

Successful Trial Preparation

WHAT PHYSICIANS NEED TO KNOW



PROASSURANCE.
PART OF The Doctors Company

Introduction

It is normal to have questions and concerns about taking your case to trial. We want to help you understand your responsibilities, and what you can expect.

Becoming familiar with the trial process can help ease anxiety and assist you in working with your defense team. Rest assured we are committed to supporting you throughout the process and providing you with an uncompromised defense.

As you review this guide, please consider issues you'd like to discuss with your defense team and write them down. Bring this list to your next meeting or call your attorney or claims representative. We want to be sure to address your questions and concerns.

Your Preparation for Trial

One very important factor in securing a successful outcome at trial is preparation. Your defense attorney and claims representative are committed to working with you to ensure you are prepared.

In the weeks leading up to trial you can expect to meet with your attorney to review your testimony. This may entail multiple meetings of several hours each—and it will be time well spent.

Make reviewing your deposition transcript and your medical records a priority before your pre-trial meetings. We recommend you start regularly reviewing your deposition testimony several weeks before trial. Your goal is not to memorize your answers but to know what you said so you can be consistent when called to testify in the courtroom.

Your defense team will work with you to help ensure you are well versed in these areas. Your attorney also may recommend that you participate in a session with a witness preparation consultant who is part of the defense team. This will allow you to hone your skills in responding to the types and tone of questions you likely will encounter at trial. Your attorney also may suggest you consider observing a portion of another malpractice trial or simply visit the courtroom to familiarize yourself with the venue.

The overall goals of trial preparation are to optimize your confidence in your trial performance and allay any natural concerns or anxieties you may have.

To testify effectively, you must have a thorough understanding of:

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| ✓ the course of events | ✓ the medical facts |
| ✓ what was actually recorded in the medical record by you and others | ✓ interrogatory answers* |
| ✓ the pros and cons of the medical care offered and/or provided | ✓ your deposition testimony |
| | ✓ factual arguments that both support your defense and those that will be used against you |

* This is part of the pre-trial discovery (fact-finding) process in which a witness provides written answers to written questions under oath.

Advice from Your Colleagues

Following are preparation suggestions from physicians who have experienced a trial:

- Be sure to read all correspondence from your attorney. If you have any concerns or questions, contact them promptly.
- You know best whether you feel well prepared. If you have any doubts, tell your attorney or claims representative.
- Understand that while there may be an enormous amount of information related to your case, not all of it will be presented at trial.
- Make sure your claims representative is aware of any concerns you may have.
- Take good notes when meeting with your defense team and any witness preparation consultant. Just about everything said is helpful and matters (especially knowing that the jury is watching you at all times during the trial).
- The importance of a caring and compassionate attitude cannot be overstated. At the end of the trial, you want members of the jury to want you to be their doctor.

Your Attendance at Trial

It will be necessary for you to be present during the entire trial—from jury selection to conclusion. Your presence demonstrates your interest and concern to the judge and jury; your absence may signal the opposite and could jeopardize your case.

Depending on the venue, we may know court dates several months in advance. You can count on us to let you know as soon as a date is set.

Your defense team will discuss with you the potential benefit of having a family member attend the trial.

Compensation for Your Attendance at Trial

Your ProAssurance policy provides reimbursement for expenses related to reasonable travel, lodging, parking, and meals to attend trial. Your policy also may provide daily compensation to attend trial. Plan to keep track of your daily expenses and save your receipts to submit for reimbursement. Your claims representative can answer any questions and assist you in submitting a request for reimbursement of allowed expenses.

Phone Calls/Electronic Devices

Cell phones and other electronic devices are not allowed in some courthouses and courtrooms, or are required to be off while court is in session. Discuss this in advance with your attorney so you will know what to expect and, if necessary, can make provisions to communicate with your practice during trial.

Your Role at Trial

The most important thing to remember during trial is that you are in the spotlight. As the defendant physician, members of the jury are observing everything you say and do, both in and out of the courtroom. You need to consider not only your testimony, but your appearance, mannerisms, and facial expressions—all of which impact the jury's opinion of you. The following is advice to help you make the best impression possible:

The most important thing to remember during trial is that you are in the spotlight.

- **Dress professionally and conservatively**—This means business attire. Do not wear anything jurors may consider to be extravagant, such as expensive jewelry or easily recognizable designer items.
- **Bring what you need to be comfortable**—such as mints, change for the vending machine, snacks, and something appropriate to read during down time.
- **Remember that nervousness at trial is normal**—especially when testifying. Jurors expect witnesses to be nervous and are often nervous themselves. There is no such thing as a perfect witness; you've worked hard to prepare, and your responsibility when testifying is to focus on doing your best.
- **Do not comment on the trial or your case**—in person, through email, on the phone, in a blog, or via social media. Conversations with anyone outside your legal team could jeopardize the outcome. You also should avoid discussing your case in common areas during breaks from trial ... you never know when a juror or potential juror is listening.
- **Do not converse with jurors**—Of course, if a juror says "hello" or "good morning," you don't want to seem impolite or discourteous; it's fine to respond, but do not engage in conversations with jurors.

Testifying:

- **When you are first called to testify, you will take an oath to tell the truth.**
- **Listen closely and answer only what is asked**—Don't elaborate or volunteer information! Doing so creates an opportunity for the plaintiff attorney to ask more questions, which often leads to challenges. It is your defense attorney's responsibility to address any damaging questioning or testimony during cross examination. Let them do it. Your responsibility is to focus on succinctly answering only what you are asked. If you don't know the answer to a question, it is okay to say "I don't know." If you don't remember, say so.
- **Understand the question**—If you do not hear or understand a question, ask that it be repeated or rephrased.
- **Pause briefly before answering**—This allows you to think about the question before responding and gives your attorney the opportunity to object, if appropriate. It also shows the jury that you give thoughtful consideration to your responses.
- **Don't fill the silence**—After you've succinctly answered a question, stop. It's common for attorneys to pause and wait for a witness to elaborate. The ensuing silence is a ploy to get you to keep talking. Don't fall for it.
- **Pause when an objection is made**—and then wait for the judge to rule and indicate what to do next.
- **Maintain a calm and professional demeanor, both on and off the stand**—Remember, you're in the spotlight; plaintiff attorneys like it when you argue with them. An argumentative physician is not likable. On the other hand, a physician who displays a warm, sympathetic, and caring manner is more likely to be viewed favorably by the jury. You must be able to make reasonable concessions and avoid being combative. Assume a teaching role, without appearing patronizing or condescending, as if the jurors are your patients. This will help you develop rapport with the jury.
- **Never forget that credibility is key**—Jurors base their decisions on who they think is telling the truth. Only provide testimony that is completely true.

CONTINUED ON THE BACK COVER



The Trial Process

The machinations of a courtroom can be confusing and intimidating. Having an understanding of common processes and procedures will help increase your comfort level. Your attorney and claims representative will review the process with you and answer your questions prior to trial. They also will be on-hand during trial to assist you. The following is a basic overview of what will occur:

- **Pretrial**—Shortly before trial, the judge will meet with defense and plaintiff attorneys to draft a pre-trial order. The order will govern what is presented at trial, such as anticipated witnesses, exhibits, unusual legal issues, and other matters stipulated by each party.
- **Motions in limine**—Parties to the lawsuit draft motions that are presented to the judge prior to or on the first day of trial. The motions are intended to prevent attempts to introduce evidence in dispute as well as legally inadmissible evidence that could prejudice the jury.
- **Voir dire** (French for “to speak the truth”)—The first step at trial is the selection of a jury. Both defense and plaintiff attorneys question prospective jurors to determine who will be fair triers of the facts. Where evidence of bias or prejudice is found, the parties have unlimited “challenges for cause” to dismiss a potential juror. Each side typically will have a few “peremptory challenges,” allowing them to dismiss a potential juror without stating a reason.
- **The jury**—After the jury is sworn in, the court will give preliminary information regarding the duties of the jury, trial procedure, and applicable law.
- **Opening statements**—The actual trial starts with the plaintiff and defense counsels’ opening statements. The statements include brief summaries of what they intend to prove and an overview of basic law that applies to the case. Nothing said by attorneys during opening statements is considered to be evidence.
- **Plaintiff presents their case**—The plaintiff always goes first in presenting their case. In many jurisdictions it’s common for the plaintiff attorney to question the defendant physician first, so you may be the first witness called to testify. Remember to answer only what is asked and keep your answers short. Your attorney will have the opportunity to question you at some point during the trial to make sure your full story is told. All of the plaintiff’s witnesses are usually called to testify during their portion of the case. This may include family members, care providers, and plaintiff’s experts. Your attorney can choose to cross examine each witness called by the plaintiff to point out inconsistencies or biases, seek concessions, or reveal their lack of knowledge (e.g., to discredit an expert witness).
- **Defense presents your case**—The same case presentation scenario plays out when it is time for your attorney to present your case. Your attorney will call and question witnesses, and then the plaintiff attorney will have the opportunity to cross-examine them. You also may testify in the defense part of the case.
- **Objections**—Objections are based on the rules of evidence (the law). It is common for both sides to voice objections during testimony. The judge can either “overrule” or “sustain” an objection.

- **Closing arguments**—After plaintiff and defense counsel have presented their cases, both sides give closing arguments. The respective attorneys summarize the evidence and present their theory of the case as provided in their opening statements. The plaintiff generally opens the argument, and the defendant goes second. The plaintiff is usually then permitted a final rebuttal argument.
- **Jury deliberation**—After closing arguments, the court will instruct the jury on the law and conducting deliberations. The jury selects a foreperson and deliberates. When a decision is made, the foreperson notifies the court and reads the verdict. The amount of time a jury will spend in deliberations varies widely. Check with your attorney about the need to remain available until the verdict is delivered. In some jurisdictions, jurors are brought back into the courtroom to have questions answered. Your presence will show continuing respect for the process.
- **Delays and down time**—In addition to the general procedures outlined above, there are often delays and down times during trial. For example, the judge may call a sidebar and go into chambers with the attorneys—leaving you sitting alone at counsel table, with the jury still present. Discuss the way to best handle this down time with your attorney. He or she can provide tips to help minimize discomfort and stay occupied during any down time that occurs in front of the jury.

Thank you for working with us in your defense.

We understand the toll a malpractice claim can take and are committed to assisting you in every way we can. Please contact your attorney or claims representative with questions or concerns. You also may want to take advantage of these additional resources:

- **The Physician’s Guide to Malpractice Litigation**
This guide helps you understand the litigation process. It also explains the importance of ProAssurance’s unparalleled defense. You can request a copy from your claims representative.
- **When Good Doctors Get Sued**
This book helps guide defendant physicians through each phase of a legal claim or lawsuit. You can request a copy from your claims representative.

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