

Medicolegal Forum: I've Been Sued – The Trial

Jonathan Fanaroff, MD, JD and Gilbert Martin, MD

In our last two Medicolegal Forums, we discussed the deposition – how to prepare and what to do on the day of the deposition. This column will focus on the trial – what to expect and how to behave.

Do most cases go to Trial?

No. The vast majority of medical malpractice cases are either dropped or settled before going to trial.

How long do Trials last?

Most trials last from one to three weeks, although that may vary considerably depending on the number of witnesses and complexity of the case.

What happens when a case goes to Trial?

The first step in a trial is the selection of a jury. Then both sides will present opening statements, with the plaintiff going first. After that, the plaintiff presents their case, followed by the defense. Both sides will then make closing statements, with the plaintiff again going first. The judge will then give the jury instructions, after which the jury will deliberate until they reach a verdict.

What are the elements of a malpractice lawsuit?

In order to succeed, a plaintiff must prove that malpractice has occurred. They have the burden of proof. In most cases they have to show that it is more likely than not that:

1. The physician had a duty to the patient.
2. That duty was breached by not practicing to the standard of care.
3. That the breach was the cause of an injury.
4. That the injury led to damages, either economic (medical expenses, lost earnings, etc.) or noneconomic (emotional distress, pain, and suffering, etc.)

“ Physicians are not expected to be perfect, but are expected to act as a reasonable physician would act under similar circumstances. ”

What is the ‘standard of care’?

Physicians are not expected to be perfect, but are expected to act as a reasonable physician would act under similar circumstances. Since jurors are generally not in medicine, expert witnesses are used to testify as to whether a physician breached the standard of care.

Is there a ‘dress code’ and a “behavior code”?

Appropriate dress and behavior are important. Conservative dress is recommended, as is professional behavior at all times. Similar to a job interview you are being evaluated at all times

by the jury.

What should I do at the Trial?

1. **BE PRESENT AND VISIBLE**– The jury needs to see that you are dedicated to your defense and taking the lawsuit seriously.
2. **STAY ALERT DURING THE TRIAL** – Unlike the movies, trials can last a long time. Jurors will notice if you appear disinterested or distracted.
3. **KEEP YOUR Demeanor APPROPRIATE** – Keep control even when the opposing expert is criticizing the care you provided.
4. **BE PREPARED FOR YOUR TESTIMONY** – Many of the tips provided in the last two columns concerning depositions apply. This is your chance to tell your story to the jury, who will expect you to explain what happened and why it happened. Do not use confusing medical terminology.
5. **SHOW APPROPRIATE SYMPATHY** – “I’m really sorry this happened to Susan and her family. I just don’t feel that I’m responsible for it.”

What are the consequences of settling or losing a malpractice lawsuit?

The jury may award economic and non-economic, and rarely, punitive damages. Usually, this is paid for by the insurance company. Additionally, any hospital or insurance company who pays a settlement or judgment must report the name of any licensed professional on whose behalf the payment was made to the National Practitioner Data Bank (NPDB). This includes nurses and nurse practitioners. Finally, State medical boards may investigate if a patient makes a complaint, or if a practitio-



ner is sued a number of times or there is a loss or settlement above a certain amount.

Summation: The Deposition and the Trial.

This three-part series has discussed the preparation for the deposition, the deposition itself and finally, the trial. This entire process can be lengthy, tedious and at times stressful. The personalities of the participants vary, and intimidation by opposing counsel can be part of the process. It is often difficult to separate obstetrical care from consequences to the newborn. Do we talk about the standard of care? Do we discuss causation? Is the alleged negligence real? A unifying theme for the expert witness is to be familiar with the evidence-based scientific literature. The "scales of justice" can only tilt in two directions. Thorough preparation, a grasp of the process and an organized overview of the issues involved are the basic guidelines.

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Survey Says: RSV

RESPIRATORY SYNCYTIAL VIRUS, or RSV, is a dangerous virus that can lead to:

- Hospitalization
- Lifelong health complications
- Death

for infants and young children.

ACCORDING TO A NATIONAL SURVEY, Specialty Health Care Providers say:

- 80% They treat RSV as a priority, "often" or "always" evaluating their patients
- 77% RSV is the "most serious and dangerous" illness for children under four
- 77% Barriers to access and denials from insurance companies limit patients' ability to get preventive RSV treatment

But Parents are Unprepared.

- 18% Only 18% know "a lot" about RSV
- 22% Only 22% consider themselves "very well" prepared to prevent RSV

RSV EDUCATION & AWARENESS CAN HELP

After parents learned more about RSV, they were:

- 65% "More concerned" about their child contracting the disease
- 67% Likely to ask their doctor about RSV

NCJIH National Coalition for Infant Health
Preventing Serious Illnesses Through Early Care

Learn More about RSV at www.infanthealth.org/RSV