the duty for the doctor or nurse to exercise professional judgment and care. If no professional relationship exists, the practitioner still has the same duty not to injure the person that he or she has to everyone else in society, but the practitioner will not be liable for professional negligence because there will not be a duty to exercise professional care. The duty element, with the exception of telephone and informal ("curbside") consultations, is most often a given in emergency medicine malpractice litigation.[3]

Breach of Duty

To prove the breach element, the plaintiff must show that the health professional failed to exercise the degree of skill and care required by the applicable *standard of care.* The standard of care is the level of medical care that the practitioner has a duty to exercise. This is not an obligation to provide excellent care, or even superior care. A health professional merely has *a duty to exercise the same degree of skill or care as would a reasonable, careful and prudent professional in the same or similar circumstances.* This "reasonable, careful, and prudent professional" is a fictional character whose conduct is judged by other practitioners in the same or similar circumstances. It is an objective measurement. Of course, health professionals do not practice with "standard of care" as an objective; this is a legal concept and not a medical practice standard. Nonetheless, in the medical negligence case, the *medical care that would be provided by a reasonably prudent practitioner in similar circumstances*

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must be established because the jury must measure the defendant health professional's conduct against this standard.

The plaintiff traditionally establishes the standard of care, and its breach by the defendant, by introducing the testimony of an expert.[4] In most jurisdictions, a plaintiff cannot prove breach of duty without expert testimony. Why? Because the role of the jurors — laypeople, not medical practitioners — is to assess the appropriate standard of care and whether the defendant's acts violated it. Thus, the standard of care becomes defined in a particular case only when a witness has been admitted as an expert and that expert, when permitted by the court, states his or her opinion on the standard of care. The standard is then a compendium of that expert's background, skills, and practice experience and is typically case-specific. The same expert that testifies to the standard of care usually will opine as to whether the defendant's conduct met the standard.[5] In some (rare) situations, the requirement for expert testimony may be obviated, such as when the defendant's negligence is so obvious that the jurors can call on their own knowledge and wisdom to determine a breach of the standard (e.g., an instrument is left inside a patient following surgery). ***Editor's note:*** *For more information on expert witnesses, see* ED Legal Letter, *November 2000.*

Causation — Actual and Proximate Cause

To maintain a cause of action for negligence, the plaintiff must show that the breach of the duty of care was causally related to the injury sustained. Obviously, there must be a causal connection between the substandard level of care and the resulting harm. Causation is subdivided into *cause-in-fact* (i.e., a link in the chain of causation that resulted in the plaintiff's injury) and *proximate cause* (i.e., a link in the chain of causation that is sufficiently closely related to the plaintiff's injury such that it is a sufficient basis for the imposition of liability). Generally, if the injury would not have occurred "but for" the defendant's wrongful act, then the act is said to be a cause-in-fact. This "but for" threshold is typically easy to meet.

The proximate cause determination typically is more difficult and more important than the cause-in-fact determination. The jury must determine whether the plaintiff's injury was a reasonable foreseeable result of the defendant's negligent actions. This determination is essentially an exercise in legal line-drawing that cuts off the defendant's liability when the harm is too remote from the defendant's acts for the imposition of liability. Proximate cause has been described as the determination of whether, considering all other relevant factors, the acts of the defendant were a legal cause of the plaintiff's injury. For example, the defendant's acts may have been one factor, but not the only factor. Proximate cause might then depend on whether the defendant's acts were a significant factor leading to the injury. Another example might be that the defendant's acts set into motion a series of events, but another individual's act constituted a superseding cause that resulted in the plaintiff's injury. In any event, it is the proximate cause determination that ultimately determines the defendant's liability.

A procedural note: Because the proximate cause determination will depend on highly technical information, the plaintiff, in most cases, must establish proximate cause through expert testimony.

Harm

The final requisite element in proving a negligence claim is that the plaintiff suffered a compensable harm as a result of the defendant's negligent act. The jury also will determine the *damages,* which is the term for the monetary compensation the plaintiff seeks.

Chronology of a Malpractice Case

Editor's note: *It must be remembered that medical malpractice is, in general, a state law cause of action and the law varies among the states, both substantively and procedurally. The intent of this article is merely to provide a generic overview of the law, not to be authoritative as to the procedure in any particular state.*

This section is intended to provide an overview of a malpractice case, from the initial claim, through the discovery process, to trial, and on to appeal. Most cases will follow the fairly standard chronology presented here. At times, the article will refer to concepts discussed in the substantive law overview above. For the health professional, the case ordinarily begins long before a lawsuit is filed, with a notice from the patient or, more commonly, from the patient's attorney.

• The notice letter.

The period preceding the filing of a lawsuit is critical for the health professional because he or she is the person who initially receives notice (Notice of Intent or NOI) of a claim. Understanding the significance of this notice will enable a prospective defendant to respond protectively and avoid potentially harmful conduct. The NOI may simply be in the form of a letter, usually from a plaintiff's attorney, that advises the health professional of an intent to file a claim of malpractice. Many jurisdictions require this notice to encourage presuit negotiations and settlement. For example, in Texas, a Notice of Claim provides for an investigatory time period set by Article 4590i of the Medical Liability and Insurance Improvement Act, which tolls (i.e., temporarily stops the statute of limitations from running) the statute of limitations as to all potential defendants for 60 days.[6] Upon receipt, a physician and his or her insurer have 60 days in which to investigate and evaluate the patient's claim. The statute requires the notice to be sent by certified mail with a return receipt requested. The claimant may file suit at the end of the 60-day notice period. If the statute of limitations has not expired, the claimant has until the end of the statute of limitations (plus 75 days if notice is timely given) to file suit. The purpose of this notice procedure is, of course, to encourage presuit negotiations and settlement. However, this notice letter is not a lawsuit and is not filed with the court. It simply places the health professional on notice of potential claims against him or her.

• Immediate notice to the carrier.

Upon receipt of a notice letter, the recipient must immediately notify his or her malpractice insurance carrier and forward any relevant papers to the carrier. Notice letters may explicitly ask the practitioner to forward the letter to the carrier. Moreover, most malpractice policies will require, as a condition of coverage, that the health professional promptly notify the carrier of claims. A delay in notification may jeopardize coverage.

A health professional also should notify the carrier upon receiving a summons and complaint (i.e., actually legal notice of a lawsuit) or notice of anything resembling a legal claim, such as a citation, petition, or discovery request, whether or not the physician or nurse has first received an NOI. The carrier's attorney is in a much better position than the health professional to evaluate the effect of any legal notices that are received. Not only can delayed notification damage the health professional's position with respect to coverage, but it prevents the opportunity for an experienced professional, either an attorney or an insurance adjuster, to evaluate this initial contact and take steps to protect the health professional's interest. Once notice is received that a lawsuit is pending, or may be filed, the best strategy is to refrain from discussing the case with anyone (except your attorney) and immediately call the carrier. In some cases, if the health professional receives even an indication of dissatisfaction from the patient, especially in writing (e.g., a significant complaint letter), the health professional would be wise to notify his or her malpractice carrier.[7]

Editor's note: *NEVER, EVER respond to an NOI by yourself. This is always something that an attorney should do for both substantive (the precise wording of the response) and procedural (deadlines, preservation of defenses, etc.) reasons.*

• The patient's chart.

The next immediate step the health professional must take after receiving an NOI is to see that the patient's chart is secured. In emergency department cases, this generally will be the responsibility of the hospital medical records department. It is imperative that the chart be secured so as to avoid any *post hoc* changes or alterations of the record. If a lawsuit does develop, even the appearance that an alteration has been made can have a devastating impact on the defense of the case. The chart must remain in exactly the same condition it was in before the health professional had notice of the claim.

• Discussion of the claim.

Upon receiving an NOI, a health professional may be tempted to discuss the claim with colleagues to obtain their opinions. This is never a good idea. If a lawsuit does develop, the health professional likely would be required to recount those conversations during the discovery process — even those conversations unfavorable to the defendant's position. While such testimony is hearsay, there are multiple exceptions to the rule against admitting hearsay. One of these exceptions is for the admissions of a party. The health professional should discuss the claim only with the insurance carrier and his or her attorney.

Editor's note: *Most (probably all) states have peer review protection statutes that protect the activities of certain peer review bodies (e.g., hospital peer review committees) from discovery. The statutes providing for this protection from discovery vary*

among the states, and each health professional should know the extent of the peer review protection in his or her state.

• Provision of information to the carrier.

After the insurance carrier is notified of a claim or possible claim against the insured, the carrier will assign an attorney who will contact the defendant health professional. This contact by an attorney, rather than a claims representative, is designed to take advantage of the attorney-client privilege. Communications between the insured and the attorney will be protected under the privilege. Then, the attorney will provide summaries to the carrier in the form of privileged work product. Therefore, it is important for the health professional to deal only with the assigned attorney.

The attorney will ask the health professional to provide a complete copy of the chart as well as other pertinent documents and also may ask the health professional to write a summary of the events surrounding the claim. A meeting likely will follow, at which the health professional can explain and clarify the case. The attorney and the claims managers will use this information to evaluate the claim — to determine whether the practitioner was at fault (or whether a jury would consider the health professional at fault) and to determine the nature and extent of the damages. At this point, the carrier might make an attempt at settlement. If not, however, the patient will decide whether to file suit. Many patients are dissuaded from filing suit when they realize no settlement offer is forthcoming. However, if the patient has retained counsel, it is likely he or she will file suit — for counsel has likely evaluated the case and retained an expert with an opinion favorable to the patient's case.

• Formal initiation of the lawsuit — the summons and complaint.

A lawsuit formally begins when a document called a *complaint* or *petition* is filed with the court. The complaint, as with all court documents, begins with the caption, which states the name of the court, docket number, and the names of the various parties to the lawsuit. The complaint then sets out, in numbered paragraphs, the facts that the plaintiff alleges. It concludes with a prayer for relief, almost invariably a demand for a jury trial, and the signature of the plaintiff's attorney. The purpose of the complaint is to define the lawsuit and to let the defendant know why he or she is being sued.

Complaints can be quite vague. The list of named defendants may contain as yet unidentified parties (e.g., Dr. Doe). This is done because the plaintiff may not know the identity of particular defendants at the time of filing (such as which physician allegedly caused the injury) but may discover certain identities as the case progresses. When and if the plaintiff discovers the identity of a previously unnamed defendant, the plaintiff may amend the complaint, specifying the identity of, for example, Dr. Doe. The allegations contained in the complaint will provide an overview of the claims being made against the defendant. The defendant should think of this as the most general phase of the process. The lawsuit itself will be refined and defined, and the issues will be narrowed and revised as the discovery process reveals which portions of the claim are worth pursuing by the plaintiff. By the time the plaintiff's expert is deposed, completely different allegations or criticisms of the defendant may have appeared. For this reason, the defendant should not be surprised if defense counsel makes an expansive evaluation of the care provided.

• Service of process — what the defendant receives and how.

After the complaint is filed with the court, the plaintiff's attorney must still have it *served* on the defendant. This will be the first notice of the actual filing of the suit given to the defendant health professional. The health professional will be served with a *summons* and a copy of the complaint. The summons notifies the defendant when and where the suit was filed and directs the defendant to respond. The summons will contain language similar to the following: You are hereby summoned to appear before the above-named court and to file your pleading to the petition, copy of which is attached hereto, and to serve a copy of your pleading upon . . ., attorney . . . for plaintiff . . . whose address is . . . all within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the petition.[8] The methods of service of process (how these document are delivered to the defendant) vary by jurisdiction, but there will be some type of in-hand service by a process server, by deposit at a place of abode, or by letter via the postal service.

As with the NOI, the defendant immediately must notify the carrier upon receipt of service to ensure that an *answer* is filed in a timely manner. There is a

deadline for the filing of an answer and failure to answer within the prescribed deadline may result in a default judgment against the defendant. It is a good idea to contact the carrier by phone first and then immediately forward a copy of the summons and complaint. The carrier will select, retain, and pay an attorney to represent the defendant. It will forward all material to the attorney, who also will want to meet with the defendant to determine how to best respond to the allegations contained in the complaint. This stage is time-sensitive, as the answer to the complaint must be filed within a certain period of time (typically 21 days). Again, if an answer is not filed by the defendant within the deadline, the plaintiff may obtain a default judgment against the defendant. A default judgment means that the defendant will have lost the lawsuit as a matter of law. Discovery requests may be served along with the complaint, although more commonly, discovery does not commence until later.[9]

Defendant Begins Preparations

The health professional is well-advised to get involved in his or her defense at this early stage. The defendant should forward as much information on the patient as possible to defense counsel. Moreover, the defendant should prepare to educate his or her attorney regarding the medical issues involved. The defendant may prepare a narrative of not only the events that took place, but also of the medical issues involved in the case. The defendant may provide a typed transcription of illegible notes on the chart or hospital record. When possible, the defendant should make reference to the date and time of specific entries in the medical record. This information, created by you solely for your attorney's use, will be protected from discovery under the attorney-client privilege. It should be shared with no one and should be kept in a safe place — and in a separate file. This separate file should contain materials related to the lawsuit, including notes and correspondence between the defendant, his or her attorney and his or her malpractice carrier.

Editor's note: *Once notice of a lawsuit has been received, the defendant should not do anything related to the lawsuit without first discussing it with his or her attorney. There might be, for example, a strategic reason for avoiding investigation of a particular issue in the case. It cannot be emphasized strongly enough that all litigation materials (and risk management materials of any type — e.g., complaint letters, peer review committee materials) must be kept separate from the medical record. All communications with counsel should be kept in this separate file.*

• Answer.

The answer is the pleading the defendant files in response to the complaint. The defendant will respond to each and every allegation (set apart by numbered paragraphs in the complaint) by either admitting the allegation, denying the allegation, or stating that he or she lacks sufficient knowledge to admit or deny the allegation. Most likely, the defendant will admit the allegations pertaining to background information and deny the rest.

However, before the answer is filed, the defendant may file a pre-answer motion to dismiss. These motions ask the court to dismiss the case based upon a lack of jurisdiction (the court in which the suit was filed does not have authority to hear the case), a problem with the service of process, or a failure to state a claim on which relief may be granted. The latter would be granted if the court decided that, even if everything alleged in the complaint were true, no cause of action was stated. If the court grants any of these motions, the suit is dismissed.

Editor's note: *The answer is crucial, particularly with respect to the inclusion of available affirmative defenses, counterclaims, cross-claims, and third-party claims. Some of these defenses and claims may be waived if not included in the initial response (pleading) of the defendant.*

• Affirmative defenses.

The answer is also the document in which the defendant will assert any available affirmative defenses. Affirmative defenses are defenses such as statute of limitations and comparative or contributory negligence. By asserting an affirmative defense, the defendant says to the court: "Even if everything the defendant alleges were true, he cannot prevail because the statute of limitations has run," or "He was negligent himself. It was this negligence that actually caused the harm . . ."

• Counterclaims, cross-claims, and third-party claims.

The defendant must include any counterclaims, cross-claims, and third-party claims in the answer. A counterclaim is a claim by the defendant against the plaintiff. A cross-claim is a claim by one defendant

against another named defendant. Similarly, if a defendant is convinced that a person or entity not named in the suit is responsible for the plaintiff's harm, then he or she may bring that person into the lawsuit through a third-party claim. For example, if three physicians who operated on the plaintiff were sued for malpractice, the physicians (depending on the facts of the case, of course) might file cross-claims against one another for indemnification or contribution. These claims can become critical because, in some situations, if they are not asserted, the defendant will waive any right to bring them at a later date, either in the malpractice case or in a separate action.

• Motions.

A motion is an application to the court requesting an order in favor of the applicant. In other words, one of the parties' attorneys asks the court to take an action by making a motion. Motions may be written or oral. This article briefly mentioned pre-answer motions, but various types of motions are made in all phases of litigation. Motions often are made during the discovery phase when the parties disagree on the extent or scope of the discovery being attempted.

When one side files a motion, the opposition is allowed an opportunity to file a response, and in response to that, the moving party may file a reply. When determining how to rule on a motion, a judge may consider the written documents filed by the parties, or the judge may conduct a hearing during which both sides present their arguments orally.

Common motions and examples:

— Motion to dismiss. A motion to dismiss is a dispositive motion — that is, the granting of the motion will end the case. The moving party is requesting that a cause of action be dismissed because the alleged facts, even if proven, do not constitute a valid claim. For example, if the jurisdiction statutorily requires the plaintiff to submit a qualified expert report establishing negligence and proximate cause within a particular time and the plaintiff does not do so, the defense will move the court to dismiss the case. Although the court may allow a plaintiff additional time to comply, at some point the plaintiff must produce an expert report in order to survive the motion. If the motion is granted, the case is — as the name suggests — dismissed.

— Summary judgment. Here, the moving party requests that the court grant judgment in its favor on a claim or claims because no material facts are in dispute. With a summary judgment motion, the party asserts that, even considering the facts in the most favorable light for the opposing party, that party cannot prevail. This motion may be filed, for example, to assert the statute of limitations, or to test the plaintiff's ability to produce a qualified expert that can establish negligence and proximate cause.

Editor's note: *We commonly file motions for partial summary judgment. That is, we ask the court to rule on particular aspects of the case (e.g., that a particular statutory damage cap applies).*

• Discovery.

Once the complaint and answer have been filed, the discovery phase begins. Discovery is a process in which each party has an opportunity to obtain relevant information and documents from the other parties to the lawsuit. Details of the various discovery methods are discussed in the insert enclosed in this issue.

• Settlement.

Settlement discussions can take place at any point in the process and generally are ongoing until the case is ultimately settled or appeals are exhausted. A settlement provides the parties with certainty, whereas resolution by trial offers no immediate guarantees since a judgment may be appealed, a process that may take years for resolution.

Unless the defendant's malpractice policy requires the consent of the insured in order to settle (common in physician malpractice policies), the carrier will decide whether to settle. The carrier will consider the merits of the case in the context of the particulars of the judges and jurors in the community where the case is set to be tried. A suggestion in favor of or against settlement will be based upon analysis by experienced professionals working for the carrier, primarily the attorney.

Parties settling a lawsuit typically will execute a compromise settlement agreement setting forth the terms of settlement. It generally will include language stating that the practitioner does not admit negligence and that the settlement is made only to avoid the time and harassment of defending a lawsuit. The parties also will execute an agreed *motion for nonsuit* to be filed in court. To formally dispose of the case, the judge executes an order of *nonsuit.*

Editor's note: *Another advantage of a settlement is that the defendant generally may include a confidentiality agreement preventing the plaintiff from discussing the case following the settlement (e.g., with the media).*

Mediation

Typically, at some point during the discovery process and before a trial takes place, the court will order the case to mediation in an effort to settle it. Some states have mandatory mediation. However, the parties also may agree to mediate the case without a court order. Mediation is a process in which an independent third party, the mediator, acts to facilitate settlement of the lawsuit. The mediator does not have independent adjudicatory power; he or she (or they) does not listen to both sides of the story and then impose a settlement on the parties as an arbitrator would. Rather, the mediator may attempt only to persuade the parties to reach a resolution. ***Editor's note:*** *Some court-ordered "mediation" is really more of a nonbinding arbitration (e.g., statutory medical malpractice mediation panels).*

Information disclosed during mediation, if not otherwise admissible, does not become admissible at a trial solely by virtue of its having been disclosed during the mediation. Mediation might take a half or full day and, depending on the jurisdiction, may require the attendance of all parties, not just the attorneys. If the case is not resolved in mediation, the mediator reports to the court only that the parties were unable to reach a settlement.

Mandatory Settlement Conferences

Similarly, many jurisdictions require the parties involved in medical malpractice cases to participate in a formal settlement conference before the case is allowed to go to trial. The conference usually will be scheduled late in the process, after the parties have had ample opportunity to gather enough information to allow them to evaluate the merits of the claim. One of the rationales for ordering a conference is to save the time and resources of the parties and the court. Of course, by the time both sides have conducted enough discovery to fully realize the strengths and weaknesses of their respective cases, much time and many resources already will have been expended. Nonetheless, the expense — and stress — of trial may be avoided if the case is settled.

The rules governing mandatory settlement conferences will vary by jurisdiction. Most often the judge will preside. In some cases, this judge is not the one who is scheduled to preside over the trial. This setup is to ensure that the trial judge can avoid any appearance of impropriety and avoid exerting any undue pressure on the parties. Often, all parties, attorneys, and insurance representatives are required to attend. This may be the first time that all parties meet face to face, and it allows the parties to discuss their positions and for the judge to address comments to both parties. Occasionally, the settlement conference judge will meet with each side separately and will spell out frankly the weaknesses and problems with that party's case.

Some jurisdictions require, and others recommend, that medical malpractice cases go through a screening process before proceeding to trial. Screening is another component in the process with the purpose of weeding out cases without merit. The court-ordered mediation discussed above is one such method; medical malpractice arbitration is another. Some jurisdictions have a medical liability review panel. ***Editor's note:*** *For more on alternative dispute resolution, see* ED Legal Letter, *July 2000.*

And Finally, Trial

It now has been a year or more since the defendant was served with the complaint and up to four years or more since the events took place. A lengthy discovery process has come to an end, depositions have been taken, independent medical evaluations performed, motions to compel discovery have been resolved, and settlement efforts have been unsuccessful. Trial of a lawsuit is an extremely demanding process for the defendant as well as the attorneys. It can be emotionally, physically, and psychologically exhausting and will require the defendant's complete and undivided attention.

• The trial setting.

It may take several years after a lawsuit is filed before it actually goes to trial. In addition to the frustration caused by the delay, another frustration for which the defendant should steel himself or herself is the uncertainty stemming from the fact that a trial date often cannot be firmly established. Generally, the parties to a lawsuit will not know for certain whether they are going to trial until the day of the trial. Even when special procedures are utilized to set a firm trial date in advance, the date will be subject to change. This means, of course, that both the defendant and the attorney must adequately prepare for a trial on a given date, despite the uncertainty of the date.

• The defendant's role at trial.

Here, let's review the defendant's role at trial. Before trial, the defendant must prepare to provide trial testimony, usually by reviewing in depth the medical records, the defendant's own deposition, and the depositions of other experts and any other significant witnesses, including the plaintiff. Before trial, the health professional will meet with counsel to prepare for direct testimony and anticipated cross-examination. Testimony at trial requires complete focus and concentration, thus the defendant must set aside the necessary preparation time.

During the trial, it is best that the defendant be present at the defense table. This means a substantial time commitment, as the trial might last two weeks or longer. The defendant's presence should indicate to the jury that the defendant takes the case, and the allegations facing him or her, quite seriously.[10]

Defendants should be prepared for how difficult it may be to listen to a large volume of testimony criticizing their actions, qualifications, and knowledge. Then, when the testimony is finally finished, the defendant will relinquish control over the outcome of the case to a jury of strangers. To understate it, this process will produce significant stress.

• Pretrial motions.

Many issues must be resolved before the start of the actual trial. At this point, the parties will bring motions to establish which pieces of evidence will be introduced at the trial. The judge will decide much of this at a pretrial conference. We have seen that through the process that began with the relatively general statements of the complaint, the issues will have been narrowed to the issues that are actually in contention. The rulings on pretrial motions continue that process by paring down the claims, facts, issues, and evidence lists and setting the stage for the trial.

Editor's note: *Some of the earlier motions may be reintroduced at this time (e.g., motion for partial or full summary judgment).*

• Pretrial conference.

The judge and the attorneys for all parties will meet shortly prior to trial for a housekeeping session. They will sort out scheduling issues, timing requirements, and the rules in the particular judge's courtroom. The judge will issue rulings on the pretrial motions and resolve remaining procedural disputes.

Judge and Jury

Two types of general determinations are made at a trial: determinations of *law* and conclusions of *fact.* It is the judge's role to decide matters of law — such as the admissibility of evidence. It is the fact-finder's role to weigh the evidence, evaluate the credibility of the witnesses involved, and come to a determination regarding the facts in dispute. Though all civil trials have a judge, not all involve juries. A party must exercise the right to a jury trial by demanding the right in the complaint. If no jury is demanded, or if the action is one in which the plaintiff has no right to a jury trial, the judge also will act as the finder of fact. This is what the term *bench trial* describes. However, in the negligence-based malpractice case, the right to a jury trial will exist. The plaintiff in all likelihood will exercise the right to a jury, given the greater likelihood that a jury will be influenced by the subjective factors of the case. Thus, the jury in the malpractice case will decide, based upon the evidence the judge allows it to hear, whether the four elements of the malpractice claim have been proven: duty, breach of that duty (a negligent act), proximate cause, and harm (i.e., damages).

• Jury selection.

Following the determination and resolution of the preliminary issues, the first step of the trial is the selection of the jury. The potential jurors are summoned, and a random group of those summoned are called to the courtroom. This random group is subjected to a series of questions by the judge and, sometimes, the attorneys. This is called the *voir dire examination.* The theoretical rationale for voir dire is to identify jurors who are unsuited to sit on a particular case because of bias or the potential of bias. The attorneys, however, will use this first meeting with the potential jurors to assess who will be most favorably inclined to their side of the case. The judge will excuse those potential jurors with obvious biases and conflicts, and then the attorneys will take turns striking potential jurors that they do not want to see on the jury. This process continues until the attorneys have exhausted their allotted number of strikes. The remaining panelists will comprise the jury and alternates. This process usually is completed in a day although, in a major case, might last several days.

• Opening statements.

The plaintiff's opening statement introduces the

case, outlines the facts that the plaintiff will attempt to prove, and previews the evidence. The plaintiff's opening statement must outline all the facts necessary to satisfy the elements of the claim, i.e., to "prove the case." Attorneys are not supposed to argue their case during the opening statement. However, most attorneys will use the opening statement as an opportunity to be as persuasive as they can be, up to the limits imposed on them by the judge and the opposing counsel.

• Burden of proof.

The plaintiff's burden of proof in most civil cases is a preponderance of the evidence. The plaintiff must convince the jury that it is more likely than not the plaintiff's allegation is true. The practitioner often will hear this expressed as a percentage: There is a 51% or more probability that the event took place as the plaintiff said it did.

• Plaintiff's case in chief.

Following opening statements, the plaintiff presents his or her case. The case will consist of the testimony of witnesses and the introduction of exhibits, and it usually will begin with plaintiff's counsel calling his or her first witness. Plaintiff's counsel will conduct the direct examination, then defense counsel will cross-examine the witness. This cross-examination must be limited to issues that were raised on the direct examination (i.e., the answers to the initial attorney's questions). Plaintiff's counsel may follow this with a redirect. The plaintiff has the burden of proof, thus the plaintiff must present a certain quantum and type of evidence. The plaintiff must present evidence that would, were it true, establish the elements of the claim. Thus, if no evidence were presented regarding the breach of the standard of care, there is no way that the jury could find that the defendant's treatment breached the standard of care. If this occurs, the defense will move for a directed verdict in favor of the defendant. This motion asks that the judge enter a verdict for the defendant on the grounds that, having heard the evidence presented, the jury could only reasonably find for the defendant. ***Editor's note:*** *In actual practice, the defense, as a rule, routinely will make this motion, unless the plaintiff's evidence has been compelling.* When the plaintiff has presented his or her evidence, he or she will "rest" his case.

• Defendant's case in chief.

If the defense motion for a directed verdict is denied, the defense will present its case. As the defendant has no burden of proof, there is no requirement that he or she present any evidence. Nonetheless, the defendant probably will call witnesses and introduce evidence that rebuts the plaintiff's claims and supports the defenses raised.

• Evidentiary motions.

During the trial, both sides' attorneys may make motions that ask the judge to determine how or whether certain evidence may be presented. One of these motions is the motion *in limine,* which is made outside the presence of the jury and asks the court to exclude any reference to anticipated evidence that the moving party deems objectionable. The purpose is to prevent any unfair prejudice that may occur if the evidentiary issue was ruled on in the presence of a jury. The following example depicts the motion *in limine* in action: The defense expert is a recovered alcoholic. Defense counsel would rather the jury did not know of the expert's alcoholism. Defense counsel makes a motion *in limine* before trial that, if granted, would prevent plaintiff's counsel from even asking about the expert's alcoholism. This is done to prevent plaintiff's counsel from asking the expert on cross: "You're an alcoholic, aren't you?" Defense counsel would object to the question, the lawyers would argue on the admissibility of evidence regarding alcoholism, and the judge might sustain the objection. Regardless, the damage to the expert's credibility would have been done as soon as the jury heard the question.

A second, similar evidentiary motion is the request for a limiting instruction. In this case, the party making the motion requests that a judge restrict the other side's use of a piece of evidence to a limited purpose. For example, defense counsel might be allowed to use one of the plaintiff's expert's statements to impeach the credibility of the expert. However, he would not be allowed to bring the statement up in his closing argument.

• Plaintiff's rebuttal.

After the defense rests, the plaintiff might ask for a chance to present a rebuttal case. This will be limited to rebutting evidence presented by the defense. It is not an opportunity for the plaintiff to introduce new or unrelated evidence.

• Closing argument.

This stage of the trial allows the attorneys to summarize and tie together their respective cases. Unlike the opening statements, which are previews, the closing is the vehicle through which the attorney

makes his or her argument. The jury has heard the evidence, and the attorneys then fit the "pieces of the puzzle" together for the jury into a coherent whole. In addition to summarizing the evidence, the plaintiff's attorney will ask the jury to make a specific monetary award to compensate the plaintiff for the alleged damages. The defense attorney will argue to the jury why it should reject the plaintiff's claims. If, for example, the defense has conceded that the defendant's negligence caused the harm, defense counsel will argue that the evidence does not support the damages figure and might suggest a lower, more appropriate figure.[11]

• Jury deliberations.

Assuming the judge does not grant a directed verdict motion (which either side may bring at this point), the jury will receive the case for deliberation. Each party will have submitted, for the judge's consideration, suggested jury instructions on particular issues. It is the judge who decides ultimately whether to use standard instructions or those presented by one or the other of the parties. The judge then instructs the jury on the law to apply in order to guide its decisions. In some states, the decision in a civil case must be based on the unanimous opinion of the jury. In others, an opinion from a specified majority of the jurors, such as 10 of 12, will suffice.

The jury retires to the deliberation room, evidentiary exhibits are transferred to the jury room, and the wait begins.

• Post-trial motions and appeals.

Should the verdict be returned against the defendant, all is not lost, and the process is not over. Defense counsel may file motions requesting relief from the verdict. These ask the judge to adjust the amount awarded, grant a new trial, or enter a judgment in favor of the defendant in spite of the plaintiff verdict. These motions are seldom granted. However, once the judge has entered the judgment and denied the post-trial motions, the losing party may file an appeal. This will not consist of a new trial, rather, the appeals court or courts will review the documentary record of the case. This appeals process can take many years. Ultimately, an appeals court decision might force the parties to return to the trial court for a new trial. However, an extended appeals process presents still more opportunity for settlement. For example, the winning party may accept a discounted settlement amount if the losing party drops its right to appeal.

Conclusion

This overview, while general, should begin to prepare a prospective defendant to respond appropriately to a claim before suit is filed. More importantly, a basic knowledge of the pretrial and trial processes makes a defendant a more formidable weapon in his or her own defense and an asset to the defense team. Moreover, knowledge of the process will help a defendant manage the stress and uncertainty that litigation will induce. The article should also serve to remind health professionals of the magnitude of the enterprise that is a malpractice case; such case will require significant time, effort, and focus. While most malpractice suits are resolved early in the process, some do go to trial. These will require even more of the health professional's time and attention. Remember, when malpractice claims arise, the best way for a defendant to help is to involve the carrier immediately, be cooperative with the assigned attorney, be flexible, be available, and be prepared to devote significant time and energy to the case.

Endnotes

1. Missouri Approved Jury Instructions 11.06 (1990 Rev.).
2. See *Pinckley v. Dr. Francisco Gallegos, MD, PA,* 740 S.W.2d 529, 531 (Tex. App. 1987). Other courts require the plaintiff to plead and prove the same elements, although the wording of the elements varies from state to state. See also *Apodaca v. Ommen,* 807 P.2d 939, 943 (Wyo. 1991); *Bates v. Meyer,* 565 So. 2d 134, 136 (Ala. 1990); *Dalley v. Utah Valley Regional Medical Center,* 791 P.2d 193, 195 (Utah 1990); *Ouellette v. Mehalic,* 534 A.2d 1331, 1332 (Me. 1988); *Wielgus v. Lopez,* 525 N.E.2d 1272, 1275 (Ind. App. 1988).
3. For a brief discussion of the physician-patient relationship in emergency settings, see Morgan D. Emergency room follow-up care and malpractice liability. *J Legal Med* 1995; 16:376.
4. See e.g., *Dalley v. Utah Valley Regional Medical Center,* 791 P.2d 193, 195 (Utah 1990).
5. For a full discussion of the role of expert witnesses, please see Babitsky B, Mangraviti JJ, Todd CJ. *The Comprehensive Forensic Services Manual: The Essential Resources for All Experts.* Falmouth MA: Seak; 2000.
6. Tex. Rev. Civ. Stat. Ann. Art. 4590i §4.01.

7. Berry DB. The physician's guide to medical malpractice. *Baylor University Medical Center Proceedings* 2001; 14:109.
8. Missouri Civil Procedure Forms, Form 1.
9. Dean M. *The Jurisprudent Physician: A Physician's Guide to Legal Process and Malpractice Litigation.* Phoenix: Legis; 1999.
10. Berry, at 111.
11. Dean, at 304-05.

CE/CME Questions

13. Failure to file a timely answer to a complaint may result in:
    A. a default judgment against the defendant.
    B. admissions to the allegations made.
    C. the granting of a motion for summary judgment.
    D. none of the above

14. Typical discovery methods include all but which of the following?
    A. Interrogatories
    B. Requests for production
    C. Motions *in limine*
    D. IMEs

15. Questions of fact to be decided by the jury include all but which of the following?
    A. Breach of the standard of care
    B. Amount of compensatory damages
    C. Admissibility of expert testimony
    D. Proximate cause

16. In most states, the burden of proof in a malpractice case is:
    A. beyond a reasonable doubt, and lies with the defendant.
    B. beyond a reasonable doubt, and lies with the plaintiff.
    C. by a preponderance of the evidence, and lies with the defendant.
    D. by a preponderance of the evidence, and lies with the plaintiff.

CE/CME Objectives

[For information on subscribing to the CE/CME program, contact customer service at (800) 688-2421 or e-mail customerservice@ahcpub.com.]

The participants will be able to:

* identify the result of failure to file a timely answer to a complaint;
* list typical discovery methods;
* identify questions of fact to be decided by a jury;
* name the burden of proof in most states.

In Future Issues:

Subarachnoid Hemorrhage

Anatomy of the Discovery Process

BY **CHRISTOPHER TODD, JD,** ASSISTANT VICE PRESIDENT, SEAK LEGAL AND MEDICAL INFORMATION SYSTEMS, FALMOUTH, MA

The standard for discovery is broad. Generally speaking, parties are allowed to discover information and documents that are "likely to lead to the discovery of admissible evidence," regardless of whether they will be ultimately admissible at trial.[1] That is, information may be obtained during discovery that is not itself admissible as evidence. This broad standard is based on two rationales: the elimination of surprise at trial and the encouragement of settlement. The idea is that if the parties know all there is to know about the other side's case, the parties will be able to rationally evaluate the strength of the case and come to a settlement. Moreover, if the suit does go to trial, the outcome will turn on the "facts" rather than gamesmanship, as the discovery process has minimized the possibility of unfair surprises.

The defendant's investment of time and effort begins in earnest at this stage. The defendant's attorney will meet with the defendant to review the events surrounding the case, the chart, and any other pertinent medical records. During discovery, the defendant likely will be required to devote some time providing answers to written discovery and gathering any relevant documents that are requested, and he or she certainly will need to devote a significant amount of time to prepare for deposition. ***Editor's note:*** *For more information on preparing for a deposition, see* ED Legal Letter, *March 2001.*

The methods parties use to discover information are fairly standard and are employed in a sequence that varies little from jurisdiction to jurisdiction.

- **Interrogatories.**
  Interrogatories are written questions served by one party on another party. Defense counsel will contact the defendant once the plaintiff has submitted what will often be a significant number of standard interrogatories. They will include questions regarding the defendant's education, training, experience, insurance, defenses to the claims, and treatment of the patient. The defendant also likely will receive questions about witnesses and exhibits. Defense counsel will forward the interrogatories to the defendant and ask him or her to supply answers in draft form. The defendant and his or her attorney will meet to go over the questions and, before giving the answers to plaintiff's counsel, the defendant's attorney will finalize the form of the answers.
- **Requests for disclosure.**
  Requests for disclosure are statutorily predetermined requests for information that must be produced without objection. Disclosures cover the basic information involved in a lawsuit, including potential witnesses, experts, contentions of the parties, damages, and the identity of health care providers who rendered medical care to the plaintiff. The parties also will be required to exchange the reports written by their experts containing the experts' opinions and bases for those opinions.
- **Requests for admission.**
  Requests for admission require the party served to either "admit" or "deny" certain facts and contentions. These requests are particularly time-sensitive, and failure to respond in a timely manner may result in matters being deemed admitted. That is, the court will consider the failure to respond in a timely fashion, as a matter of law, an admission of the particular fact.
- **Requests for production.**
  Requests for production are requests for written documentation or other tangible items that the requesting party would like to inspect or copy. Such requests may be served with interrogatories and might include requests for all pertinent records, diagnostic studies, pathology samples, correspondence, billing statements, exhibits, photographs, policies and procedures, materials given to experts, and the experts' curriculum vitae. Defense counsel likely will ask the defendant practitioner to help obtain many of the requested items.
- **Depositions.**
  Depositions are question and answer sessions in which witnesses provide sworn testimony. They usually take place after the completion of all written discovery. The parties are generally deposed first, then fact witnesses, and finally the experts. This is because the experts often rely on information that is developed in the earlier depositions.[2]

  — Plaintiff's deposition.
  The deposition of the plaintiff is necessary, but infrequently of overwhelming benefit, since plaintiffs themselves often have minimal recall or understanding of the truly important medical issues. The plaintiff's deposition is important, however, because it allows defense counsel to tie down the plaintiff's version of the facts

(Continued)

that the plaintiff subsequently will have to stick to.

— Defendant's deposition.

The defendant deposition is, in many respects, the most important part of preparing the case for the defense. The most important testimony in malpractice actions usually comes from the defendant, rather than the experts — in particular when the defendant can convincingly explain what happened. And, while facts certainly are important to jurors, firmly establishing the defendant's credibility and trustworthiness has great impact. The defendant's deposition is critical for another reason: Plaintiff's counsel will conclude, on the basis of the defendant's performance at deposition, whether the defendant will make a strong witness at trial. As a result, the plaintiff's attorney may decide to drop the case altogether. For these reasons, substantial predeposition preparation of the defendant can make a critical difference in a malpractice case. Defense counsel should and will prepare the defendant meticulously and thoroughly. The defendant should be prepared for the time and effort involved in deposition preparation. The defendant should expect that as part of deposition preparation, defense counsel will: explain the procedural aspects of the case in understandable terms; go through each allegation made by the plaintiff, including its meaning and its probable merits; discuss the strengths and weaknesses of the case; discuss key questions that the plaintiff's lawyer likely will ask; explain the deposition procedure; explain how the deposition transcript can be used at trial; explain how to respond to questions; go through all pertinent medical records, studies, and legal documents; and explain how to respond to an attorney's objections.[3] Moreover, as part of the preparation, the defendant must review interrogatory answers and the contents of documents that were produced during previous discovery in addition to medical documents. Inconsistent answers at the deposition will harm the defendant's credibility. The defendant also should discuss the vulnerabilities and weaknesses of the case with defense counsel. It is vital that the defendant work with defense counsel to anticipate the questions the plaintiff's lawyer will pose.

- **Independent medical evaluations.**

  Another tool allowed under discovery rules is the physical examination of a plaintiff, which may be allowed when the mental or physical condition of a party is in controversy. In malpractice cases, such examinations usually are requested by the defense and are called *independent medical evaluations* (IME). The defense attorney will hire a practitioner to perform the IME. The plaintiff will be ordered by the court to appear for the IME. Following the examination, the professional performing the IME will submit a report of the findings and conclusions of the examination. This report often will rebut the plaintiff's injury claim. Also, the examining physician or nurse will testify as an expert witness in many cases. It is of note that the IME generally does not create a physician-patient relationship or a nurse-patient relationship.

Limits of Discovery — Privileges

The plaintiff may seek to discover information that the defendant considers confidential. Although the scope of discovery is broad, the discovery rules prevent the disclosure of privileged matters. Privilege examples are the physician-patient, attorney-client, and attorney work-product privileges. Of these, the attorney-client privilege arises most often in malpractice cases. This privilege shields from discovery all communications between the client and the attorney, and may extend to agents of the attorney. Privileges often are raised during discovery. The plaintiff's attorney will use one of the discovery methods to request a piece of information, and defense counsel may file a motion to protect this piece of information from discovery based on a claim of privilege. Less often, the plaintiff will claim the privilege. The judge will rule as to whether the privilege applies.

The discovery rules also allow the judge to consider the burden imposed on a party if the discovery were to be allowed. The convenience, expense, possibility of other avenues of discovery, and the benefit of the discovery may form the basis of a judge's decision to prevent discovery.

Endnotes

1. Berry DB. The physician's guide to medical malpractice. *Baylor University Medical Center Proceedings* 2001; 14:110.
2. Fed. Rule of Civ. Pro. 26(b)1.
3. For a detailed discussion of the deposition of an expert witness, please see Babitsky S, Mangraviti Jr. J. *How to Excel During Depositions: Techniques for Experts that Work.* Falmouth, MA: Seak; 1999.