LITIGATION HANDBOOK *for* THE OPHTHALMOLOGIST

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The *Litigation Handbook for the Ophthalmologist* was developed by OMIC's Risk Management and Claims Committees. It is the result of the contributions and cooperation of ophthalmologists, medical malpractice defense lawyers, and risk management professionals.

OMIC defense counsel Geoffrey A. Mires, partner in the law firm of Rankin, Sproat & Pollack in Oakland, California, deserves special recognition for his effort in writing the first draft of the handbook. Mr. Mires' legal expertise and knowledge of the needs of physicians undergoing malpractice litigation contribute greatly to the effectiveness of this handbook. The assistance of OMIC defense counsel in other states was essential to ensure that the handbook would be relevant to all insureds. In this regard, three attorneys, all medical malpractice defense specialists, deserve special mention: William F. Cunningham of O'Reilly, Cunningham, Norton & Mancini in Chicago, Illinois; John C. Marshall of Marshall & Gonzalez in Houston, Texas; and Amy B. Angert of Fisher, Rushmer, Werrenrath, Keiner, Wack & Dickson, P.A. in Orlando, Florida.

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Introduction

Being sued for malpractice can be a shocking as well as depressing experience. Feelings of anger, guilt and disbelief are a common result of being sued. While those emotions are natural, they tend to be counterproductive and interfere with your ability to work with your counsel to prepare an effective defense. Emotion may prevent you from being objective about the facts of the case and can divert your efforts into time-consuming or futile action. The litigation process may span years, and if you view it as a constant source of oppression, it may overwhelm you.

Your appointed counsel is experienced in handling these matters and will capably proceed to represent your interests. Your counsel will need your participation and expertise in many areas, including identification of facts and issues, retention of experts, and completion of discovery matters (depositions, interrogatories, etc.).

Two-way communication between you and your counsel will be essential to the development of your case. Your attorney will make every effort to respond promptly to your questions and concerns, and you should feel free to inquire about your rights, the status of the litigation, and the evaluation of your potential exposure (financial loss).

This handbook provides an overview of the litigation process to assist you in understanding the various stages of your case. Principles expressed are necessarily generic since laws vary from state to state and different courts impose their own rules of court. Although this manual can provide you with a general understanding of legal procedures, it is not a substitute for specific advice from your attorney or OMIC.

HOW TO SURVIVE A MALPRACTICE LAWSUIT AND EMERGE STRONGER

By Gerhard W. Cibis, MD

No amount of risk management articles or seminars can prepare a physician for the emotional devastation of being sued. It is possible, however, to emerge from the experience emotionally and personally stronger, with greater equanimity for one's self, one's work and one's patients.

I have been sued twice. In my opinion, both cases were medical no-win situations. The first case involved loss of residual vision in the remaining glaucomatous rubella eye following multiple surgeries performed elsewhere. The second case involved ptosis and amblyopia after an orbital biopsy of suspected rhabdomyosarcoma.

Both cases were tried and rendered defense verdicts. The second case was successfully appealed by the plaintiff and retried. Again, the court ruled in my favor. The defense verdict was appealed again, but this time it was upheld. After nine years of being on this emotional roller coaster, the case is finally behind me.

I think the reason physicians find being sued so devastating lies in the fundamentally different approaches of medicine and law. Physicians learn through books, lectures and clinical observation, then practice under supervision and expect criticisms for their "mistakes." Mortality morbidity conferences, teaching rounds, peer reviews all are designed to criticize and challenge a physician's clinical decision making. A good physician listens, learns, interprets, adapts and improves.

Therefore, when a letter comes from a plaintiff's attorney stating that an "expert" has reviewed the records and finds fault, the conscientious physician immediately assumes there is validity to the charge and second guesses how he or she could have done better and how the bad result, without which there is rarely a suit, could have been avoided. It is the medical version of the "Monday morning quarterback."

What the physician fails to realize is that attorneys are advocates for their clients. Their goal is to affirm the law in the best interest of their client. Truth, which for doctors means the best clinical result possible given the circumstances, is nearly immaterial to the lawyer who seeks to apply the law favorably to his or her client. The emotional appeal and monetary potential of a case is as important as the medical facts in any decision to litigate. This is the basis of our advocacy system.

Prepare for a Long Battle

When a malpractice notice arrives, prepare yourself mentally for a long battle. This is a marathon. Do not peak too early. Do not expect to settle the case in deposition or by calling the plaintiff's

attorney to explain your side. Do not delude yourself into thinking that the plaintiff will be unable to find experts to testify against you. In the case against me involving the child with ptosis and amblyopia, the plaintiff found three experts, all of whom disagreed as to the reason for my "malpractice."

Remember plaintiff's attorneys are not looking for the truth. They are looking for the law as it best serves their client. They may appear sympathetic to you one moment and play hardball the next, depending on which tactic they think will work. What you tell the plaintiff's attorney will direct his or her concept of the "theory" of the case. The more you talk the more likely it is that the plaintiff's attorney will stumble onto something not previously considered from which to develop another theory. Therefore, do not volunteer extraneous information. Answer the questions asked and do not be evasive, but do not elaborate.

It is important to keep your family involved and informed. As with any adversity or joy, these are the people most important to you. But while talking about your general feelings to family, friends and colleagues is cathartic, avoid discussing details of the case with others, especially health care providers who could be subpoenaed to testify against you.

On the other hand, your own attorney needs access to your unrestricted fears, opinions and medical knowledge. Treat this as a doctor-patient relationship with you as the patient. Go over the facts of the case, especially the medical records, again and again. Each time you do new angles and facets will appear. Do not begrudge the time you spend with your defense attorney. Do not cancel or cut short meetings with your attorney. Thoroughness in preparation comes to the fore during the deposition and especially during the trial. Only through repeated reworkings will you have discussed and considered enough alternatives to see the ramifications of any question and have developed the skill to deal with it, avoiding the intended traps.

Attend All Depositions

Attend all depositions, especially those of the plaintiff's experts. It toughens you mentally to hear their criticism and recognize its weaknesses and strengths. I found that the facts of the case often were twisted in unbelievable ways. Hearing my opponents' depositions enabled me to anticipate their theory of the case and develop an effective rebuttal. I also used these opportunities to help explain medical facts to my attorney.

You may find, as I did, that by familiarizing yourself with the office environment, personality and reasoning of your opponent experts, you will be less emotional at your own deposition and in court. Most important, however, your presence at the depositions of the plaintiff's experts, especially when held in their offices, helps blunt their attack. Just as you feel strange in their presence, they are affected by your presence.

Maintain Faith in Yourself

Maintain faith in yourself throughout this long process. Even if respected peers tell you they would have acted differently, they were not there

and did not have to weigh all the factors at the time. You did. When you find some area where you yourself agree you could have acted differently, recall why you did not. You had sound reasoning at the time. Analyze it and with the help of your attorney or your expert witnesses, muster your best arguments to support your course of action. Just because someone disagrees with the course you took does not mean you are guilty of malpractice. In court it becomes malpractice only if the jury believes the plaintiff over you.

Understand that by conveying intelligent concern, thoughtfulness, empathy and a sympathetic personality, you can persuade the jury to side with you. Realize that the jury wants to like you. They want to believe you are a good doctor. Make them wish you were their doctor if they found themselves in a situation similar to the plaintiff's. To do this you need to convey the same confidence you originally had in yourself and in your treatment of the patient. Do not let subsequent events cloud your judgment.

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THE LITIGATION PROCESS

First Indication You Might Be Sued

You may find out you are going to be sued in a number of ways. A partner or colleague who treated the same patient may be sued and your name is also on the Summons and Complaint, although you have not been formally served yet. A patient may have filed a complaint against you at the Medical Board. You may receive a request for records from the patient's attorney. A patient may come right out and tell you, or the patient's attorney may contact you and discuss his intentions. In some jurisdictions (e.g., Texas, Florida and California) you may receive a **Notice of Intention to Sue (Notice).**

Whenever you suspect that you might be sued, you should contact OMIC immediately. Of course, any letter alleging wrongdoing from or on behalf of a patient should be forwarded immediately to OMIC. Never contact the patient/plaintiff's attorney prior to speaking with an OMIC claims representative or risk manager. In almost all cases you will be instructed by OMIC not to speak directly with the patient/plaintiff's attorney. This is for your protection since any conversation you have with the patient/plaintiff's attorney will be used to their advantage in their claim or lawsuit against you.

Summons and Complaint

As mentioned above, civil suits are usually started by filing a complaint. The plaintiff must provide for service of the summons issued by a court, along with the complaint and any other preliminary documents. Since service of the summons and complaint can be accomplished by a number of methods, any legal documents received by you, your office staff, or at your residence are extremely important. Such documents should be preserved, and legible copies should be forwarded immediately to OMIC. Improper or untimely service of the complaint can be a preliminary defense to the action. Propriety of service can be challenged by a motion. To succeed in this, it is imperative that all documents concerning efforts at service of the complaint be retained for your attorney's use.

The complaint outlines allegations of wrongdoing, which in most jurisdictions can be surprisingly nonspecific. Do not expect to understand the full nature of the contentions being raised by the complaint from an initial reading.

Appointment of and Working with Defense Counsel

Once you have reported receipt of the summons and complaint to OMIC, it is OMIC's responsibility to retain experienced counsel for you. OMIC appoints attorneys who have significant experience in medical malpractice litigation,

knowledge of ophthalmology, and proven effectiveness in jury trial cases. Appointed defense counsel is *your attorney,* not an attorney for OMIC, and counsel owes a fiduciary duty to you (a position of trust and a legal duty to act primarily for your benefit).

Mutual communication between you, your counsel and OMIC is essential; any difficulties should be brought up immediately so that problems can be avoided. Conversations between you and your counsel are always privileged, which permits complete candor in those discussions. Do not, however, discuss your case with anyone else, such as friends, relatives or colleagues. These individuals could later be called as witnesses by opposing counsel.

You will be meeting with your attorney and communicating by phone throughout the course of the litigation; you and your counsel should become a team in defending this case. Despite your defense attorney's experience in this area, your knowledge, insights and experience are essential elements that should be applied to assist your counsel in preparing your defense. Similarly, you should listen carefully to the inquiries and advice of your counsel and incorporate those observations into your decision-making process to obtain the optimum benefit from counsel's experience.

You will be receiving copies of correspondence and reports that will keep you updated on the status of the litigation, information obtained through the discovery process, legal strategy and evaluation of your potential exposure. *You should keep all documents received from OMIC and your defense attorney in a separate file, apart from the medical records or other chart material.* Otherwise, if your records were subpoenaed during litigation, confidential information could be inadvertently provided to the plaintiff. The purpose of providing you with updates is to encourage your review and to invite your observations, comments and suggestions on issues presented as the case develops.

With counsel having been appointed, our discussion turns to the issues, typically raised in malpractice cases and the plaintiff's burden to prove those issues.

Defining Issues and Shaping a Defense

In the context of a malpractice action, there can be a number of potential claims or issues, including medical negligence, lack of informed consent, breach of express warranty, unfair business practices, battery, fraud and defective medical devices, among others. This introduction to malpractice litigation will focus on medical negligence, which involves obtaining historical and physical data, obtaining informed consent for treatment, the techniques and decisions governing treatment modalities, and propriety of follow-up care.

In a malpractice case, plaintiff's complaint must allege, and the plaintiff generally carries the burden of proving, four main elements:

1. Duty

The plaintiff must establish that there was a duty of due care. This generally is not a difficult element of the case to prove. The ophthalmologist usually establishes this relationship by rendering professional services to the patient. It

is also possible for the relationship to be established without the patient ever being examined by the ophthalmologist. The most common instance is where an ophthalmologist gives advice or prescribes medication over the telephone.

2. Negligent act or omission by the defendant

The plaintiff must demonstrate that the defendant, by act or omission, failed to comply with the applicable standard of care, established by expert testimony. Generally, a physician must have and use the requisite training and skill ordinarily possessed by reputable physicians acting reasonably and prudently under similar circumstances. A specialist may, for example, be held to a higher degree of care commensurate with the particular specialization. Failure to comply with the standard of care generally constitutes negligence, or malpractice.

3. Causation

The plaintiff must establish that the negligent action or omission of the defendant was a proximate or direct legal cause of plaintiff's harm. There can be multiple and competing legal causes, including conduct by the plaintiff or other health care providers.

4. Damages

Last, the plaintiff must establish that the neglect of the defendant caused some injury or damage such as pain and suffering, disability and disfigurement, past and future medical bills, lost wages, wrongful death, etc.

The plaintiff has the burden of proving *all* of the four elements outlined above. That means that the plaintiff must present a greater weight and degree of evidence than that opposed to it to convince the judge or jury.

In your own evaluation of the case against you, sift through the facts and assist counsel in developing information that may prevent plaintiff from establishing any one of the foregoing elements. Such a failure on plaintiff's part could help defeat the claim of malpractice.

Responding to the Complaint

Having been effectively served with a summons and complaint, the next step is preparation of a "responsive pleading." The most common response is an "answer."

The answer responds to the complaint by admitting and denying, or generally denying, allegations of the complaint. The answer may also raise certain "affirmative defenses" which the defendant has the burden of proving. There are numerous potential defenses, and they vary from state to state. Affirmative defenses often can be asserted at other points during the course of litigation. Two common affirmative defenses include:

The complaint is barred by the statute of limitations. Statutes of limitation define the amount of time that plaintiffs have to file suit. The terms of the statutes will vary from state to state

and may be different for adults, minors and incompetent adults. The statutes themselves are frequently convoluted and difficult to interpret and apply. In general terms, however, applicable statutes provide limited time for an action to be filed (e.g., two or three years from the date of injury, or one year from the date upon which the plaintiff knew or, through the use of reasonable diligence, should have learned of the injury, whichever occurs first). Some courts have interpreted this "knew or should have known" standard to mean that once a reasonable person discovers or should have discovered an injury and should have been aware of the facts to support a negligent cause, the statutory period begins to run.

The statute will not begin to run or will be "tolled" if the plaintiff can prove fraud, or concealment of the facts from the patient, which hindered the patient's ability to bring a claim (e.g., altered or misplaced documentation). If you are aware of facts not contained in the medical records that bear on the statute of limitations, these should be brought to your defense counsel's attention.

Plaintiff fails to mitigate damages. The law requires that an injured party must affirmatively take reasonable steps to prevent an injury from becoming worse. By raising this defense, liability for damages may be limited by the plaintiff's failure to prevent the injury from becoming worse.

The Discovery Process

Once the responsive pleading stage has been initiated, a process known as discovery is undertaken. This involves the use of various devices such as depositions, interrogatories, subpoenas of records, and retention of experts among others. Through this process, each side attempts to learn the facts to better evaluate its respective position and develop the evidence that may be presented at trial.

1. Interrogatories

Interrogatories are written questions submitted to the adverse party which must be answered under oath. This is usually the first discovery device used and is generally helpful for obtaining background information from all parties and witnesses involved in the suit, including their contentions of how the incident occurred. You will be called upon to assist defense counsel in preparation of responses to interrogatories posed to you. Your prompt and full attention should be devoted to preparing those responses to the best of your ability. Delay caused by you could result in monetary or discovery sanctions being imposed against you and your counsel. Do not hesitate to ask for counsel's assistance with problem areas.

2. Record Requests and Subpoenas

If any of the parties in the lawsuit has documents or items pertaining to the case, they may be obtained by opposing counsel with a request for inspection. This can include tangible items,

such as prescriptions, medication bottles and medical appliances.

Your counsel has the ability, with some limitations, to subpoena prior, concurrent or subsequent records concerning the patient from other individuals or entities, including health care providers. You should provide your counsel with the names of any health care providers, employers or other entities that may have pertinent records.

Your counsel may not want you to see all of the records subpoenaed prior to your deposition since you could be asked to comment on what you reviewed. You may, however, discuss the content of those records in confidence with your counsel.

3. Requests for Admissions

At some point during the discovery process, opposing counsel may send your attorney requests for admissions. These are written questions demanding answers that will determine matters before going through the effort and expense of proving them at trial. There is usually a statutory period (30 days) in which the requests must be answered or all the questions are deemed admitted. The questions may be phrased along these lines, "Admit or deny: Dr. Roe negligently performed a cataract surgery on the plaintiff's right eye leading to blindness." This is not the kind of question you would want admitted for evidentiary purposes because of an untimely response.

Your attorney will assist you in drafting effective responses to the requests. Your medical insight will be valuable in formulating truthful and accurate answers that will be admissible at trial.

4. Depositions

Background

A deposition is oral testimony given under oath but outside the court. Generally, depositions are taken in the physician's office or in an attorney's office. A court reporter is present and is responsible for recording everything said during the process; sometimes a video technician may also be present to record the testimony on tape. A copy of the transcript is usually obtained for your review once it is transcribed.

All of the attorneys for the parties to the lawsuit are usually present and the parties themselves are entitled to be present. This can be strategically important because the parties may be uncomfortable when confronting the opposition. Consequently, you may be asked to attend the plaintiff's deposition or depositions of the experts.

The deposition process is a critical part of discovery and provides the best opportunity to develop the factual framework underlying the case and the contentions and legal issues to be confronted. Since the testimony is under oath, it has the same significance as if it were given in court and can be used for any number of purposes, including: (a) "impeachment" of a witness should the testimony vary from other evidence or testimony; (b) proof of facts that are in issue; and (c) use by expert witnesses in forming their opinions concerning the case.

The deposition process is also an opportunity to determine how the various witnesses and parties will appear at the time of trial, arbitration or other forum for resolution of the case. How things are said and the demeanor and appearance of the witnesses as they testify is critical to the outcome of the case, particularly since the cases that go to trial will be determined by people from the community.

Your input may be requested to determine who should be deposed and what questions may be helpful or potentially damaging. As always, your thoughtful attention to this process is critical and will be welcomed.

Your Deposition

In light of the importance of your deposition, a significant amount of time with your counsel will be devoted to preparation. Each case usually presents unique issues that will require special attention. You should be prepared to devote your complete attention to this process, as the outcome of the case will depend on the quality of your testimony and your appearance.

You will be represented at your deposition by your appointed counsel and will be protected from inappropriate questions by objections raised by your counsel. You should follow your counsel's direction concerning objections that have been raised.

Your appearance and demeanor during questioning should be nothing but professional and deferential. Dress appropriately for the occasion and maintain composure during the process. This is not the time to display any anger, frustration, arrogance, anxiety or fear, although the process may well provoke those emotions.

Resist the temptation to believe that you will win the case during the deposition. It is not uncommon to feel that given the opportunity to explain your position to the other side, your opponent will dismiss the suit; that is not, however, consistent with OMIC's experience.

The primary objective is to reach the end of your deposition without volunteering any information that has not specifically been requested by the questions asked of you. Plaintiff's counsel should leave the deposition with nothing more than could have been learned from a careful reading of the records. To meet that objective you will need to listen carefully, be certain that you understand the question fully, and then form a brief and accurate response to the specific question asked. You will want to consult your records and your memory to assure that you provide an accurate response. Accuracy and credibility are essential; if lost, these qualities are almost always irretrievable. In court, loss of credibility is fatal.

You can expect to be asked questions concerning: (a) your background, training and experience; (b) the facts surrounding the care provided; (c) your opinions concerning the standard of care; and (d) facts concerning damages. You are only required to answer from personal knowledge. You should not speculate.

You will be given an opportunity to review the transcript of your deposition,

which should be read and corrected as necessary. You should keep in mind, however, that significant revision of your testimony may result in a further deposition or impeachment of your testimony should there not be a legitimate reason for change. Your deposition is one of the key events in the case and should be given your complete attention.

Expert Witnesses

In almost every malpractice case, the standard of care is defined by expert testimony. Experts are retained by both sides, in various specialties, depending upon the facts of the case. Experts will testify concerning the standard of care and may also testify concerning the issues of causation and damages.

Cases are often won or lost on the strength and quality of the experts. Consequently, selection of expert witnesses is an important element of the pretrial preparation. Factors that are taken into consideration include the background, training and experience of the witness, how well the witness can articulate opinions, and how the expert will be viewed by a jury drawn from the community.

OMIC and your counsel have had prior experience with a significant number of experts in various fields and will work to retain the most suitable experts for your case. Your input in this process is also important since you may be able to provide names of prospective experts who would be more effective in presenting the defense. The sooner the experts are retained, the better. You should not embark on your own to retain or consult prospective experts. Your contact with any potential experts may create the appearance of bias or influence. Rely upon your counsel to follow up on any suggestions you may have concerning experts.

The experts retained will be provided with the medical records, depositions, and other relevant information needed to provide a factual basis for rendering their opinions. If necessary, they may also be permitted an opportunity to examine the plaintiff to determine what happened and what damage, if any, is apparent.

Not every case will be supported by expert testimony. Unfavorable reviews concerning issues in the case should be seriously considered and will factor into the future course of the lawsuit.

Motions

Motions to the court are occasionally made by your counsel during the pretrial period. A motion is a formal request to the court to take some particular action with respect to discovery or the course of the lawsuit. Such motions may include requests to test the propriety of the service of the summons and complaint, to challenge defects in the pleadings, to compel discovery, to resist improper discovery, or to challenge the merits of the lawsuit.

If discovery reveals that the plaintiff will be unable to establish any one of the essential elements of its case, a summary judgment motion may be considered. These motions are generally difficult to win and can be defeated by a single material fact shown to be in dispute. Just because a case ultimately should be won does not assure that the case will be summarily dismissed.

Settlement or Trial

Some jurisdictions have adopted forms of resolving litigation short of going to a jury trial. The general thought in these jurisdictions is that litigation costs make early resolution preferable. These "alternative dispute resolutions" may include mediation, arbitration, neutral evaluation panels, and judicial settlement conferences.

Any of these alternatives to trial will invariably result in some effort to arrive at a settlement of the case. Just as in medicine, your consent to settle in this regard should be informed and based on objective assessment of the facts and issues presented by the case.

There are various factors that influence whether settlement may be appropriate. You will need to discuss with your counsel the specifics of your case. In general, however, you should consider the advice of your counsel, the information that has been developed during discovery, and the analysis of the case by retained experts. The decision to settle is usually the result of a consensus achieved between you, your counsel, and OMIC. OMIC has a policy of not settling a claim simply to avoid litigation costs. However, a timely resolution often can be the best course, and that is what malpractice insurance is for.

The National Practitioner Data Bank has assumed increased importance in settlement discussions. As a general rule, any money paid to a plaintiff to settle a case results in a report to the Data Bank, and in most jurisdictions, a concurrent report to your state licensing board. This is one of the factors that should be discussed and weighed in making your informed decision concerning settlement.

A pretrial settlement conference will usually occur close to the time of trial. The parties, their counsel, and insurance representatives are usually present at this conference. The court (judge) will undertake to resolve the case. Your failure to appear and participate in this process, particularly if you have decided to withhold consent, may result in sanctions being imposed by the judge.

The litigation process can be long and tortuous. In many jurisdictions, the life of a case may exceed five years. There has been a decided effort to reduce the time it takes to resolve a lawsuit, which may make your case move more quickly. In any event, patience is truly a virtue in dealing with the legal process and will make your preparation and participation less traumatic.

TRIAL

Trial is an appropriate name for the process, as it is arduous and trying for all involved. The vast majority of cases filed do not reach trial, but should your case get that far, you should be prepared to participate fully. Your failure to be present throughout the trial could prove to be prejudicial to your case and interpreted by the judge or jury as a lack of interest.

OMIC requires that you be present through the entire trial, which may last for weeks, and will help pay for reasonable expenses and some loss of earnings as set forth in your OMIC claims made professional liability insurance policy.

Pretrial Motions

Prior to jury selection, your attorney and opposing counsel will have a conference with the trial judge to argue legal and procedural matters. This is done to delineate the scope of the evidence and testimony to be presented. Parties to the action and witnesses will not be present. However, you will be kept informed of what happens.

Jury Selection [Voir Dire]

Juries are usually composed of twelve persons selected at random by the clerk. Each juror is questioned during an initial phase called voir dire. The size of the jury may vary ranging from 6 to 12 persons depending upon the jurisdiction. The judge may explain the general issues of the case and may choose to question the panel of jurors or each potential juror personally.

Attorneys for the parties commonly have an opportunity to question potential jurors. However, depending on the jurisdiction, the judge may do all the questioning of jurors. Each side may reject a certain number of jurors peremptorily (without cause). Jurors also may be excused by the judge for reasons of bias, knowledge of the case, or acquaintance with the parties or attorneys involved in the case. Each side is attempting to mold a jury that will be most sympathetic to that side.

Opening Statements Outlining the Case

Once the jury is selected, each side has an opportunity to present an outline of the evidence and what it intends to prove. Although these statements are not evidence, they play a very important role in the trial of the case. The jury will be forming initial impressions of the facts of the case. Attorneys understand that what is heard first is often remembered best (the law of primacy). Therefore, each attorney carefully prepares the opening statement taking care to highlight, often dramatically, the important themes and issues he or she intends to prove. Sometimes plaintiff's counsel is very aggressive and begins by attacking the defendant. However, opening statements vary

greatly based upon the facts of the case and the individual style of the attorney. Plaintiff's counsel is permitted to speak first since the plaintiff has the burden of proof during trial.

Evidence

The trial will consist mainly of the presentation of testimony to the jury. The plaintiff will proceed first and try to prove that you were guilty of malpractice (a negligent act or omission causing damages). Witnesses for the plaintiff may include the plaintiff, subsequent treating physicians, economists, and the plaintiff's spouse and children. Plaintiff's counsel has the right to call you to the stand to try to elicit testimony supporting the plaintiff's case.

Also appearing for the plaintiff will be any number of expert witnesses. The experts will define the standard of care and what you allegedly did to breach that standard of care.

After the plaintiff witnesses have testified, the defense will present witnesses to support its theory of the case and/or rebut the plaintiff's witnesses. Defense witnesses also will include experts and often the defendant ophthalmologist.

Closing Arguments

Once all the evidence has been presented and any motions ruled upon, attorneys for both sides are given an opportunity to summarize their cases for the jury. As with the opening statements, the plaintiff's attorney speaks first and is allowed another opportunity to speak later to "rebut" the defense attorney's closing argument.

Often the plaintiff's attorney will try to stir the emotions of the jury to feel either anger at you or sympathy for the plaintiff. In most cases, he or she will be careful to point out the facts that support the theory of negligence and the damages that the plaintiff has incurred.

Generally, your attorney will not aggressively attack the plaintiff, who may have suffered some type of injury to which the jury is sympathetic. Instead, your attorney will use reason and logic, not passion, to persuade the jury that the plaintiff has failed to prove one or more of the allegations against you and will underscore the inconsistencies and weaknesses of the plaintiff's case against you.

Jury Instruction and Deliberation

The judge will instruct the jury about the specific law applying to the case and define necessary terms. Attorneys sometimes provide special instructions for the judge's use. However, in most cases the judge takes the instructions from a form book of jury instructions used in civil trials. The jury is sent to the jury room to deliberate for however long it takes to reach a verdict.

Verdict

Some jurisdictions require a unanimous verdict; others require a majority verdict, although what constitutes a majority may vary. The jury may take a few hours or a few days to deliberate and return a verdict. The jury can return any of a number of verdicts, including a finding that you were not negligent, in which case the plaintiff

recovers nothing, to a finding of negligence with an award of money damages. The jury may fail to reach a decision, sometimes referred to as a "hung jury." If this occurs, the judge will declare a mistrial and may order a retrial of the case.

AFTER THE TRIAL: MOTIONS AND APPEAL

A favorable or unfavorable result at trial may not be the end of the lawsuit. Either the plaintiff or the defense may make a motion to the trial court for a new trial based on various grounds, such as judicial error, jury misconduct, insufficiency of evidence to support the verdict or, in some states, reduction of the verdict to an amount allowed by a statutory damage cap. The outcome of this motion may be appealed to the appellate court by either party. OMIC may retain additional counsel skilled in appellate work to assist in this procedure.

An appeal may ultimately result in disposition of the case as a result of a ruling by the court of appeals or in the case being remanded for trial, although very few cases are retried. If your case is the subject of post-trial motions or appeals, the process could take months or even years. Be prepared to be patient and positive.

CLOSURE AND FUTURE RISK MANAGEMENT

After the claim is finally resolved, OMIC insureds will complete a Closed Claims Survey regarding the performance of the OMIC Claims Department, the defense counsel and the defense experts assigned to the case. This evaluation is important to ensure that OMIC is providing an efficient and supportive claims service.

One thing is clear after the exhausting process of litigating a case to its completion, whether it be through settlement, trial, alternative dispute resolution or appeal: You really do not want to waste valuable years doing this again. On a positive note, consider what you can do to prevent future malpractice collisions.

Your representatives at OMIC are available to help you with seminars, publications and other risk management resources. As time-consuming as it may seem to attend risk management seminars, the investment of time is not only therapeutic but rewarding. Attend these seminars with an open mind and a willingness to improve.

Imagine yourself as a patient and take an objective walk around your office or hospital. Would you feel comfortable being treated in those environments? Would you send members of your family to be treated there? If not, then make constructive changes or comments. Studies show that patients usually know little about the scientific components of medicine, but much about caring. Be honest with yourself and analyze your practice patterns to assess the level of personal interaction with patients. Not only does such commitment form the basis of good informed consent, it also creates an active and personal risk management program—a climate of caring.