

# AVOIDING AND SUCCESSFULLY NAVIGATING LITIGATION IN THE ORTHOTIC AND PROSTHETIC PROFESSION

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## I. INTRODUCTION

For more than a decade I have had the privilege of representing AOPA and its members.

I have seen cases ranging from trivial complaints to extremely severe and permanently disfiguring injuries and amputations.

In most of these cases the professional services rendered met, or highly exceeded, accepted industry standards. This is a credit to your Association and your profession. In the vast majority of these cases either judgment was granted in favor of the AOPA professional, or extremely minimal damages were paid in settlement to avoid further costs of litigation. This, even if viewed as regrettable and unfortunate, is often a reality in American litigation where almost literally anyone can sue anyone else for any reason, and generally do so without any fear of being assessed the penalty of paying the attorneys fees and costs of the defending party. Unlike many other countries, the United States has not adopted the “loser pays” approach to litigation requiring the non-prevailing party to reimburse the “winner” for their attorneys fees and out-of-pocket expenses.

Even in those cases where there was absolutely no negligence on the part of the AOPA professional, the reality of being a defendant in the lawsuit still occurred, and with it the distraction from the professional’s practice and the always inherent risk of being found liable for injury and damages of another.

As a trial attorney one of the questions I am most frequently asked is “can I be sued for this....” The simple answer to that question is always “yes.” Even if you are not liable that, in and of itself, will not automatically lead the court to dismiss the lawsuit against you. In most states, and in the federal courts, our American judicial system has adopted the concept of “notice” pleading. What this means is without even pleading the specific facts of the occurrence, it is merely enough for a person to allege issues such as negligence or professional misconduct to begin the lawsuit. Once that occurs, even though the burden still rests upon the plaintiff to prove their case, the “discovery” phase of the lawsuit has begun, and you as the defendant are

embroiled in a lawsuit taking time away from your professional practice to respond to written questions, oral depositions, and possibly even attend hearings in a lawsuit for which you truly believe you have no responsibility or liability.

There is a strong likelihood, depending upon the jurisdiction in which the case is filed, it may take months, or even years, before the case can be postured before the court so you are dismissed without going to trial. Depending on the judge to whom the case is assigned, there may even be situations where even when all of the evidence clearly shows you do not belong in the lawsuit, the case is, nevertheless, permitted to go before a jury for final determination.

Much has been written for decades about the American jury trial system. My personal opinion is it is the best system for judicial determination developed anywhere in the world, however, that does not mean it is not without its faults. As an attorney who tries cases on a regular basis, there have been very few cases in the past decade where in some manner either the O.J. Simpson or McDonald's coffee cases are not mentioned, at least, in passing. Regularly we read in newspapers and hear on television about jury verdicts where we simply shake our head in disbelief.

Notwithstanding what you may have read, by-in-large juries do rule correctly in the vast majority of cases. Like so many other things in life, we only hear of the highly unusual and bizarre. As such, I would recommend you not panic merely because a case is going to trial before a jury.

Having said that, however, the initial concept behind this program you are attending today is to assist the AOPA professional in first and foremost avoiding litigation. Having been in practice for more than twenty years, I can truly say oftentimes litigation in many situations could have been avoided through such simple measures as better oral communication, better written documentation and appropriate follow-up action. It is the hope of your Association this program will assist you in how you conduct your practice, how you communicate with your patients, and how you document your patient file records. Ideally, the information and skills you have developed thus far in your professional career, combined with the information in this program, will save

you from the time and expense of being named a defendant in a legal proceeding. If not, then the second reason your Association has developed this program is to acquaint you with, and help guide you through what to expect if you are named as a defendant in a lawsuit.

In our time together, and in these written materials, we will explore the areas of how to avoid litigation, acquaint you with the lawsuit and litigation process if you are named as a defendant, and share with you some skills and techniques to aid you if it becomes necessary for you to testify in a jury trial.

If this program is successful in bringing skills to your practice to improve your service to your patients, make your practice more professional and well-run, and assist you in either avoiding or successfully navigating through litigation, then our time and effort will have been well-spent!

## II. AVOIDING THE LAWSUIT PROCESS

### A. WHEN DOES A LAWSUIT BEGIN?

The easy answer to this question is when it is filed at the courthouse. In my opinion, however, that answer is wrong. Although a filing at the courthouse may start the long and tumultuous process of litigation, chances are the lawsuit itself has its roots many months, if not years, back when the seeds of discontent between the patient and the AOPA professional were first sown.

I am convinced the vast majority of lawsuits, and even those where some degree of negligence is involved, either occur because of, or are extremely magnified by, poor communications between the professional and the patient.

As we will explore in this module, poor communications can include everything from the look and presentation of your office environment, your written records, your communication skills (whether oral or written) concerning your patient, and the training of your staff.

Even though you may not see it at the onset, all of these factors combine to ultimately contribute, whether positively or negatively, to the outcome of a lawsuit involving you and your practice as defendants.

## B. THE OFFICE ENVIRONMENT

I am an attorney, not an interior decorator. However, when you return from this seminar try walking into your own office through the front door and imagine yourself coming in as a first-time patient. What message does your office convey? Is the environment professional, up-to-date, and one which would instill in a person a feeling of the utmost of professionalism?

Your practice is an integral part of the medical profession. As such, it should meet, or exceed, the standards you would expect for yourself, or a member of your family, seeking medical services.

The same concept continues beyond the reception area into hallways, examination and fitting rooms, and the like. What message is your office conveying to your patients? You need not redecorate the office or spend tens of thousands of dollars to have the most updated equipment available, but your office should convey a very strong message of being neat, organized and professionally run.

There is an intrinsic benefit to this process in that it brings an air of reassurance and confidence in your skills and abilities to your patient, while simultaneously establishing in your patient's mind you are a competent, organized and knowledgeable professional who is assisting them with their prosthetic and orthotic requirements.

There is another reason why I, as an attorney, am concerned about your office environment. In most litigation either party may request a jury view if it is pertinent to the lawsuit. Jury views most frequently occur regarding crime scenes or accident sites. In most jurisdictions, however, requests for jury views are extremely broad and will oftentimes be granted if requested by either party.

If relevant to the case, you may find a situation where a court bailiff, the entire jury and the parties are inspecting your office during some phase of the jury trial. The time to be cleaning up and organizing the office

is not on the eve of a jury inspection when the plaintiff can then explain from the witness stand to the jury how cluttered and dysfunctional the office appeared before, and you were then forced on the witness stand to admit the office environment the jury saw had been changed from the time of the plaintiff's treatment.

Whether you like it or not your office environment does reflect directly upon your qualifications and expertise as an orthotic and prosthetic professional. Periodically do take the time to walk through your office and view it through the eyes of a patient, or even a juror, and ask yourself repeatedly am I presenting the best and most professional office environment I am capable of presenting in my practice?

If you begin in this manner we are well on our way to laying an excellent foundation in keeping you and your practice out of the courtroom and litigation process.

### C. THE PATIENT INTAKE PROCESS

As I look back on the years of handling AOPA claims, as stated previously, the vast majority of those lawsuits involve in some manner of poor communication. More frequently than any other issue, that lack of communication most frequently centers around failure to obtain a full and complete history or failure to document the follow-up care required of the patient. Successfully avoiding these type of problems begins with the initial patient intake process.

If you have not already done so, in your practice you should immediately begin implementing a structured patient intake regimen. This should include a detailed medical written history questionnaire completed by the patient and signed and dated by them. Contact information should be provided on an emergency basis for family members and all treating physicians concerning the medical condition for which the prosthetic or orthotic services are related. Information such as prior medical conditions, hospitalizations and other acute or chronic medical problems, including prescription medications, should all be included in the patient medical history.

I would also recommend on the patient intake form you allow sufficient space where you request the patient to, in their own writing, advise you of any specific questions, issues, concerns or problems which they believe you should be aware of as part of their treatment.

For patients you see for a period of time longer than one year, I would also recommend you have the patient update the intake and medical history information on a regular annual basis. You should also note on each office visit that you have asked your patient to update you on any significant changes in their medical condition since their last visit.

The written patient intake information is going to be crucial in any lawsuit process. Additionally, however, part of the intake process will also be your initial consultation with the patient. In the next section we will discuss more fully recordkeeping. However, your initial patient intake consultation, whether done by you or an assistant, should be detailed and complete. The patient interview should be chronicled clearly as part of the intake process and made a part of the permanent chart. Often it is wise to record the start and conclusion time of the intake interview to refresh your recollection, and be able to later tell a jury how much time you did spend reviewing the patient's history, concerns and needs before undertaking any treatment.

The goal we are establishing in the intake process is to make certain before any orthotic or prosthetic services are provided at all, you and your practice have explored fully and completely all relevant medical history and conditions so you are making a fully informed and proper assessment of their needs and requirements.

One of the worst things you can tell a jury is to have to admit had you secured additional information, which you failed to secure from the patient, your course of treatment would have been different.

#### D. PATIENT RECORDKEEPING

The same issues we just discussed regarding the intake form also apply to your patient recordkeeping. Whether you use S.O.A.P. recordkeeping or some other format, it is absolutely crucial your records be kept contemporaneously with the treatment and be comprehensive in nature.

There are two huge problems I have had repeatedly in dealing with not only AOPA, but all other medical type claims. These problems are the records are incomplete, illegible, or both. In my opinion there is no excuse for either.

Incomplete recordkeeping violates virtually every professional practice standard whether in law, medicine, or any other profession. As a professional you are held to higher standards which include making certain you keep accurate and complete records regarding your professional activities.

If there are changes in your patient's condition, differences in their medical condition, prescriptions, medical providers, or any other directly or ancillary related information concerning their condition, this must be recorded in your notes for proper recordkeeping. Comprehensive notes should be kept for each and every visit, regardless of how minimal, the patient makes to your practice. There is, quite simply, no excuse for providing orthotic or prosthetic treatment for which no written record exists.

If there are other members of your staff who also treat, or assist, the patient, you must instill the same standards of quality and completeness for the recordkeeping of each of your employees. Ultimately in litigation you are fully responsible for their actions.

In like manner, I do not care how good or comprehensive your records are if they are completely illegible. I have often counseled professionals if their records are not capable of being read by a jury then they should simply assume that treatment never took place. This may appear to be a harsh standard, but your records should be kept in such a manner so while a jury is in deliberation they can clearly review your records and in a logical and chronological document trace all of the care and treatment provided to the patient.



If you contend your practice is such you are too busy to take the time to write down clearly in the chart notes information concerning your patient's care and treatment, perhaps you do need to evaluate how you are running your practice and the quality of care you are providing to your patients. If you do not do this then chances are the jury may do it for you and you may not like the result.

Keeping complete and legible records will not only provide your patient better care and assist the jury, but also can be a tremendous asset to you if you are named as a defendant in a lawsuit. In most states the statute of limitations to file suit against you for any claim of professional negligence will range from one to four years. Keep in mind that is only to file suit and it may be several more years before you are actually deposed or take the witness stand. Having complete and legible records will assist you when you do testify in being able to accurately testify concerning the care and treatment rendered by you and members of your staff.

If the treatment provided by you, or other members of your staff, is fully, completely and legibly recorded, it will be very easy for you to testify and explain why all of the treatment provided met, or exceeded, professional standards. It is not a good way to defend a lawsuit for you to have to testify in deposition or at trial that you do not know, or cannot make out in the records, what treatment you, or others, provided to the patient who has now become the plaintiff. In like manner, your believability before a jury is also going to be questionable if you repeatedly try to testify to "remembering" significant events and activities regarding the patient's treatment which are not reflected in the medical records.

Keeping of complete and legible records will not only benefit each of your patients and the quality of practice you operate, but will also greatly benefit you in establishing in a court proceeding the professional quality of the services you have provided.

## E. DISCLOSURE STATEMENTS

Certain prosthetic and orthotic services do inherently contain risks. Other devices or apparatus may require routine servicing and maintenance, the lack of which may diminish its effectiveness or cause further harm or injury to the patient.

Although you will need to make the determination on a case-by-case basis, where more than extremely minimal risk is involved, or where there are specific duties and responsibilities of the patient to assist in their care, I strongly recommend you develop written disclosure statements setting forth specifically what the risks are to the patient and what requirements or duties are expected of the patient to assist in their care or avoid further injury.

Without being unduly lengthy, these disclosure statements should clearly set forth what the specific risks are and what the patient is expected to do to avoid or minimize those risks. This form should be reviewed with the patient and include the following type of statement immediately above the signature of the patient:

*I have been provided this disclosure statement and the information contained herein has been reviewed with me to my satisfaction.*

It is important you have the patient sign this form and date it, keeping the original in your patient records and giving a signed photocopy to your patient.

As with your other records, having signed disclosure statements will not only assure the court and jury you did advise the patient of the risk and responsibilities associated with their treatment, but will also make certain you are operating your practice in accordance with good recordkeeping standards.

## F. KEEPING GOOD PATIENT COMMUNICATIONS

As was stated at the onset of this presentation, one of the biggest problems leading to litigation in these type of cases is a lack of communication between the patient and the professional. This applies especially to medical and legal professionals.

Oftentimes in the rush of a professional practice it is easy to overlook the need of a patient or client to secure information from you regarding the matter for which they are seeking your services. Frequently information which we deem to be routine and trivial is extremely frightening or misunderstood by the patient.

I do not advocate that you need to take hours on end to answer every conceivable question of every patient. I do recommend strongly, however, you take the time on each visit to ask the patient if there are any specific questions or concerns they have regarding their treatment, and that you record into each and every chart note that you asked this question of the patient at the end of the office visit, record any questions or concerns they may raise and briefly record what advice you gave them. Instruct all members of your staff to do the same with each patient.

Not every issue or problem is going to arise during an office visit. I have handled a number of AOPA cases where problems have developed and repeated telephone calls were made to the practice. In at least one case I distinctly remember the plaintiff testifying of her need to place multiple calls to the professional which would not be returned for days at a time.

Remember you do have a continuing duty to your patient to respond to their needs and inquiries. When a patient brings a concern to the attention of you, or your office staff, make certain that patient's concerns are responded to promptly and completely. This may include something as simple as scheduling an immediate office visit, or could entail giving them specific direction regarding their care or device over the telephone.

When consultations such as this occur, remember these are equally a part of the medical record as any office visit. Any complaint or question which is voiced to you by a patient should be recorded into the medical chart together with a concise description of how the inquiry or issue was handled by you or your staff.

Interpersonal communication skills are extremely important in a patient/professional relationship. If your patient truly believes you have taken the time with him, or her, to understand their medical condition, answer their concerns and questions, and have truly cared about improving their health condition by expressing a personal interest in them, there is actually very little chance that person will then turn around and file a lawsuit against you even if the results of their treatment may be not as successful as they, or you, desired. Contrast this, however, with a patient who believes he, or she, has not been treated fairly or properly by you or your practice, feels their questions were never addressed to their satisfaction, and believes they have simply been rushed in and out of the office and charged for services which were not to their satisfaction. That type of individual is going to be much more prone to seek legal counsel and financial redress, not only for the result they do not care for, but for the way they perceive they were treated by you and the members of your staff.

#### G. STAFF TRAINING

As you will note throughout this presentation, I have made repeated references to not only you as the professional, but members of your staff needing to learn and abide by these recommendations. Upon your return to your practice I would first recommend you implement these specific recommendations and procedures outlined in this program which you believe will benefit your patients, your practice and yourself. Seek the input and advice of your staff and explain to them the reasons why you are implementing new policies and procedures within the practice.

Explain fully to your staff the very real risk of litigation involving the services you collectively provide to patients, and your concern as the professional in making certain all patients receive only the highest quality of care. Review everything about your practice from its physical appearance through your recordkeeping and interpersonal communication skills with your patients.

Yes, you are the professional who is in charge of the office, and that also means you will be the person who will probably be named individually as a defendant in any litigation which may ensue. Remember, however, you are not going to be the only witness. Members of your staff, including former or disgruntled employees, may well be witnesses called either for deposition or at jury trial of your case. How you train and interact with the members of your staff, and what instructions or directions you have given to them concerning the quality of care to be imparted to your patients, are all areas of relevant testimony in any possible lawsuit.

You may even wish to consider development of a written set of standards, policies and procedures which you expect your office staff to abide by in treating of any patient incorporating many of the recommendations set forth in this presentation.

Consider reviewing those written standards and procedures with all members of your staff, and having your employees as well sign a statement they understand fully what is expected of them in providing care and treatment to patients of your practice.

In summary, remember whether or not you become a defendant in a lawsuit may well depend upon the very initial relationship you establish between your practice and your patient. This includes everything from the physical presentation of your office to how that patient is treated by you and the members of your staff and the recordkeeping and disclosure policies you have instituted to make certain accurate and complete records are kept concerning the care and treatment for each patient. Following these relatively simple procedures may well keep you from ever being named as a defendant in any type of legal proceeding.

### III. THE LAWSUIT PROCESS

Try as you may, and even if you do everything correctly, you still may find yourself a defendant in a legal proceeding. Sometimes you may be the target defendant (meaning you are the one the plaintiff and their attorney have determined to be predominantly liable for the claimed injuries) or you may be joined in the lawsuit as an additional defendant merely because you were involved in this course of treatment to the allegedly

injured party. Frequently I have handled AOPA cases where the plaintiff's attorney filed suit predominantly for a more traditional medical malpractice claim, but felt the necessity to join the AOPA professional out of fear the doctor, hospital or other medical practitioner would attempt to allege they were not at fault by shifting liability and responsibility to the orthotic or prosthetic professional not named in the lawsuit. As regrettable as this may seem to you, under our American jurisprudence system this type of pleading is permissible.

Whether you are the primary defendant or not really does not matter when it comes to the steps required of you to defend the lawsuit. There are no different standards applied to a primary or ancillary defendant. In fact, there is a very real possibility situations can arise in the discovery phase of the lawsuit which may change the entire focus of the litigation either away, or toward, liability being found on a particular defendant. For these reasons all litigation must be considered by you to be of a very serious nature requiring your most immediate attention and action.

#### A. INITIAL NOTIFICATION OF POTENTIAL LITIGATION

Chances are you will receive some type of written communication, probably from a lawyer, before you actually receive any summons or lawsuit filed against you. There are rare occasions where the lawsuit is the first notification you may receive of any potential problem with one of your patients, however, this is highly unusual.

Chances are the first notification you will receive will be in the form of a letter from an attorney representing your patient. This initial notification letter will advise you of the patient and generally a brief description of the allegations being asserted against you and your practice. Generally this letter will also contain a request by the attorney for you to immediately notify your insurance carrier and provide them with a copy of the letter.

It is important to keep in mind the attorney who sends you the letter has already been retained by the plaintiff and has already identified you as a potential defendant in the lawsuit. Some of the worst cases I have

been involved in is where a potential defendant truly believes they have done nothing wrong and decides it is in their best interest to simply call the attorney and explain to them exactly what they did and why. Even though this may appear to make perfect sense to you, I would strongly advise you not to engage in such actions.

The attorney representing a potential plaintiff is probably not interested in hearing why you do not believe you should be named as a defendant. The only thing important to that attorney will be determining what information he, or she, can get from you to either establish liability on your part or try to use you as a witness to establish liability against one of the other defendants. Proceeding in this manner in either respect can be perilous to your interests in the lawsuit.

You are not obligated in any respect to speak to any attorney representing one of your patients. I would recommend you not do so unless you are represented by your own legal counsel during the course of the conversation or meeting.

I doubt seriously if any of you would permit an attorney to walk into your practice and begin examining and fitting a patient for a prosthetic or orthotic device. You have had many years of training and experience leading you to know how to do your job in a professional and competent manner. Remember, when you decide to speak to the attorney about why you believe you have done nothing wrong, you are literally walking into their “profession” for which they have been trained and have experience. It is not ever a question of the attorney being any smarter or more skilled than you, it is simply a very high stakes risk you are taking to speak with someone who probably has a better understanding of the laws of professional negligence than you may possess. As such, even to you what may be a perfectly harmless statement may later be used against you in the lawsuit to establish your liability for injury or damage.

So what should you do if you receive notification of a potential lawsuit by way of an attorney letter? Whatever you do, do not ignore the letter as there is very little, if any, chance the entire matter will simply go away. What you must do is follow the appropriate AOPA reporting procedures to notify your insurance carrier of a potential claim being made against you. Notification should be done in writing to protect your interest by

showing you have promptly notified your carrier of the claim, and you should forward the letter promptly to your insurer's claims department. If you do have private counsel to your practice, it is also generally also advisable to notify your personal attorney, and you may even wish to have your attorney handle submission of the claim on your behalf to your insurer.

## B. PRESERVATION OF EVIDENCE

As soon as you are on notice of being involved in potential litigation concerning a patient or treatment, it is imperative you not destroy or discard any potential relevant evidence. Information such as patient records, lab results or other information should be preserved as potential evidence in the case.

In recent years there has been a tremendous increase in the frequency of issues focusing on spoliation of evidence in litigation.

In most states the courts have adopted rules regarding spoliation of evidence where a party intentionally, or negligently, fails to preserve evidence which is relevant to the case. These rules and court decisions can range from the jury being instructed to determine as a matter of law the evidence would have supported the plaintiff's case and found you and your practice liable, to the court actually awarding attorneys fees and fines against you or your practice for destruction of evidence. In the most severe cases the court even has the right to enter judgment against you as a matter of law if there is a finding relevant evidence was tampered with, destroyed or discarded. Issues of spoliation of evidence can be extremely costly and detrimental to your interest in any litigation proceeding.

If there is any doubt in your mind whatsoever, you should preserve all information and evidence which may even remotely be relevant to the potential litigation.

## C. THE CLAIM INVESTIGATION PROCESS

As soon as you are placed on notice of a potential suit and notify your insurer, most insurance carriers will begin an investigation process. The investigation process will probably include the following steps:



1. A request for you to produce relevant records and documents.
2. A telephone interview with you to determine more information regarding the claim.
3. The request to take a recorded statement of you or members of your staff.
4. Request for you to assist your insurance carrier in the investigation and possible resolution of the claim.

Under your insurance policy you do have the duty and obligation to cooperate with your insurance carrier in their investigation of any potential claim or lawsuit which may be made against you and your practice. You should cooperate fully in the investigation and provide all information and documentation you are able to provide to your insurance carrier.

You will note in the above sentence the word “able” is underlined. The mere fact you are involved in a potential lawsuit does not permit you to violate any federal or state privacy laws and standards. Especially in the last decade, the United States Congress and many states have adopted privacy policies prohibiting, or vastly limiting, what information you are permitted to disclose.

It is absolutely crucial you have a complete and thorough understanding of what ethical obligations and requirements you and your practice are governed by for purposes of disclosing patient information. If your practice has developed a patient privacy policy, please review that policy carefully to make sure you are acting in compliance with your own privacy statement regarding what information, and to whom, any information is being released.

Generally the mere fact you may be named as a defendant in a lawsuit does not permit you to disclose vital patient information to even your own legal counsel or your insurance carrier. Even in cases where you may have no liability you may create a subsequent lawsuit for yourself by disclosing sensitive patient information in violation of federal or state law if it is later learned in the lawsuit you violated such laws involving your patient.

If issues do arise regarding what records you may turn over to your insurance carrier, I urge you to notify your insurance carrier, again in writing, you are more than willing to cooperate fully in the investigation, but your insurance carrier will need to contact the attorney representing the plaintiff and secure an authorization permitting you to release the records. This may create somewhat of a “catch 22” type of situation, but it is better to do so than run the risk of you violating privacy laws.

During the claim investigation process your insurance carrier should also keep you advised regarding what investigation they are undertaking and the status of your claim. Generally during this phase there will be some form of communication going back and forth between the claims handler and the attorney representing the allegedly injured party. At least in my experience most insurance carriers conduct the claim investigation process with little or no communication directly to the insured. Proceeding in this manner may be entirely acceptable to you, however, remember as an insured you have the right at any time to contact the adjuster assigned to your claim to request an update regarding the status of the claim investigation.

Many potential claims are resolved during the claim investigation process and never proceed further. Depending upon the type of insurance policy you have, your insurance carrier may have the right to settle the claim and pay damages even over your objection, and even if you believe you have done nothing wrong. For this reason it is important you understand fully what your rights are as an insured under your policy.

You should periodically review your policy of insurance and your coverage limits to make certain you understand fully the scope and limits of insurance available for you and your practice.

#### D. SERVICE OF SUMMONS AND COMPLAINT

If the case is not able to be amicably resolved, the next step will be the actual filing of the lawsuit against you and your practice. Generally, most suits involving AOPA claims will be filed in the state courts, but it also may be filed in the United States District Court for your particular portion of the country. The state

and federal court systems operate entirely independently from each other, but normally follow many similar rules and procedures.

When any lawsuit is filed the first step which must be undertaken is to secure service of summons upon the defendant. This means you must be officially served with the summons and suit papers. Generally this will be done by certified mail, but in some circumstances suit papers may also be delivered to you by a local sheriff, sheriff's deputy or marshal.

It is generally not wise to try to avoid being served with summons and suit papers. Some people have a mistaken belief if they can simply avoid being served with the suit papers, the litigation will simply go away. In virtually every jurisdiction if you attempt to evade service the plaintiff's attorney may lawfully resort to service by publication. This means notice of the lawsuit is published generally in a court index style newspaper only for a period of several weeks and you are then deemed to have been properly served.

Trying to avoid service of summons is perilous to you since if service is made by publication (and assuming you do not regularly read the legal notices in the court index newspaper) a default judgment may be entered against you, and your insurance carrier may also refuse to provide you coverage based upon your failure to timely notify them of the lawsuit.

Once you are served with summons and suit papers, the time period for you to file an answer, or other responsive motion, begins to run immediately. Check with your local state to make certain you know what the time limit is for filing of the answer, or motion, on your behalf, as failure to file a pleading with the court during that time period will also result in a default judgment being taken against you. Most states require responsive pleading answers to be filed within 14 to 30 days of receipt of the summons and suit papers.

Immediately upon your receipt of the summons and suit papers you should notify your private counsel, as well as take all appropriate steps for reporting through the AOPA procedures to your insurance carrier.

Failure to timely notify your insurance carrier of receipt of the suit papers may give rise to your insurer lawfully refusing to provide you with any defense or indemnification.

Keep in mind your incorporated business practice will normally be sued along with you individually. Depending upon the state in which you reside, and depending upon what documents you have filed with your incorporation papers with the secretary of state, service of summons may be made upon your statutory agent, and oftentimes upon you personally or your office staff. It is imperative when the summons and suit papers are received you, and whoever may be responsible for handling mail at your office, understand the importance of these documents and does not simply place them in an “inbox” or on someone’s desk who may be out of town for several weeks. You should notify your staff if any type of legal documents are received you, or the appropriate individual within your practice, must be notified immediately.

When you do forward the summons and suit papers to your insurance carrier, I would also recommend you do so in writing with an appropriate cover letter, and that you forward the documents via certified mail to establish clearly you have complied with the policy requirements and have timely forwarded the summons and suit papers to your insurer. In the unlikely event your insurer then fails to timely defend the lawsuit on your behalf, you are protected and it will be the responsibility of the insurance carrier to rectify and pay any default judgment and not you personally.

Attached to the summons and suit papers may also be important additional documents including written discovery (which will be discussed in the next section of this module), possibly notices for deposition testimony, and a scheduling order setting forth key dates regarding the case, including possibly the date for jury trial.

It is important you review each of these documents and make certain all of the documents in their entirety are forwarded to your personal attorney and insurance carrier.

## E. DISCOVERY

Filing of the lawsuit is merely the first step in the litigation process. As soon as you file your answer to the complaint, or as soon as any motion is decided by the court other than one throwing the lawsuit out in its entirety, you enter the longest phase of the litigation process which is “discovery.” As you may have already figured out, this phase of the litigation process is also the most costly.

The purpose of the discovery phase of the lawsuit is for each side to have the opportunity to determine what evidence the other will present at trial. Although courtroom dramas continue to be featured in television and movies, the days of Perry Mason solving the case with the mystery witness walking into the courtroom and taking the stand are long gone.

Beginning several decades ago the courts throughout the United States adopted rules for discovery requiring disclosure of all relevant evidence and witnesses far in advance of the trial, or you will be precluded from presenting that evidence, or witness, when the case does proceed to jury trial. The federal courts have gone so far as to now require each side to file a disclosure of its evidence without even being requested to do so by the opposing party.

The discovery phase of the lawsuit can be summarized in three areas: 1) written discovery, 2) deposition testimony and 3) court hearings and conferences. We will explore each of these areas more fully.

### 1. *Written Discovery*

The initial phase of discovery in most lawsuits will consist of written discovery served by either party upon the other. This type of discovery is generally limited to the parties themselves and not independent witnesses.

The most common form of written discovery is interrogatories. Interrogatories are written questions which one party may serve upon the other party to determine information such as background data, witnesses to be called at trial, evidence to be used at trial, prior claims or litigation, and key information concerning the

incident giving rise to the lawsuit. Depending upon the state in which you practice, your court system may limit the interrogatories either in number or scope. You will need to rely upon your attorney to advise you concerning which interrogatories are to be answered and which should be objected to based upon the laws of your particular jurisdiction.

Interrogatories can be an important discovery tool in the litigation for several reasons. First, the written interrogatories allow you to assess key information regarding the lawsuit from the opposing side, including securing from the plaintiff detailed information concerning medical history, the injuries being claimed, and the amounts of any special damages such as medical bills, wage loss, or other similar claims being asserted against you.

Second, interrogatories are signed by the answering party under oath. This means you are attesting to the truthfulness and accuracy of the information contained in the written responses. Accordingly, it is absolutely crucial you not view the interrogatories as merely perfunctory questions. Rather these are extremely important questions which require detailed analysis, review and consideration before preparing your written responses in final form and signing them under oath.

Interrogatories can be used at a jury trial (or in any other aspect of the case) for purposes of impeachment or establishing in cross-examination you have not been completely truthful and candid regarding your answers. For these reasons, even though this may be early on in the lawsuit, it is absolutely imperative we answer these questions completely and truthfully.

In most jurisdictions if you learn new information you can supplement your answers to interrogatories and even perhaps change an answer completely. The risk you run is many courts will allow the jury to later hear both your initial answer and your subsequently changed, or modified, response.

Third, interrogatories can be an extremely useful tool in determining what additional phases of discovery will be required to defend the case and properly prepare for a trial. If used correctly, the interrogatories can

assist you and your attorney in determining what are the key issues in the case to be addressed and which witnesses it will be necessary for you to take deposition testimony from to prepare your case fully for dispositive motion or trial.

## 2. *Deposition Testimony*

The taking of deposition testimony is generally where many cases are either won or lost. Either side has the right to take sworn deposition testimony of the opposing party or any witness who may have relevant information concerning the case or be called by any other party.

Depositions are oral testimony of a witness. In a deposition the witness is placed under oath by the court reporter and is questioned by the opposing attorney and any other attorney representing a party to the lawsuit. Generally, if you are deposed, your own attorney will not ask you questions in the deposition, but you should review this with your attorney in advance of giving of your testimony.

If you are a party to the lawsuit you are generally obligated to appear and give deposition testimony if so requested by any other party. Witnesses in the lawsuit may be subpoenaed compelling them to appear and give deposition testimony.

Virtually all depositions will be taken down by a court reporter and transcribed into a written record. The transcript of the deposition is then at the appropriate time filed with the court for use as evidence in the lawsuit. Depositions may also be taken by way of videotape if properly so noticed. The videotape of the deposition is then also filed with the court and may be played before the jury as evidence.

Most depositions which are taken are for discovery purposes only. This means the person's deposition is being taken, but the person is expected to testify in person if the case proceeds to trial. For witnesses who are unavailable to attend the trial, or frequently for expert witnesses such as physicians, depositions are taken on videotape for actual playback to the jury. Even if your deposition is being taken for discovery purposes, either side does have the right to request the deposition to be taken by way of videotape.

It is imperative you prepare for your deposition the same as you would prepare for your testimony before a judge and jury. Under no circumstances is a deposition a “rehearsal” or “dry-run” of your testimony. Remember, everything you say is being taken down by the court reporter and you are under oath the same as if you testified in a courtroom. It is absolutely crucial you be fully and completely prepared for the taking of your deposition. You should have one or more meetings with your attorney to review the case, the anticipated scope of the questions to be asked of you, and perhaps even do a practice run of the deposition process. One of the greatest compliments I can receive from a client is to have them tell me after their deposition was taken by the opposing counsel the questioning was much easier than what I had put them through in the practice session!

We attorneys take depositions for a number of reasons. The most obvious of which is to find out what information you have regarding the case and what you will testify to at trial. Equally importantly, however, is chances are the opposing attorney will never have met you prior to the day your deposition is taken. In large measure, the opposing attorney wants to use the deposition process to assess how you will present as a witness to a jury. This includes everything including your physical appearance, dress, eye contact and your apparent forthrightness in answering questions.

To assess these factors, a good attorney may use a variety of techniques in questioning you. The attorney may begin the deposition in a very cordial and friendly manner, but you should remember under no circumstances is the opposing attorney your friend or confidant. At other portions of the deposition the attorney may become more forceful, or even argumentative. This can occur for a number of reasons, including the mere fact the attorney may be trying to assess how you will react to different forms of questioning to determine how he, or she, feels they may most effectively cross-examine you before a jury.

Questions you have regarding the deposition process and how you should respond to those questions should be addressed fully in the pre-deposition meeting with your attorney.

Key points your attorney will want to review with you include the caution to make certain you understand each and every question fully and completely before making any answer. Often in a deposition



witnesses who want to end the deposition process as quickly as possible will volunteer information or answer questions assuming they understand what the attorney is asking when, in reality, the question was entirely different. Many times I have seen witnesses volunteer information in a deposition assuming the attorney already knew, or understood, the matter which they were discussing. Frequently this will lead to the attorney gaining valuable information he, or she, never would have known had the witness not volunteered the information. You may also find yourself in another half hour or hour of questioning while the attorney explores an entirely new area he, or she, did not even know existed in the case.

Your attorney should also prepare you to listen extremely carefully to the question you are being asked. If you do not understand the question then ask the attorney to repeat or rephrase the question to you. I tell my own clients I do not care if you have to ask the opposing attorney to repeat or rephrase the question to you ten times, because it is the duty of the attorney to ask a clear and concise question which you understand.

Once you are certain you understand the question fully, then take a moment to pause, collect your thoughts, and only then should you begin verbalizing your answer. It is amazing how much more clear and concise your answer will be if you take even a few moments to stop, think and organize your response in your mind before you begin speaking.

One of the traits we humans have is generally we listen to only about half of what someone is telling us before we start speaking. If you do not believe this, try listening carefully to a conversation and you will find the two persons speaking generally talk over one another throughout the entirety of the conversation. In a deposition doing this can be extremely detrimental to your case. Accordingly, you need to make certain you do not begin to answer, or even begin to collect your thoughts, until the opposing attorney has fully completed the question and you are fully satisfied you understand the scope and context of the question you are being asked.

At the end of the deposition you will also be asked if you want to read and sign the transcription or waive your right to signature. Even though most court reporters are extremely competent, I always require my clients to read and sign the transcription of their deposition. I do this for several reasons, including the fact it

does force them to read through again everything they said in the case so they are better prepared for the next phase of the litigation. Reading and signing of the transcript also affords them the opportunity to make any corrections or changes to the record, especially where the court reporter may have taken down information incorrectly. Especially when you are dealing with areas such as orthotics and prosthetics where technical terms are involved, you are always better protected to read through the transcription to make certain your testimony was transcribed correctly.

If it does become necessary for you to substantially change an answer when you read and sign the transcript, you are permitted to do so on a correction sheet. As with responses to interrogatories, however, if you do substantially change your answer there is a high probability the court will permit the jury to hear your original answer and your corrected answer, so you should always attempt to make certain your first response to the question is complete and correct.

Finally, remember the deposition process is the opportunity for the opposing attorney to learn what facts and information you have relevant to the case, and determine what type of witness you will be. You will probably approach the deposition with much pent up frustration, and perhaps anger, towards the attorney and his client for drawing you into a lawsuit. In like manner, you may feel the deposition is your chance to vindicate yourself and prove you have done nothing wrong.

Although in the deposition you should present as a confident professional. Remember, you have probably given few, if any, depositions, and the attorney questioning you probably does this for his, or her, living. Giving snide responses, incomplete and evasive answers, or trying to tell the attorney how unintelligent he, or she, is may give you some degree of personal satisfaction, but in 99.9 percent of the cases such actions are going to come back negatively on you in the court proceeding, and probably ultimately at the trial.

The better way to approach the deposition process is to make certain you are fully and completely prepared, that you know your course of treatment of the patient, and are confident all treatment was done correctly and with the utmost of professionalism. Remember too, you are the orthotic and prosthetic

professional and are trained as such, and the attorney is now “on your turf” having to question you regarding a profession you have been trained in and are extremely competent to practice. This should give you the correct degree of confidence and assuredness to address the deposition process in a manner which will benefit you, and may well lead to earlier resolution of the case.

### 3. *Court Hearings and Conferences*

Throughout your case there will be periodic hearings before the judge or an appointed magistrate. Most of these hearings will not require your attendance.

Generally at the start of the case the initial case management conference, or scheduling conference, will occur. At this hearing the court will listen to each attorney and get an initial understanding of the issues raised in the lawsuit. Depending upon the jurisdiction, the court may then issue a scheduling order setting forth key deadlines for disclosure of both lay and expert witnesses, completion of discovery, filing of any dispositive motions (motions which would terminate the case without the necessity of a trial), completion of discovery, mediation or arbitration where applicable, final pretrial and jury trial dates. Normally the parties do not attend the scheduling conference. Immediately following the scheduling conference, however, your attorney should notify you of all key dates which do require your attendance and participation.

If you have a conflict with any of the dates notify your attorney immediately. Most courts are more than reasonable in accommodating rescheduling of hearings, and even trials, if advance notification is given. Do not, however, wait until the last minute and then expect your attorney to be able to secure the agreement of opposing counsel and the court to change a key date to accommodate your schedule.

The court may well require you to attend the final pretrial hearing. Normally courts will instruct that not only the attorneys, but the actual parties and their insurance carriers must be present at the final pretrial, as the court will generally make an attempt to see if the case can be resolved without the necessity of jury trial.

Since you are the defendant in the lawsuit you do have the right to attend any of the depositions or court hearings involving your case. Frequently, however, judges conduct these hearings in their private chambers and not in the courtroom. Normally in these type of settings only the attorneys are present.

You may wish to check with your attorney in advance to see if your attorney recommends you attend the hearing or not. If you attend the hearing you may well find you never actually see the judge and spend the entire time either sitting in the courtroom or on a bench in the hallway. If this occurs, do not take offense or feel your attorney has necessarily mistreated you. Most times this is the way court hearings are conducted, and this is generally why your attorney will advise you it is not necessary for you to attend a hearing unless specifically requested to do so by the judge.

A more prudent use of your time will generally be to note the dates for the hearings on your calendar and either request your attorney to call you and give you an update after each hearing, or take it upon yourself to call your attorney the day after each of the hearings and request an update report concerning your case.

Even if the attorney has been retained through your insurance carrier, remember you are the client and the attorney's fiduciary duty is to represent your interest fully and not that of the insurance carrier. If at any time you have any question concerning your case, or for any reason you feel your attorney is not keeping you fully advised regarding the status of the litigation, you have every right to contact the attorney and request to be kept fully informed regarding your case.

#### F. ALTERNATIVE DISPUTE RESOLUTION (ADR)

In the past twenty years American courts have adopted almost universally the concept of alternative dispute resolution. Most everyone has read in the papers, or heard on the news, about the litigation explosion which has occurred in the United States in the past generation. By-in-large what you read is true. There has been a tremendous increase in lawsuits overwhelming the American court system.

Our courts handle both civil and criminal litigation. Civil cases are those in which you will hopefully only be involved in and involve disputes between individual persons, or corporations, where in most situations monetary damages are being sought. In criminal cases the state or federal government brings the lawsuit on behalf of the citizens seeking redress for violation of laws by an award of fines and imprisonment. Almost always, criminal cases take precedence over civil cases creating an even worse backlog of civil litigation matters in the court system. In some parts of the country it can take from four to six years for a civil case to actually proceed to trial.

Because of this, alternative dispute resolution has been adopted by courts for civil cases. Alternative dispute resolution is an attempt to bring the parties together through a process other than a jury trial to see if the case can be resolved. The two most common types of alternative dispute resolution are arbitration and mediation.

Arbitration is basically a “mini trial”, whereas a jury trial normally lasts three days or longer, arbitrations can generally be done in a day or often a half day session. In an arbitration each side makes brief opening statements and may call witnesses for abbreviated testimony. The normal rules of evidence used in court are generally suspended to some degree allowing the case to be presented with less formality. At the end of the arbitration each attorney makes a very brief closing argument.

Instead of occurring in front of a judge and jury, the arbitration hearing takes place before generally one to three lawyers who volunteer their time away from their practice to serve as arbitrators. The arbitrators then review the evidence and reach a verdict which is issued to the parties, which is normally received several days after the hearing. Either side then has the right to appeal the arbitration verdict and the trial will proceed. Generally, the purpose of the arbitration is to allow both sides to present their case to an impartial panel and determine how that panel views the evidence and potential damages. The arbitration process can be beneficial in hopefully bringing one, or sometimes both, sides to a more realistic evaluation of their position.

If the parties agree to do so in advance, arbitration can also be binding on both parties, meaning there is no right to appeal after the arbitration verdict. One of the other advantages of the arbitration process is it is not only much quicker, but is also much less expensive than the cost of a full jury trial.

The other common form of alternative dispute resolution is mediation. Unlike arbitration, the purpose of mediation is to bring the parties together to reach an amicable and agreed settlement figure. Remember, in the arbitration proceeding the arbitrator, or arbitration panel, actually issues a written verdict which either side can appeal.

Mediation is much less formal than even an arbitration. In the mediation process there will be one impartial mediator who will generally begin the process with all of the parties together in a conference room. The mediator will explain their role is not to judge or decide the case, but to facilitate a discussion amongst the parties in an attempt to reach resolution of all issues in the case.

Generally, the mediator will ask the attorney for each of the parties to make a brief statement summarizing the strengths, and perhaps even weaknesses, of their case.

After the initial conference the mediator will generally separate the parties speaking with each of the parties and their attorneys privately. Mediation is generally not successful if it is a case where you or your insurer are not willing to entertain any type of payment to the plaintiff in exchange for dismissal of the lawsuit. Mediation can be very effective, however, in bringing both parties together toward a realistic figure for settlement.

Although you will not probably be personally involved in the process, the key to a successful mediation is selecting a mediator who is truly impartial and will expend the time and effort necessary to acquaint themselves with the facts of the case and the specific legal issues which will be presented at a jury trial. An effective mediator is able to communicate the position of each party to the other while simultaneously pointing

out the respective strengths and weaknesses of your own, or the opposing party's, case and the risk you may run in proceeding to a jury trial.

At least in my experience we have been much more successful in resolving cases by way of mediation than arbitration. A friend of mine who is a very good mediator often correctly states the best results he reaches in a mediation are when each side feels they have given up "slightly more" than they intended to do at the mediation session. Generally, if each side is willing to realistically evaluate the case and "give a little", mediation can be an excellent tool for resolving litigation without the time or expense of a jury trial.

Before we move to the final module of this presentation, it is also important you understand the difference between two types of damages which may be sought against you. In civil litigation the parties may seek compensatory or punitive damages against a defendant.

Compensatory damages are damages which are sought to compensate another for injury or damage caused by the liable party. Compensatory damages can include repayment for out-of-pocket medical expenses, lost wages or ability to earn an income, the intangible award of damages for pain and suffering, and if a spouse or child is involved, damages for what is termed loss of consortium. Consortium is the loss of services and companionship of one's spouse or a child. Consortium damages can also be awarded for the loss of a parent or sibling. Although you do need to check the terms of your insurance policy, most compensatory damages are covered by insurance up to your applicable policy limits.

The other type of damages which may be sought against you are punitive damages. Punitive damages are not intended to compensate the injured party, but instead to punish the liable party for engaging in actions which are not merely negligent, but may rise, depending upon the jurisdiction you are in, to a level of willful, wanton or reckless conduct. Much media coverage has been afforded in recent years to very large punitive damage awards being made by juries. Normally these cases are the exception and not the rule.

If you are sued for punitive damages it is important you understand, however, many jurisdictions prohibit insurance companies from providing coverage to you for punitive damages. As such, if there is an award of punitive damages against you, or your practice, those damages may be your personal responsibility to pay for. Additionally, punitive damages may not be dischargeable in bankruptcy.

If you find yourself in the unfortunate situation of being sued for punitive damages, you should monitor the litigation extremely closely and make certain your attorney is doing everything within his, or her, power to have the punitive damage claim against you dismissed by the court. Although rarely awarded, punitive damages can be extremely harsh in nature, and do pose a substantial risk to your personal and professional assets.

In this module of the presentation we have attempted to look at the lawsuit process from initial filing through alternative dispute resolution and the final pretrial hearing. If the case still has not been resolved you will probably have no other alternative than to proceed to a jury trial.

Although you will not ultimately know if you win or lose a trial until a jury verdict is returned, chances are the discovery phase of the lawsuit may well have laid the foundation which will determine whether you will succeed or fail before the jury. If you do find yourself in the litigation process, do not under any circumstance downplay the importance of the discovery process leading up to the jury trial. Defendants who think they can simply ignore, or coast through, the discovery process and then tell their story and win a jury over at trial generally find they have made a costly mistake.

## G. THE JURY TRIAL PROCESS

Perhaps you have tried to settle the case and have been unsuccessful in doing so because of unrealistic demands and expectations on the part of the plaintiff. More often you may be in a situation where the facts and evidence clearly support you have done nothing wrong and bear no liability for the damages being sought



against you. Regardless, you are now in a situation where you are headed to resolution of the case by way of jury trial.

Jury trials, fortunately or unfortunately, are in no way even close in reality to the perception given through television and movies. It would certainly be nice if every case were presented in a dramatic and interesting format and resolved in either a thirty or sixty minute segment.

The reality is the jury trial process is generally very long and oftentimes can be boring, especially to the jurors! This can be avoided by attorneys presenting their cases well and in an organized format. Training attorneys for jury trials, however, is a separate seminar for a separate audience.

Well in advance of the trial your attorney should explain to you the entirety of the jury trial process. Each jurisdiction may have differing rules regarding the trial process, but most state and federal courts follow the same general outline for the trial procedure.

One of the initial things to note regarding a jury trial is your presence as the defendant will be required throughout the entirety of the trial. From the initial start of the trial through the final verdict your attendance should be mandatory. Even if not ordered to be there by the court, remember the jurors who are hearing your case have been pulled away from their professional and personal lives to serve as part of the judicial process. If you send a message to the jury by claiming you are “too busy” or “unavailable” for portions of the trial, this will not be lost upon the jury when they deliberate and consider your credibility and conduct.

The jury trial process begins with selection of the jury. Most American courthouses are overrun on Monday mornings as trials begin and potential jurors are brought in for questioning. Although you may think the trial process does not begin until you walk into the courtroom, I would strongly urge you to consider very carefully the fact the person you cutoff in the parking garage to get a parking space, or failed to hold open the door to the courthouse for as you walk in on a rainy morning, may well end up being one of the individuals who sits on the jury deciding the outcome of your case!

The process for jury selection is called *voir dire*. This is a French term which means simply “to tell the truth.” The goal of the *voir dire* process is to select jurors who are fair and impartial to both sides.

Depending upon the jurisdiction you are in, generally from six to twelve jurors will be seated for a civil case. Again depending upon the jurisdiction, either all of the jury, or a majority, will need to rule in favor of one of the parties for a verdict to be reached. In most criminal trials the court will generally seat twelve jurors and require a unanimous verdict. Many jurisdictions do not require the same standard for civil litigation.

During the *voir dire* process the court will question potential jurors, and then each attorney will have the opportunity to question the jurors as well. Although I cannot speak for all attorneys, it is generally my practice to involve the opinions and thoughts of my clients in making our final determination regarding which members of the jury we like and those we would rather remove.

Jurors can be removed for two reasons. If a juror is obviously, for some reason, partial to one side or the other for reasons which may include business or personal relationships, or their own involvement in a prior similar case, the juror can be removed for cause.

With some exceptions (generally a juror may not be removed for religious or ethnic purposes) either party may also remove a potential juror simply because they are not comfortable with the juror’s answers to questions during the *voir dire* process. These are called preemptory challenges. The court will set in advance the number of preemptory challenges each side has for removal of jurors. Generally each side will have approximately three challenges.

Once the jurors have been interviewed and the appropriate jurors have either been removed for cause or by preemptory challenges, the jury will then be seated. Most courts will then also seat one or two alternate jurors in case during the course of the trial one of the jurors becomes disqualified, ill, or is unable for other reasons to complete jury service. Once all the jurors and alternates have been selected, the jury will be sworn in to fairly and truthfully decide the issues presented in the case.

After the jury is selected the first phase of the actual trial begins with opening statements. Opening statements are generally relatively brief, and in almost every jurisdiction the plaintiff will go first because the plaintiff carries the burden of proof of establishing the necessary evidence in the lawsuit.

The court will generally tell the jurors opening statements are not evidence and are merely a chance for the attorneys to summarize what they believe the evidence presented during the course of the trial will show. Opening statements can be very effective as many studies show jurors do develop very strong initial opinions concerning the case based upon the opening statements of the attorneys.

Throughout the pendency of the trial, from jury selection through verdict, your actions will be observed at all times by the jurors. It is difficult in any seminar to teach you what “appropriate” responses may be during the course of a trial. Repeatedly reacting with overly-dramatic facial expressions, rolling of the eyes or similar actions, however, are rarely viewed favorably by a jury.

After the opening statements are completed the evidentiary phase of the trial begins. The plaintiff will again go first because the plaintiff does carry the burden of proof.

Presentation of a party’s case is called their “case-in-chief.” During the plaintiff’s case-in-chief the plaintiff’s attorney may call any witness listed on their disclosure to the stand. Frequently this may include calling you to testify as if on cross-examination, and oftentimes you may well be the first witness called by the plaintiff in hopes you will be nervous, and also to afford the plaintiff’s counsel the opportunity to question you before you hear the testimony of any other witness. If this occurs your attorney should have advised you of this advance and have you fully prepared for questioning.

During the plaintiff’s case-in-chief, your attorney will also have the opportunity to cross-examine any witness called by the plaintiff. The only exception may be, depending upon the jurisdiction, if you are called as a witness your attorney may, or may not, be permitted to question you on direct examination during the

plaintiff's case-in-chief. Otherwise, your attorney will have the opportunity to question fully on your behalf each and every witness called on behalf of the plaintiff.

Throughout the pendency of the trial, in addition to witnesses testifying, exhibits will be marked and introduced into evidence. Exhibits may be documents, photographs or tangible objects, including prosthetic or orthotic devices. At the conclusion of the case, and prior to the jury deliberations, the court will make a final determination regarding which evidence is admissible and which is not.

Throughout the trial there will also probably be objections made to witnesses testimony. It is the duty of the judge to rule upon objections by either sustaining the objection, which means the objection by the attorney is proper and the witness should not answer the question as phrased. If the court overrules the objection the witness may proceed to answer the question. We have previously discussed in module II your deposition testimony where objections may also be made. In a deposition, objections are made on the record and preserved for subsequent ruling by the court prior to a jury trial. For this reason your attorney may object to a question in your deposition, but instruct you to proceed to answer the question. At a jury trial this will not occur since the judge will rule on the objection before the witness is required to answer the question.

At the end of the plaintiff's submission of witnesses and exhibits, the plaintiff will rest their case. At that time your attorney may make a motion for a directed verdict, or other similar motion, requesting the court to dismiss the case. Obviously if the motion is granted the case is then terminated, although this occurs rarely. Frequently, however, motions for directed verdict are made by defense counsel to make certain all issues are properly preserved for an appellate court review should that become necessary.

Following completion of the plaintiff's case-in-chief and ruling by the court on any appropriate motions, the focus will now shift to the defense. This will now be the opportunity for the defense to present its case-in-chief.

Oftentimes the defense case is much more brief than the plaintiff's case. This occurs because the plaintiff has the burden of proof in the case and generally must present evidence regarding both liability and the alleged damages caused by that liability. The defense will more frequently focus on evidence showing evidence of no liability and limited evidence to refute any claim for damages. The defense case may also be more brief because frequently the plaintiff will have called many of the same witnesses which the defense had planned to call during its case-in-chief. Rather than recalling each of those witnesses, generally the witness will be questioned fully by all parties when they take the witness stand regardless of whose case-in-chief they are called in to testify.

When you are called to testify at jury trial the same rules apply as in your deposition. It is absolutely imperative you listen carefully to the question, think briefly about your response, and then answer the question clearly and concisely. The additional requirement you have in a jury trial is to always make certain when you answer you speak directly to the jury. In our daily lives one of the best tools we have for deciding if someone is telling us the truth is whether they will look at us squarely in the eye or look away. Establishing strong eye contact with the jury is one of the best ways you can establish your credibility, and in doing so convince them of your lack of liability.

There are many "tricks" an attorney many choose to use in the courtroom. One of the ones I will use frequently is to position myself in a manner where the witness is looking at me and I am the one making eye contact with the jury. By doing this when I question an adverse witness I try to engage the witness to direct his, or her, answers toward me where it appears they are ignoring the jury. You should avoid this and remember always to direct your responses to the jury. Doing this can actually benefit you by taking the time to look at the attorney while he, or she, is questioning you and then turning and repositioning yourself to look at the jury before answering. During this natural process of movement you will afford yourself an additional period of time to analyze the question in your mind and formulate a clear and concise response.

At the conclusion of the defense case-in-chief your attorney will rest the case on your behalf and request the court to move into evidence the exhibits you have offered. Frequently your attorney will again make a motion for directed verdict to either hopefully dispose of the case in its entirety, or preserve issues for appeal.

Although it is not always used, following completion of the defense case the plaintiff may be afforded the opportunity to present a rebuttal case. Rebuttal cases are normally very brief and consist of one to three witnesses for very limited testimony. This may, or may not be, the same witnesses called during the plaintiff's case-in-chief. Rebuttal witnesses are intended to counter evidence presented by the defense's case-in-chief. As with witnesses called during the plaintiff's case-in-chief, your attorney will have the opportunity to cross-examine any rebuttal witness. Following completion of the rebuttal case, the plaintiff will again rest their case, and in limited circumstances the defendant may be able to present a very brief *sur*-rebuttal case where witnesses, or evidence, are presented to counteract rebuttal witnesses of the plaintiff.

Once all parties have fully rested their case and the exhibits have been moved into evidence, the next, and one of the most important, phases of the case occurs. These are the closing arguments.

It is important to note the difference in terminology we have used. Remember, the trial began with opening statements summarizing what the attorneys felt the evidence would show. The trial draws to conclusion with closing arguments.

The closing argument is the opportunity for the attorney to tie together the evidence and use his, or her, best skills to explain to the jury why the evidence supports the position being taken on behalf of the plaintiff or defendant. Closing arguments are generally much longer than opening statements, but may be limited by the court to a reasonable time period.

During closing argument the attorney will generally remind the jury what key witnesses testified to, and the attorney is normally permitted to utilize the exhibits which have been introduced into evidence to explain why those exhibits support his, or her, client's position in the trial. During closing argument the attorney for the

plaintiff will also probably spend a great deal of time focusing upon the plaintiff's damages and why a substantial monetary award is justified. Although attorneys are provided wide latitude in closing argument, objections may also be made during this phase of the trial which will be ruled upon by the judge.

Different jurisdictions have different rules of court regarding closing arguments. In most jurisdictions the plaintiff will go first followed by the defendant, and then the plaintiff will have one additional and final opportunity to speak to the jury after the defense has made its closing argument. Once again the plaintiff is given the final opportunity to speak to the jury because the plaintiff has the burden of proof in the lawsuit.

In some jurisdictions the defendant actually makes the first closing argument and is then followed by the plaintiff. Regardless of your court's jurisdictional rules, in most circumstances the plaintiff will be given the final opportunity to speak to the jury before the trial is concluded.

After the closing arguments have been completed, the court will then read a series of instructions to the jury. The scope of the jury instructions varies widely depending upon the jurisdiction where the trial occurs. Jury instructions may be quite brief, or can be quite involved lasting more than an hour to read the instructions.

The jury instructions are read to the jury by the judge. The judge has final ruling over what jury instructions are given, but as the trial approaches conclusion the court will request input from the attorneys for each party to compile the appropriate jury instructions. The instructions are intended to guide and assist the jury in how to consider and weigh the evidence, and the format they should follow in reaching a verdict. The court will instruct the jury regarding issues such as the burden of proof, the weight of the evidence, how to distinguish between circumstantial and direct evidence, and what inferences the jury may, or may not, make from the evidence and witness testimony. The court will also provide the jury with written interrogatories (where appropriate) which the jury needs to answer to assist them in reaching their verdict. The court will also provide the jury with appropriate verdict forms to either return a verdict in favor of the plaintiff or the defendant. Depending upon the jurisdiction you are in, the court may, or may not, provide the jury with a written copy of the instructions.

Following reading of the jury instructions, the jury then retires in private for its deliberations. No one other than the jurors is permitted in the jury room during the course of the deliberations. The court will also not set any time limit by which the jury must reach a verdict. As was discussed previously, depending upon the jurisdiction the trial is taking place in, the jury may, or may not, have to reach a unanimous verdict.

During the course of jury deliberations the jury may have questions to address to the court. If questions arise, generally the court will request the foreperson of the jury to write out the question and will then notify counsel and permit them to review the question. The court will then make a decision relative to whether to tell the jury an answer to the question, or refuse to answer the question.

Although it does not occur frequently, juries may also become deadlocked. A deadlocked jury means, for whatever reason, the jury believes it is not able to reach either a unanimous verdict, or the required percentage of the jurors cannot agree on a verdict to rule in favor of one party or the other. In a truly deadlocked case the court is left with no alternative other than to declare a mistrial in which case the entire process of the jury trial will start over again with a new jury months, or perhaps even a year or more, later.

Since a mistrial is generally not in the best interest of any party, the court will frequently admonish the jury of its duty to consider all of the evidence and to deliberate with an open mind in hopes the further instruction and admonition from the court will force the jurors to reconsider evidence or change their opinion so a verdict can be reached.

At least for me, the time period in which the jury is deliberating seems to go painfully slow. A minute can seem like an hour. During this phase of the trial you have no choice but to simply wait until being advised the jury has reached its verdict.

Upon reaching the verdict, the jury is brought into the courtroom and, depending upon local procedures, either the jury reads its verdict in open court, or the verdict is presented to the judge and read into the record. Then depending upon the rules of the court, you and your attorney may, or may not, be able to speak to the



members of the jury following their verdict to either thank them, or determine upon what basis they reached their verdict.

Unless the parties for some reason, which is rare, agree the jury verdict will be binding, either side does have the right to appeal the jury verdict. Generally, most jurisdictions afford one appeal “as of right.” What this means is the first level of appellate review of a jury verdict is mandatory, meaning the appellate court cannot reject the case and refuse to hear the appeal. Even though either side has the right to appeal, there still must be meritorious issues raised in the court of appeal or the jury verdict will stand and be upheld.

Depending upon the jurisdiction you are in, review by any further courts of appeal, or the state supreme court, is on a discretionary basis, meaning the court is not obligated to accept the case for review, and generally discretionary appeals are rarely granted.

Hopefully your experience with the jury trial process has been successful and the jury has ruled in your favor. When I jury try cases I am always extremely nervous (which I think is good because it demonstrates you care) and there is nothing quite like the feeling of exhilaration when a jury rules in favor of your client. In like manner, however, an adverse jury verdict ruling can be devastating.

Regardless of the outcome, the jury trial process is a grueling one. It requires a great deal of preparation and extreme attention to detail throughout all phases of the jury trial process. Your attorney should keep you fully informed and updated throughout the entirety of the trial and if issues, or concerns, arise during the trial which you do not understand, it is certainly appropriate for you to make note of those questions and during breaks when the jury is out of the room, or in the evening following completion of the day’s trial activities, you should not hesitate to ask your attorney to clarify for you any issues or rulings which may have taken place which you do not understand.

Remember your attorney will probably go on to another trial on another day, but this may be your only trial, and ultimately it is your career and reputation which are on the line. You should hopefully have an

excellent working relationship and extreme confidence in your attorney, but you should also not hesitate to be an active participant in the trial process making certain you understand what is occurring in your case. Make sure you are not merely an uninformed spectator at your own trial.

#### IV. CONCLUSION

I would like to commend AOPA, its staff and board of directors for having the forethought and consideration for you as members to present this program. I am humbled and honored that of the attorneys who have the privilege of representing AOPA members throughout the United States I, and my firm, were asked to present this program to you.

We have had the privilege for many years of representing AOPA and its membership. During those years we have developed a strong bond of professional relationship and respect for the quality of services each of you provide to those in need.

Although we make our living in the courtroom, it is our sincere hope and desire your practice is operated in such a manner you are able to complete your career without ever being involved as a defendant in any litigation. It is further our hope the information presented in this program will be implemented by you and your staff to hopefully put in place specific policies and procedures in your practice to avoid your ever being named as a defendant in any type of lawsuit or proceeding.

If that is not the case, then it is also our hope the information presented in this program will make you a more informed participant in the legal process and give you some level of assurance and education regarding how to navigate successfully through the legal system process even if that takes you all the way through jury trial.

While we can certainly never guarantee clients a successful result in any litigation, in more than twenty years of practice my experience has shown me if you do follow the procedures and recommendations set forth in this program you will hopefully never find yourself involved in litigation or, if you do, the result will be one for which you and your attorney will be proud.

My best wishes to each of you as you return to your practices, and hopefully successful and rewarding careers!