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Section I. General Information

Introduction

This is your C.A.R.E. Litigation Guide. The purpose of this Guide is:

1. To provide information about the various parts of a lawsuit;

2. To help organize the various papers you may acquire during litigation from your attorney or others; and,

3. To provide resources for managing the stress of a lawsuit.

KaMMCO wants to encourage you to share this Guide with your spouse. The Guide is for them, too. KaMMCO hopes your spouse (as well as you) will review the entire Guide; however, we have included a special section especially for spouses.

This Guide contains numerous sections. Do not worry--this does not need to be read all at once. You may find different sections useful at different times during the litigation. Access those areas on which you want more information when you deem appropriate. The size of the Guide is to provide a place to store your litigation documents. Ask your attorney to three-hole punch anything sent to you.

All the items in Section I have materials behind the tabs which explain the subject matter identified. Section II is the place you will store items you receive during litigation. In Section III, KaMMCO addresses "life after" the lawsuit by giving post-litigation tips and reminders.

KaMMCO hopes you will find this Guide helpful. Please feel free to call KaMMCO with any suggestions or questions.

About C.A.R.E.

Creating Advocacy through Responsive Education (C.A.R.E.), was established by KaMMCO with assistance from members of KaMMCO's Loss Prevention and Practice Management Committees. C.A.R.E. was designed to provide emotional and educational support to members as they work through the litigation process.

Through C.A.R.E., KaMMCO offers members written and videotaped material regarding the litigation process. In addition, through the Doctors on Call (D.O.C.) program and Spouses Offering Support (S.O.S.) program, members and spouses may talk to peers regarding personal reactions to litigation.

Definitions

Answer	The document a defendant may file in response to a petition generally admitting, or denying, specific allegations.
Defendant	The person or entity being sued.
Deponent	A person testifying, by stating answers in response to questions at a deposition.
Deposition	A question-and-answer session in which a witness answers questions, under oath, posed by an attorney for one of the parties. A transcript of the deposition is taken by a court reporter.
Discovery	The process used by the parties to "discover" the facts of the case, *i.e.*, what witness documents will the other party present, what witnesses and documents exist, *etc*.
Expert Designation	A written pleading, filed by a party's attorney, in which the party designates expert witnesses who will testify on such party's behalf, and a brief summary of such experts' opinions.
Fact Depositions	Depositions in which the attorneys ask witnesses about factual information in the case. The witnesses give the answers under oath. The answers are recorded in written form by a court reporter.
Interrogatory	Written questions by a party in a lawsuit to another party or to a witness. The person receiving the interrogatories must answer the interrogatories, in writing, and under oath.
Journal Entry	A written decision by a judge entitled "Journal Entry," in which the judge describes his/her decision or order. It is dated and signed by a judge. (It is usually a synonym for an "Order".)
Motion	A document filed by a person or entity, usually a party in a lawsuit, requesting action by the court. In essence, the motion is the vehicle used by attorneys to present a variety of issues to the court upon which a decision is needed throughout the lawsuit.
Order	A decision, by the judge, made either verbally, or in writing. (It is usually a synonym for "Journal Entry.")
Petition	The initial document used by the plaintiff to start the lawsuit and state the claims against the defendant.

Pleading	The general term, used by parties in a lawsuit, to describe the various documents an attorney may file with the court.
Pretrial Conference	A conference, between the judge and the parties, in which the final procedure for trial is set. In addition, the parties are required to finalize witness and exhibit lists at this time. The judge also finalizes the issues for trial. This information is summarized in a pretrial order. The pretrial order is the "road map" for the trial.
Request for Production	A written pleading in which one of the parties asks for specified documents from the other party and to which the other party must respond.
Response	A document filed with the court in response to a motion, or other pleading, filed by another person or entity, usually another party.
Scheduling Conference	A conference between the parties and the judge, setting out the time frame of the lawsuit. In a lawsuit, there is an initial scheduling conference. Often, time frames are changed due to circumstances that arise. Numerous scheduling conferences are held throughout the litigation process.
Service of Petition	The process the plaintiff's attorney uses to deliver the petition to you. Usually, the petition will be sent to you by certified mail or delivered to you by the Sheriff at your home.
Settlement Discussions/ Settlement Conference	After discovery is complete, the parties attempt to negotiate a resolution to the lawsuit without having a trial. Sometimes, these conversations occur over time. Sometimes, a specified date is set for these discussions called a settlement conference. A disinterested third party facilitates the discussion.
Summary Judgment	A document filed with the court in which one of the parties asks the court to decide the lawsuit without the need for a trial. It is usually filed after all the discovery and fact-finding processes are done and after experts have been designated. If there are any disputes as to material facts of the case, a summary judgment motion will not be successful. Its success depends on either the facts being undisputed or upon a conclusion that even if the facts are read in the light most favorable to a non-moving party, the moving party wins. Few medical malpractice cases are decided on summary judgment.

Summons	The tool used by a party to notify the defendant that a lawsuit has been started.
Trial	The process during which each side presents evidence to a jury or judge who then renders a decision based on the evidence for one party or another.
Verdict	The decision by the jury (or, in some cases, a judge), as to whether the defendant is liable, or not liable, for the plaintiff's damages.
Voir Dire	The process used to question potential jurors about any potential bias in a juror's background.
Written Discovery	The initial phase of discovery. Usually, written discovery will include written questions submitted to your attorney, by plaintiff's attorney, that you will need to assist your attorney in answering. You will also be asked to produce documents relevant to the lawsuit such as the medical chart.

Anatomy of a Lawsuit

What is Medical Malpractice?

Legally, medical malpractice involves an allegation of negligence in the rendering of medical care or services. To prove negligence, a plaintiff must prove that:

1. The physician owed a duty to the patient;
2. A breach of that duty occurred;
3. The breach caused injury to the patient; and,
4. Damage occurred.

Usually, the existence of the physician/patient relationship proves a duty is owed to a patient. A breach of duty is proven when a physician's act, or failure to act, deviates from the standard of care. Suits of this kind often involve expert witnesses on both sides. Proving that the damages were caused by the physician requires proof of a causal link or connection between the breach and the damages. For damages to be proven, it must be shown that there was an actual loss, or damage, caused by breach of duty.

Usually, deviation from the standard of care must be proven by expert testimony. Under Kansas law, an expert witness is not qualified as an expert witness on an issue unless at least fifty (50) percent of such person's professional time, within the two-year period preceding the incident giving rise to the action, is devoted to actual clinical practice in the same profession in which the defendant is licensed.

It is critical to remember that, under Kansas law, you are not a guarantor of good results and liability does not arise merely from bad results.

What is the Standard of Care by Which I Will Be Judged?

The standard of care by which you will be judged, and that you owe to your patients, is reasonable ordinary care and diligence. You are obligated to use good judgment, exercise a reasonable degree of learning, and possess skill and experience which is ordinarily common to other physicians who are similarly situated. A specialist has a duty to use the same degree of care and skill as other specialists in the same specialty.

Stages of a Lawsuit

The stages of a lawsuit can be broken down into the following stages. These stages are defined in this section and throughout this Guide.

1. Petition & Service of Petition
2. Written Discovery
3. Fact Depositions
4. Expert Designations
5. Expert Depositions
6. Settlement Discussions
7. Pretrial Conference
8. Trial

Basic Rules for Giving a Deposition and Tips When Giving Testimony

Overview of the Deposition Process

The deposition is the opportunity for the parties to discover information potential witnesses might possess about the case. It is a question-and-answer process with witnesses testifying under oath.

Explanation of the Parties and Their Roles

The Participants. The participants will usually consist of the court reporter, opposing counsel, the opposing party or a representative of the opposing party, other possible witnesses, you, and your defense team.

It is the role of the court reporter to transcribe both the question and the answer, which will be typed and bound in book form. You will have a chance to review the written record of your deposition, make appropriate changes, and sign the same.

Opposing Counsel. The general role of opposing counsel is to ask questions you will be required to answer. Opposing counsel is representing the best interests of the opposing party.

Your Attorney's Role. Your attorney's role is to protect the record and to represent your best interests. Your attorney most likely will not ask any questions during your deposition.

Your attorney may object to certain questions and, when this occurs, your attorney will provide you with instructions on whether you should answer. You may be instructed not to answer a particular question.

Videotape Preparation. A videotape may help you prepare for your deposition and can be very helpful in explaining the basics of the deposition process and the general rules that a witness should follow. A videotape on depositions is available on request from KaMMCO.

Mock Deposition. Your attorney may choose to make you more comfortable by having a "dress rehearsal" prior to your deposition. The length of the mock deposition may range from thirty (30) minutes or less to several hours depending on the size and complexity of the case.

While testifying is potentially stressful, you can minimize anxiety, confusion, and other problems by remembering and following these general rules.

Tell the Truth

The first and most fundamental rule is to **TELL THE TRUTH**. To tell the truth, you should keep in mind the following:

Understand the Question

Listen to the question and pay attention. Make sure you have heard and understood the question. If you do not understand the question, you should ask the questioner to make the question clear before you answer it. Many problems arise from failure to listen to the question. This often happens when the witness assumes what the question is going to be, and stops listening before the questioner is finished. Watch out for ambiguous references to "he/she," "they," "it," and vague time references in the question. Here is an example:

Question: "She says that you were there an hour later when she did this. Is that true?"

You should know what is meant by "she," "there," "this," and "an hour later."

It is not a sign of ignorance, weakness, or lack of cooperation to require reasonable clarification of questions. Know that attorneys may ask confusing questions because they are thinking ahead to the next question, are not using notes, have confused or misstated the facts, or have misunderstood your earlier answers.

Think Before Answering and Respond Accurately

Before responding to a question, take a brief moment to think. Sometimes, thinking about your answer may help to make it a more accurate answer. For example, responding "no," means absolutely not. The accurate answer may be, "I am not sure," or "I do not recall," instead of a simple "no." Here is an example:

Question: "Have you ever met a person named David Jackson?"

This question refers to your entire lifetime and is broad. The accurate answer may be "no;" however, it may also be "I am not sure."

Question: "Have you ever seen this document before?"

If your answer is not "yes," your answer may be, "I do not recall" or "I am not sure," or, it may be accurate to say, "no." Remember to think before answering in order to give the most accurate answers.

Do Not Accept Opposing Counsel's Statements

Do not accept a "fact" merely because an attorney says it. While the fact may be accurate, make sure you know it is accurate from personal knowledge. For instance:

Question: "You discussed the problem with Mr. Smith when you reviewed this letter with him, didn't you?"

While you may have discussed "the problem" with Mr. Smith, if you do not recall having reviewed the letter with him, say so.

Documents and Statements

Prior to testifying, you should review all statements or communications you have made about the matter, and you should know any factual allegations made in any complaint or answer filed on your behalf. You should review the petition, your answer, and all answers you have made to interrogatories, or to requests for admission. You should review any documents you have produced to opposing counsel. You should review all of your own correspondence or written material on the matter that came to you, *e.g.*, copies of letters authored by others. If other parties have given interrogatory responses or deposition testimony about you, you should know what the other parties have said. Take time to review all such written material and review all pertinent medical records.

Unless directed by your attorney, it is not necessary to bring documents. If you want certain documents available to you for reference during your testimony, be sure to review them with your attorney during your preparation.

Analyze Documents Carefully Before Answering Questions About Them

If a document is important enough for the attorney to use in questioning you, you should give it the same importance and scrutinize it carefully before you answer. For example, if you are asked to "look at" a letter, before answering questions about it, actually take the time to look at it carefully. Take the time you need. Look at:

- The letterhead, if any;
- The date;

- The person to whom it was sent;
- The recipient's full address;
- The name of the author of the letter; and,
- Persons to whom copies are noted.

Only after examining these parts of the letter should you read--carefully--the content of the letter.

If you follow these rules, you will indeed have "looked at" the letter and you will be prepared to answer questions about it. You cannot do this if you simply glance at the letter.

If the document is lengthy, you are not required to review and absorb it instantly. You can request a brief recess from the deposition and take the time you need to review the document. Do not be rushed.

Difficult Situations

Your attorney can object if opposing counsel is overly aggressive, but your attorney will not necessarily object at every single opportunity. If opposing counsel is argumentative, but you are handling their questions comfortably, your attorney may not object, even though it is permissible.

Be Concise

Respond to the question asked. If you are asked for your name, do not give your address, social security number, date of birth, and the names of all members of your family, as some people do through nervousness. If the attorney asking the question wants more information, then the attorney will ask another question.

Opposition's Demeanor

While being questioned by opposing counsel, pay no attention to:

- The tone of voice of the questioner;
- Suggestions in the question that tell you what the answer is; or,
- The attitude of the person asking the question.

The questioner's attitude is irrelevant. All that counts is the question. Disregard sarcasm, skepticism, raised voice level, suggestions that the answer is obvious, and all other attempts by counsel to influence your answer.

Do not be distracted if opposing counsel's sequence of questions seems to jump around in time, or if counsel seems otherwise disorganized in presenting the sequence of events. Counsel has a method to questioning.

Further, know that if counsel cannot attack you on important points, he/she may attempt to magnify and emphasize some minor point. Arguing about a minor point will not make it important.

Take Your Time

You are not subject to a time clock or a deadline, particularly in a deposition. Pause after every question to:

- Be sure you have heard and understood it;
- Decide if you know the answer; and,
- Consider the accurate answer.

Remember that if you are giving your testimony by writing your answers, instead of giving them orally, you should devote time and energy to writing accurate answers. Your oral answers require the same time and concentration. In a deposition, you can take the time you need to consider the question before responding.

Do not let the examiner control the rhythm of the testimony by giving quick, rapid answers to rapid questions. Take your time to answer even simple questions so you will remember to take time with the more complex questions.

For example, do not be lulled by a sequence of quick short answers, *e.g.*, four in a row, to which the answer is a simple "yes" and a fifth throwaway question at the end to which the answer is *not* a "simple yes."

Question: "You told Mr. Smith to write this letter?"

Answer: "Yes."

Question: "And you told him what to say?"

Answer: "Yes."

Question: "And he wrote the letter?"

Answer: "Yes."

Question: "And he sent the letter?"

Answer: "Yes."

Question: "And you had approved it?"

Answer: (Be alert not to give an automatic "yes" answer.)

Correct Mistakes

If you realize that you have said something that was inaccurate, interrupt the questioning and correct your answer. You should do this even if the inaccurate statement was given long before you realize your error. Everyone makes mistakes--and it is perfectly normal; but you need to correct any mistakes. If you do not realize a mistake has been made until your deposition has finished, inform your attorney as soon as possible of this mistake.

Your Own Knowledge

Be sure to distinguish between what you know from your own knowledge and what you have heard. For example, assume your wife told you she came home at 10:00 p.m. on a certain night, but you actually came home at 11:00 p.m.

Question: "What time did your wife come home that night?"

Answer: "I don't know."

Question: "Do you have any knowledge about when she came home?"

Answer: "I know that she was home when I came home at 11:00 p.m."

Question: "Do you have any other information about when she came home?"

Answer: "Not of my own knowledge, but I know what she told me."

Question: "What did she tell you?"

At this point, there may, or may not, be an objection to what she told you. Note that each of these answers accurately responds to the question.

Avoid Speculation

Do not guess or speculate. Testify only about information based on personal knowledge.

Assumptions

If you make assumptions in your answer, state them so your answer is understood. For instance:

Question: "When the steam pressure goes above that level, this safety valve opens, doesn't it?"

Answer: "Yes, if the safety valve is properly set and working."

The question did not include the conditions that the valve was properly set and working, so clarify your answer by explaining your assumptions.

Explanations

If your answer requires an explanation, because otherwise a simple "yes" or "no" would be incomplete, avoid answering "yes" or "no" and provide an explanation instead.

Interruptions

If opposing counsel interrupts your answer before you have finished, politely indicate that you need to finish your answer by saying, "Excuse me, but I have not finished my answer." Complete your answer.

Likewise, unless you are trying to correct prior testimony, do not interrupt the questioner, even when the question is misstating your testimony or the facts. Wait until the question is finished. The court reporter can only record the words of one person at a time. So, you must wait until the question is finished before answering, even when you think you know the complete question before it is finished.

Videotaped Deposition

If your deposition is to be videotaped, you must remember, at all times, that you are speaking to the judge and jury on videotape and not simply to the attorneys in the deposition room. Address your answers to the camera and act appropriately for courtroom testimony. While attorneys at the depositions, who are off-camera, may act less formally, you are on-camera at all times. Avoid distracting mannerisms such as tapping your pen on the table or moving a water glass around because all sounds will be picked up by the microphone. Never assume that you are off-camera until the camera operator so states.

Recesses

If, at deposition, you become tired or unwell, say so and request a recess. Fatigue is more often a problem at depositions when there are fewer scheduled breaks than in court testimony. Know that it is not a sign of weakness to ask for a break in a deposition whenever you need it.

In a deposition, you may be permitted to ask for a recess to confer with your attorney. The need to confer may arise, for example, if you suspect that a question calls for you to reveal privileged material such as communication with your attorney, trade secrets, or testimony which is subject to a protective order. Attempts to identify these types of materials will be made during your preparation.

Summary of Your Testimony

Frequently, an attorney may attempt to summarize, or restate, your previous testimony in such a manner as to make it more favorable to the client. The attorney will then ask you to agree with the summarization. You should be careful to avoid agreeing with any incorrect summary of your testimony. For instance:

Question: "Mr. Smith, you previously testified that Mr. Jones was present during the signing of the contract, isn't that correct?"

Answer: "No, I did not say that Mr. Jones was present. I stated he may have been present at the signing of the contract."

I'm Not Saying It Did Happen, and I'm Not Saying It Did Not

Witnesses are frequently confused when an attorney tries to establish whether a witness actually observed, or perceived, an event or a particular statement. The following is an example:

Question: "Did you see Mr. Jones strike Mr. Smith?"

Answer: "No."

One possibility is that Mr. Jones did, in fact, strike Mr. Smith, but you did not observe the event. In this case, opposing counsel will try to establish whether you are really saying that Mr. Jones did not strike Mr. Smith, or whether you are saying you do not know whether Mr. Jones struck Mr. Smith. For example, you may only have observed Mr. Jones and Mr. Smith for a brief period of time and Mr. Jones may have hit Mr. Smith either before, or after, that period of time in which you had them in your view. This testimony might be elicited as follows:

Question: "Are you saying Mr. Jones didn't strike Mr. Smith?"

Answer: "No, I am not saying that."

Question: "Are you saying you did not see Mr. Jones strike Mr. Smith?"

Answer: "Yes."

Question: "Well then, you are not testifying that Mr. Jones did not strike Mr. Smith, are you?"

Answer: "No, I am not. I am simply testifying that I did not see Mr. Jones strike Mr. Smith."

Question: "Well then, it is possible that Mr. Jones did, in fact, strike Mr. Smith and you simply did not observe that fact, isn't that true?"

Answer: "Yes, that is true."

Question: "So, you are not saying Mr. Jones did not strike Mr. Smith, are you?"

Answer: "No."

In this particular example, the opposing attorney is not trying to trick you and you should not be confused or rattled by the nature of the questioning. The opposing attorney is simply trying to determine whether you are claiming the event could not possibly have happened, or whether you are saying it did not happen to the best of your knowledge because you did not personally witness it.

If the altercation allegedly occurred at precisely 10:00 p.m., and you had both parties within your view for several minutes prior to, and subsequent to, 10:00 p.m., and you were not distracted at any point during that time frame, your answer would have been:

Answer: "Yes, I am saying that Mr. Jones did not strike Mr. Smith."

Do Not Be Offended By Questions Which You Think Are Personal or Irrelevant

The opposing attorney is given great latitude in asking questions which you believe have nothing to do with the lawsuit. The inquiry may seem to be overly personal and offensive. If they are improperly so, your attorney will object and may instruct you not to answer the question. However, you must trust your attorney to protect you and you should not be aggravated or indignant over the inquiry. Do not argue with opposing counsel by saying, "I do not understand what this has to do with the case," or "That does not have anything to do with the case and I do not see why I should have to answer it."

The Insinuation That Something Improper Has Occurred

Do not be concerned if opposing counsel asks questions in such a manner as to insinuate that something improper has taken place. A good example is if opposing attorney asks whether you met with your attorney before the deposition, or talked with your attorney during a break. Of course, there is nothing improper about meeting with, or talking to, your attorney and you should not be made to feel uncomfortable by the insinuation that it is somehow improper.

Questions Which Assume Facts Which Are Not True

Occasionally, an attorney may ask a question which assumes facts that are not true. For example, an attorney may ask the question, "Where was the plaintiff's car in relation to the intersection when you ran the red light?" The attorney's question assumes you ran the red light when, in fact, you did not. Your attorney should object to the question as improper and opposing counsel will be forced to rephrase it. If your attorney overlooks the objectionable nature of the question, you must be prepared to respond that you did not run the red light. You would state, "That is incorrect, I did not run the red light."

Conclusion

Your defense team will assist you in preparing for the deposition. You can help by remembering the tips in this section. Finally, before the deposition, take care of yourself. Try to get plenty of sleep, exercise, and eat well. Schedule the day off after the deposition. It will tire you out and you may need time to rejuvenate.

Tips for Trials

Congratulations, you have now completed the arduous task of the discovery process in litigation. You and your defense team are now working together to best present your case to a jury. Your attorney will prepare you for trial. These tips are to assist that process, not replace it. Here are a few suggestions to help you as you prepare for the trial phase of your lawsuit.

Physical Layout

Courtrooms across the state differ in size and appearance. At the very least, most courtrooms will have the following areas:

The judge's area

The area in which the judge sits is sometimes called the "bench." The judge often sits on a raised platform behind a large desk above the rest of the room. The judge will be in the front center of the room and often look down on the proceedings.

The witness stand

Generally, the witness stand is next to the bench. It is often a chair surrounded on two (2) sides by a railing or divider. Many times, there is a microphone. It is important to adjust the microphone to fit your height and manner of speaking.

The court reporter

The court reporter is a person who is responsible for making an accurate record of the trial. The court reporter generally sits on the main level close to the judge and the witness stand so the court reporter can hear everything being said. When court is in session, the court reporter will type or record everything said. During the trial, there will be occasions when conversations "off the record" will occur that are not relevant to the proceedings.

The jury box

Most courtrooms have an enclosed area in which the jury sits during trial. It is often perpendicular to the bench and the witness stand.

The judge's chambers

Usually, there is a door leading to the judge's office area. This area is called the judge's "chambers." Occasionally, the judge will retreat to the judge's chambers, or invite counsel to retreat to the judge's chambers, for a conference.

The jury room

A room exists next to the courtroom where the jury goes to discuss a case and make a decision.

Parties' seating area

Opposite the judge's bench, there will be two tables, one on each side, at which the parties sit with their attorneys. The plaintiff, and the plaintiff's attorneys, will sit on one side of the room. The defendant, and the defense team, will sit on the other side of the room. There will be an aisle in between. These two tables face the judge. Behind these tables often there is a rail, behind which public seating is available. Most trials are open to the public.

The bailiff

Some courts use a bailiff. The bailiff will sit near the judge and will swear in witnesses and help the judge maintain order.

The Trial Itself

The typical trial has the following steps listed in chronological order.

Selection of the jury

The first task in a trial is for the parties to select a jury. Often, the attorneys will ask questions from a potential pool of jurors. This process is called "voir dire." It is an attempt by both sides to determine whether potential jurors hold any unfair prejudices and to object to those potential jurors who cannot be fair. Most courts allow each side to eliminate three (3) potential jurors for any reason. Once the jurors are chosen, a jury promises to arrive at a verdict based only on the evidence presented.

Opening statements

After a jury is picked, the attorneys will make opening statements. The plaintiff's attorney will present the plaintiff's side of the case and itemize what will be shown during the trial. The defendant's attorney will then present the defense's version of the facts and what will be shown during trial.

Presenting the evidence

During the next phase of the trial, the plaintiff will call witnesses followed by the defendant calling witnesses. The person calling the witness will have an opportunity to ask questions of the witness. This part of the questioning is called "direct" questioning.

The opposing party can then "cross-examine" the witness. During this period, leading questions are allowed. Leading a witness often means wording a question so the attorney really gives the answer in the form of a question. For example:

Question: "Isn't it true that you failed to follow up for numerous appointments after your surgery?"

In this kind of question, the attorney is giving the witness the answer and wants the witness to answer in a certain way. Leading questions are not allowed during "direct" questioning--they are permitted only during cross-examination.

Once the person calling the witness asks direct questions, and once the opposing party has had an opportunity to cross-examine the witness, the person calling the witness will do what is called "redirect" followed by "re-cross." This back-and-forth volley occurs until each side has had an opportunity to ask all questions they desire of the witness.

Objections

During the witness phase of the trial, opposing parties may often object to the form of a question or to the introduction of the evidence. The person making the objection will state the basis for the objection. The other side will have an opportunity to respond. The judge will then make a ruling.

Closing arguments

After the parties have called witnesses and introduced all the evidence, each party will have an opportunity to tell the jury what the evidence showed and why a certain conclusion should be reached. The judge will then instruct the jury on the law and ask the jury to return to the jury room and render a verdict. The judge will caution the jury to avoid inappropriate conduct.

Verdict

When the jury has reached a verdict, it will inform the judge of the verdict. The judge will then reconvene court. The foreman of the jury will announce the verdict or pass the written verdict to the judge or bailiff who will read the verdict aloud.

Appeal

After a verdict has been given, either party may file an appeal with the appellate court. The appellate court will not "rehear" the evidence but will review the record to make sure no errors in the law, or in the process, occurred.

What You Can Do To Help

Prepare for the trial

The trial will demand that you have familiarity with the facts of the case and potential areas of concern. You and your defense team should review all the relevant evidence, the facts of the case, and practice responses to questions which may prove difficult or problematic to answer.

Impression counts

Your demeanor, as well as your physical appearance, is important. You should talk with your attorney about the type of clothing to wear and your conduct. The courtroom is a formal process and demands formal conduct. Inappropriate gasping, mugging, or inappropriate facial expressions will detract from your credibility. Your manner and dress should show respect for the process.

Conversations

You should avoid talking to a juror about anything, since this could form a basis for mistrial. You should also be cautious of the places in which you discuss your case. Bathrooms, hallways, public areas, and restaurants are all potentially hazardous places in which to discuss your case. You never know who is listening or who may be just around the corner. If you must discuss your case, do so in a setting you know is confidential.

Err on the side of conservativeness and respect

If you have any question about conduct or appearance, err on the side of being conservative and respectful.

Take care of yourself

You should make every effort to get a good night's sleep each night of the trial, eat well, and exercise. Take steps to keep well hydrated, eat well, stay relaxed but interested in your case, and pace yourself during this process. To the extent you can, you should eliminate all outside distractions during the trial process.

When You Testify

Before trial

Prior to the trial, you and your attorney should go to the actual courtroom itself. You should practice sitting at the defense table, walking to the jury box, sitting in the jury box, and familiarizing yourself with your surroundings. Figure out the location of restrooms, water fountains, and snack bars.

Eye Contact

During your testimony, maintain eye contact, not only with your attorney, but also with the jurors. If the judge addresses you, you should give your attention to the judge.

Going to the witness stand

When you go to the witness stand, do not eat anything or chew gum. Unless your attorney directs otherwise, leave notes, purses, and anything else you have at your seat. If appropriate, your attorney will provide you with the papers you need to refresh your memory. Remember, it is expected that you will be a little nervous, but because you have sat in the witness stand and practiced your testimony, you will be ready to testify on the witness stand. Prior to being seated, or just after you are seated, the bailiff will ask you to raise your right hand and will ask if you agree to "tell the truth, the whole truth, and nothing but the truth." Once asked this question, you should say, "I do."

Testimony

During your testimony, try not to cover your mouth and eyes. Keep your hands away from your face. Although it is appropriate to gesture, you should try to avoid negative non-verbal cues such as folding your arms or covering your mouth, face, or eyes that would suggest to the jury you are trying to hide something when answering questions. Additionally:

- Answer confidently.
- Listen carefully to all questions. If you do not understand a question, ask that the question to be clarified.
- Do not speculate. Testify only as to what you know. If you are being asked to speculate, state that you would only be guessing if you answer that question.
- Tell the truth.

- Show respect and courtesy to all including the court reporter, judge, the attorneys, and the jury.
- Be familiar with the facts of the case, but you do not need to memorize your answers.
- Think before you speak. There is no hurry. Fully think through your answer before you begin speaking.
- Answer only the question asked. Give complete answers to the questions, but do not ramble on with additional information.
- Stay calm and courteous under questioning. As you answer questions, try to remain calm, breathe, and stay relaxed.

Ready for Trial

You are ready for your trial. You will do a good professional job. As with anything, a successful trial depends on good preparation. Having taken the time to prepare for your trial, using your defense team's direction and advice, you will have a successful experience, regardless of the outcome.

Taking Care of You

The litigation process can be stressful. To ease the burden, consider the following coping strategies:

Balancing Your Life

Spend time with your family, develop and spend time on hobbies, and do activities that you enjoy. Studies show that those with varied interests and balanced lives live a happier and more productive life. Having other activities, besides work, helps you to focus on being efficient at work and allow you "time off" from work. When things are not going well at work, it is helpful to have alternative activities in which to engage to help you recuperate.

Do a Critical Self-Analysis Periodically

If you are frequently angry or frustrated, analyze those persons or situations that make you frustrated or angry. Try to pinpoint the cause and take steps to change the situation so you can avoid angry or frustrating situations.

Simplify

Evaluate the number of activities in which you engage. Are they really activities in which you want to participate? Limit your community contributions to one or two items that are important to you. Focus on one or two hobbies. Be sure to leave enough quiet time for yourself. Periodically, re-evaluate your personal goals and those steps you want to take to achieve them. Do not be afraid to say "no." Your life is complicated enough by virtue of your profession. Keep other areas of your life simple, but enjoyable.

Improve Your Effectiveness

Evaluate your system of working. Delegate frequently in areas that do not compromise quality. Look for better ways to do things. If a problem or mistake continues to occur, develop a system to prevent it. Create a team at your place of work that most effectively contributes to patient care as well as to a good working environment.

Communicate

Become involved with positive people who support you. Avoid those people that tend to anger you or demean your self-esteem. When you do face difficulties, communicate those problems with a trusted source. Do not be afraid to talk through a problem or voice a concern. Be assertive in addressing problems.

Live in the Now

Do not stew about past confrontations or situations. Deal directly with difficult situations as they arise. Be assertive. If you are about to engage in a difficult situation or problem, plan and prepare accordingly. Focus on the "now" and provide full attention to the task or problem at issue. Leave time to take steps to prepare sufficiently for upcoming activities and procedures.

Get in Shape, Stay in Shape, and Eat Well

As difficult as it may be to start such a process, build in time to exercise and eat well. Build in time every day to exercise intensely, stretch, or at least take a walk. Although twenty (20) minutes of actual exercise is adequate, you should build in an hour and a half each day for getting dressed, engaging in intense activity or stretching, and cooling down. Similarly, build in enough time to sit down and enjoy at least two meals a day. You cannot take care of others unless you have first taken care of yourself!

Move On

If a situation arises which proves problematic, spend some time going through it, analyzing it, taking what you can from the situation, and then move on. Focus on the issue for a set amount of time and then leave it behind you.

Forgive Yourself

No one is perfect. Although you strive to be the best, mistakes happen. Make mistakes a learning opportunity. If a mistake arises and you are the cause, analyze the error and learn from it. You do not have to be perfect and flawless all the time.

Change Jobs or Professions If You Need To

If you are chronically unhappy in your profession or work setting, change it. Life is too short to continue to work in an adverse work environment.

Keeping stress to a manageable level is a challenge worth the effort. So, take a deep breath and stretch. You deserve a break!

Spouse Section

KaMMCO developed the Spouses Offering Support (S.O.S.) program for spouses of physicians who are currently involved in the litigation process and for those who have been previously sued. The program involves physician spouses who have been through the litigation process and who have volunteered to telephone other physician spouses who need a sympathetic ear. The volunteer spouses understand the need for communication with other spouses and the unique emotions a spouse goes through when the physician is named in a medical malpractice claim.

KaMMCO will not, in any way, monitor the phone calls and, thus, all information shared will remain confidential. Over the years, KaMMCO has learned that the litigation process is often harder on the physician's family than it is on the physician. Spouses are often kept in the dark. Often, a person, who has been sued, wants home to be a place to escape the situation, and does not want to worry the spouse. The spouse is often uncomfortable talking to friends and family about concerns and, thus, is left to worry alone. By talking to someone who has been in a similar position, the spouse may be better able to cope with the situation and, thus, be a greater support to the physician.

To request a call from a volunteer spouse, you may contact Diana Mayer, Education Coordinator, KaMMCO at 785-232-2224 or 800-232-2259 or e-mail her at dmayer@KaMMCO.com.

What Can Spouses Do?

- Take advantage of KaMMCO's Spouses Offering Support (S.O.S.) Program.
- Learn about the litigation process so you are knowledgeable.
- Be supportive of your spouse.
- Communicate.
- Talk to the family, being careful not to discuss the facts of the case while it is pending.
- Read and learn about coping skills.
- Seek the support of peers.
- Be polite, but firm, to any questions from the media or strangers. Rehearse a brief response to use for any inquiries.
- Encourage your spouse to work with your attorney on the defense of the case.
- Participate in your spouse's defense, if your spouse's attorney and your spouse want you to be involved.
- Encourage your spouse to continue to practice medicine.
- Minimize optional responsibilities.
- Take care of yourself.

Emotional support and positive reassurance from you are vital. The impact of malpractice litigation on the physician is real and long-lasting. Sharing the experience can help to alleviate the stress for you and your spouse, as well as your family. Participate!

Reading List

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Thomas Hobbs, Ph.D; and Gregory Gable, M.A., "Coping With Litigation Stress," *Physicians' News Digest*, January 1998.

Robert C. Rouwenhorst, "Physicians Can Modify Distorted Thinking Related to Threat of Lawsuits," *The Digest*, St. Paul Services, Fall 1996.

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Sara C. Charles, M.D.; Richard B. Warnecke, Ph.D; Amy Nelson, B.A.; and Charlene E. Pyskoty, M.A., "Appraisal of the Event as a Factor in Coping with Malpractice Litigation," Reprinted from *Behavioral Medicine*, Winter 1988, pp. 148-155.

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Sara C. Charles, M.D.; Jeffrey R. Wilbert, M.A.; and Eugene C. Kennedy, Ph.D, "Physicians' Self Reports of Reactions to Malpractice Litigation," *American Journal of Psychiatry*, Volume. 141:4, April 1984, pp. 563-565.

Mark Crane, "Why Burned-Out Doctors Get Sued More Often," *Medical Economics*, May 26, 1998, pp. 210-218.

Video Library

KaMMCO maintains a library containing videos that may be useful to you as you proceed through litigation. You may contact Diana Mayer, Education Coordinator, at 785-232-2224; 800-232-2259, or via e-mail at dmayer@KaMMCO.com to check out a video. A description of those videos currently available are listed below:

Preparing For Your Deposition

This video will help you prepare for your deposition, a routine procedure attorneys use to gather information. Knowing the basics--who will be at the deposition and how the process works--is the first step in making you more confident and comfortable. This program will also show some common problems that you, the deponent, may face in answering questions during the deposition.

Preparing Your Expert Witness

This video will help you understand expert testimony. Your attorney may also ask the expert to view the tape to make the expert more confident and effective in the interest of serving justice. Understanding and reviewing the basics is useful for the first-time, or experienced, expert. This program will give you and your expert an overview of the expert's role and responsibilities as both a consulting, and/or a testifying expert, and help you prepare for your own deposition and trial process. There are also practical tips to avoid common pitfalls that experts frequently encounter.

Going to Court: What to Expect and What Is Expected of You

This two-part video offers many important facts and suggestions to help prepare you for a civil court case: a dispute between two parties (that does not involve criminal charges). The video will help you get a realistic picture of what a courtroom looks like, who will be present, and what happens during a trial. It is natural to be a little nervous about your upcoming trial, but once you know what to expect and what is expected of you, you will be more comfortable and better prepared to deal with the situation.

Mock Trial: The Case of Dr. Goode

This video was part of KaMMCO's Fall 1996 Loss Prevention series. The program provided attendees an opportunity to listen to, and evaluate, court testimony from a medical malpractice trial involving an emergency room physician and a managed care organization. Presented in a "mock trial" format, this program actually allowed attendees to participate in the enactment of the trial. A jury of attendees listened to the evidence, an expert witness, and attorneys as it prepared to deliberate and determine if there was "liability" or "no liability" in the case. Following the jury's vote, there is a discussion regarding the actual outcome.

Doctors On Call (D.O.C.)

Members indicated a desire to speak one-on-one to other members and, thus, KaMMCO developed the Doctors On Call (D.O.C.) Program. The program involves members who have been through litigation and who have volunteered to speak, by telephone, to other members who need a sympathetic ear. Most members who were asked to volunteer did so immediately indicating that having been through the process, they understood the need for communication with others and the unique emotions a member goes through when named in a medical malpractice lawsuit. Recent studies have shown that during the course of their professional careers, a large percentage of members can expect to be named in a lawsuit. While being named as a defendant no longer has the stigma that it once did, it does not lessen the impact this process has on a physician. For this reason, KaMMCO is continuing efforts and searching for ways to address the individual needs of defendant members. If you are interested in having one of our volunteer members contact you, please contact Diana Mayer, Education Coordinator, at 785-232-2224; 800-232-2259; or via e-mail at dmayer@KaMMCO.com.

Spouses Offering Support (S.O.S.)

KaMMCO's Spouses Offering Support (S.O.S.) Program is structured in the same way as the D.O.C. program. Individuals whose spouses are involved in litigation are given the names of other spouses who have previously been in their shoes and who have offered to receive telephone calls. Over the years, KaMMCO has learned that the litigation process is often harder on the member's family than it is on the member. Spouses are often kept in the dark as their husband or wife does not want them to worry or wants the family home to remain a place to escape the situation. Spouses are often uncomfortable talking to friends and family about their concerns and, thus, are left to worry alone. By talking to someone who has been in their position, the spouse may be better able to cope with the situation and, therefore, be of greater support to the defendant member. If you are interested in having one of our volunteer spouses contact you or your spouse, please contact Diana Mayer, Education Coordinator, at 785-232-224; 800-232-2259; or via e-mail at dmayer@KaMMCO.com.

NOTE: As with both D.O.C. and S.O.S., KaMMCO does not, in any way, monitor the phone calls and, thus, all information shared remains confidential.

Quiz

Circle or check one answer for each question. Then, check your answers at the end of the quiz.

1. The purpose of the C.A.R.E. program is:

A. To educate.
B. To provide emotional support.
C. To make you a better defendant.
D. All of the above.

2. In an effort to help you cope with the stress of litigation, which of the following activities might you find helpful?:

A. Actively work with your defense attorney and KaMMCO.
B. Engage in physical and enjoyable activities.
C. Interact with peers that have been involved in the same or similar situations.
D. All of the above.

3. While there are many emotional and behavioral responses to being named in litigation, which are the most universal and the most likely to have the greatest initial impact on you, your family, and others close to you?

A. Anger.
B. Guilt.
C. Depression.
D. Loss of interest in things or activities you usually find enjoyable.
E. Denial.
F. Sense of isolation.
G. All of the above.

4. A "Petition" is:

A. A request by the physician, urging the court to drop the lawsuit.
B. A document, signed by numerous people, requesting the court to drop the lawsuit against the physician.
C. An archaic term that is no longer used in law.
D. The initial complaint filed by the plaintiff in a lawsuit alleging malpractice.

5. An "Answer is"

A. The first opportunity by the physician to generally admit, or deny, allegations in the petition.
B. Nothing significant in a lawsuit since there is no pleading called an "Answer."
C. A document in which the court places its decision.
D. A response to a question posed by a judge in writing.

6. Of the following, which will occur first in the course of a lawsuit?

A. Pre-trial conference.
B. Fact deposition.
C. Settlement discussion.
D. Expert deposition.

7. "Discovery" is:

A. What occurs when a physician discovers a patient really has no injuries.
B. A general term used to describe the investigative stage of a lawsuit in which each party attempts to determine what evidence the other side intends to use in support of his/her position.
C. A newly-found point of view.
D. None of the above.

8. The discovery process includes all of the following except:

A. Acquisition of medical records.
B. Settlement discussions.
C. Expert designations.
D. Interrogatories.

9. The standard of care by which you will be judged is:

A. Reasonable ordinary care and diligence.
B. Mere negligence.
C. Gross negligence.
D. None of the above.

10. When questioned about specific facts/events, your testimony should be based on:

A. Vague recollection.
B. Personal knowledge.
C. Speculation.
D. Information obtained from others.

11. The plaintiff is the person who is suing and the defendant is the person who has been named in the suit.

❒ True
❒ False

12. To prove negligence, the plaintiff must prove that the physician owed the plaintiff a duty, breach of that duty occurred, and that breach caused injury and damages.

❒ True
❒ False

13. "Interrogatories" are written questions that each party submits to the other party under oath.

- ❒ True
- ❒ False

14. In deposition testimony, you can correct mistakes at any time during the deposition, but not after.

- ❒ True
- ❒ False

15. In deposition testimony, you have the right to finish your answer even if opposing counsel interrupts you before you have finished.

- ❒ True
- ❒ False

16. Talking to a juror during the litigation process may be a basis for a mistrial.

- ❒ True
- ❒ False

17. KaMMCO offers (check all that apply):

- ❒ Education seminars.
- ❒ On-site education.
- ❒ Answers to loss prevention questions through a toll-free telephone number.
- ❒ *Loss Prevention Guide* (3-ring, blue notebook/binder addressing common questions.)
- ❒ Video library (copies of KaMMCO's education programs offered free of charge to members.)
- ❒ *Vital Sounds* (KaMMCO's quarterly newsletter sent to members.)
- ❒ C.A.R.E. (litigation support program.)

Answers to Quiz

1. D
2. D
3. G
4. D
5. A
6. B
7. B
8. B
9. A
10. B
11. True
12. True
13. True
14. True
15. True
16. True
17. Check all

Section II. Your Case

(For Filing Your Correspondence/Pleadings as you receive them.)

A. Attorney Letters and Communications

B. Petition and Answer

C. Plaintiff's Written Interrogatories / Requests for Production and Your Responses

D. Your Written Interrogatories / Requests for Production to Plaintiff and Plaintiff's Responses

E. Other Parties' Written Discovery Requests and Responses

F. Plaintiff's Deposition

G. Your Deposition

H. Expert Designations and Depositions and Relevant Medical Information

I. Settlement Conference Documents

J. Pretrial Questionnaires and Pretrial Orders

K. Other Motions and Orders

L. Trial

M. Notes

N. Correspondence

O. Other

Section III. After the Lawsuit (Life Goes On)

A. What to Keep on Hand from your Lawsuit

B. Tips to Prevent Future Lawsuits

What to Keep on Hand From Your Lawsuit

You have now completed the litigation process. There are certain items you should keep on hand after the lawsuit to refer to from time to time. KaMMCO suggests that you keep the following items in a folder that is readily accessible:

1. A copy of the verdict (if there was one).

2. The journal entry, order, or ruling indicating the final resolution of your case.

3. A letter from your attorney explaining the resolution of your case in "plain English." You may need a "To Whom It May Concern" letter to answer questions when, among other things, you:

    - Renew privileges;
    - Enroll in managed care arrangements;
    - Renew your license;
    - Obtain professional liability insurance; or,
    - Enter into future business relationships.

4. The amount, if any, paid on your behalf to settle the case or the amount of the verdict.

5. The settlement agreement and release (if there was one).

Tips to Prevent Future Lawsuits

All practicing physicians are vulnerable to medical malpractice claims. Prevention is, by far, the most effective strategy to reduce malpractice claims.

The following steps will help you prevent lawsuits:

Communication

Establish good communication skills. Effective communication with staff and patients reduces the risk of misunderstandings, bad feelings, and missed opportunities. Good communication includes listening and asking questions. Get all the information before you give your opinion or position.

With staff, do not infer instructions or assume they know what you want. Be specific with your directions and needs.

In communicating with patients, try:

- Uninterrupted listening during the critical first sixty (60) seconds of the physician/patient interaction.
- Setting up realistic expectations for the interaction.
- Sharing responsibility regarding the outcome with the patient, family, and other providers.
- Providing time- and action-specific discharge instructions, including the expected time frame for follow up or recovery.

Know What You Are Doing

Stay up to date in your field by reading, attending seminars, and networking with colleagues. Stay within your scope of practice and skill level. Do not engage in areas of practice about which you have inadequate training or knowledge. It is not worth it!

Implement Policies and Procedures

Establish uniform policies and procedures for you and your staff to help avoid missing a particular step and to assist in documenting care given to patients. Periodically, educate your staff on your expectations. Build in redundancies for critical areas such as follow up and test results.

Informed Consent

If you engage in more complex procedures or surgery, develop a written informed consent. Additionally, establish a routine for verbally explaining a procedure to a patient. Assemble written material to give the patient to read at home about the procedure.

Systems Check

If you have a "near miss" or adverse outcome, review what happened. Identify "what" in your system or process contributed to, or caused, the event. Revise your system to help prevent future mishaps.

High-Risk Situations

Learn from your mistakes. Try to identify high-risk areas or problem patients early. If possible, avoid high-risk situations and terminate problem patients. If these "avoidance" techniques are not available, consider taking extra time to fully document your care and the patient's condition. Make it a practice to advise patients to call or return if there is a change in their condition. Document your advice.