



Courtroom rules don't favor defendants, and plaintiff attorneys will paint you as incompetent and uncaring. Don't despair! You can prepare for the attack and counter it.





Rebuff those malpractice lawyers' traps and tricks!

CASE

You are a defendant in a malpractice case, and your lawyer has just finished questioning you—the “direct” part of your testimony. She asked you straightforward questions and you answered fully and without interruption. You were able to explain, at length, your account of what happened during the events in question. This is the first time you’ve been sued; you’re nervous, but things have gone well so far, you feel.

Cross-examination by the plaintiff’s attorney comes next. He starts aggressively, questioning the quality of your training and experience. Have any disciplinary actions ever been taken against you by your hospital or the state licensing board? Did you have specialty fellowship training? He makes it seem that, if you didn’t, you have no business taking care of patients.

He drills in: Have you taken courses in the specific area at question in the case—as if whole courses are given routinely on the narrow topics that are often the subject of litigation, whether shoulder dystocia, placental abruption, damage to a ureter, or other bad outcomes.

He moves on to ask about details of the case but cuts you off when you try to flesh out your answers. He admonishes you: Listen to the question and answer “Yes” or “No”!

He begins to raise his voice.

The attorney attacks your notes in the medical record; he makes them seem incomplete and inadequate. He tells members of the jury that they can assume that you did not take a specific action, despite your claim to the contrary, because it’s not in the record: “If it wasn’t written down, it didn’t happen.”

His demeanor becomes more confrontational. The increasingly abusive questioning goes on and on, and your sense that things are going well has evaporated.

How, you ask yourself as the assault continues, did all this rancor

and accusation come on so fast and so unexpectedly?

This scenario, or versions close to it, occurs all too often to physicians in courtrooms across the United States. Defendant physicians who are vilified and goaded feel angry, frustrated, and helpless. No wonder—the courtroom environment is alien to us. We trained for years to become competent, knowledgeable practitioners of our specialty; we work hard every day to provide the best possible care; and we diligently keep up with advances in ObGyn medicine by reading the literature and attending continuing medical education conferences. But in the courtroom, attorneys make a pointed attempt to paint us as incompetent and uncaring—even malicious.

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Moreover, customary rules of argumentation don't apply. We can't answer questions fully or correct misstatements that are implicit in certain questions. Judges often limit what we can say and what the jury is allowed to hear. Not only is the medical care we gave questioned—we are subject to attempts to discredit us personally. We're asked questions about the most private aspects of our life: "What's your income?" "Why were you divorced?" "What is the financial arrangement between you and your partners?" "Are you seeing—have you ever seen—a psychiatrist?"

The playing field has been set at a tilt

Lawyers made the rules of the legal system by which we are forced to defend ourselves when we are sued, and they surely made them for their benefit. Those rules provide lawyers with immunity from having to reveal their conversations and memos, but don't provide you with protection for conversations or other communications you have had with patients, partners, friends, risk managers, and hospital administrators. Only conversations with your lawyer are "privileged."

Perhaps your greatest disadvantage when you are sued is that, most likely, this is going to be your first time in a courtroom. You haven't had the chance to become familiar with the venue—the courtroom—or the tactics of cross-examination used by plaintiff attorneys.

Combine an accusation of malpractice and the need to defend yourself in an alien environment with rules made by and favoring lawyers that are foreign to you and that you cannot control—what a daunting prospect! Plaintiff attorneys take advantage of the situation to prey on defendants.

There are ways to defend yourself!

Did you go into an operating room or a delivery room for the first time without preparation or training? No! Likewise, don't go into a courtroom unprepared.

You may be surprised to learn that you do have advantages over lawyers for plaintiffs:

- You know more medicine than they ever will, no matter how many malpractice cases they have tried.
- *You were there* when the actions under dispute took place. You can speak from direct experience about those actions, with authority, as a knowledgeable eyewitness.
- Despite how it may appear, you have the right to defend your actions and your statements vigorously.

Your biggest hurdle? You'll have to climb the learning curve of the legal system rapidly to understand what will happen to you during a trial or a deposition and what you can do to fight back on the witness stand.

Plaintiff lawyers routinely employ a standard repertoire of tricks and traps, which I have seen used time and again. My goals here are to describe them to you so that you can see them coming and to tell you how to defend yourself against them. You'll then be in a position to counter these tricks by **1)** giving them a name, **2)** confronting the lawyer—in front of the judge and the jury—with what he or she is attempting to do, and **3)** employing defensive tactics.

A note about language in this article: For simplicity, when I say "he" when referring to a physician or lawyer, I mean "he" or "she." And I mean "plaintiff attorney" when I say just "lawyer" or "attorney," unless I am referring explicitly to your (the defendant's) representation.

First, three little words to set the stage

Always keep in mind that, for you to be found guilty of malpractice, the plaintiff attorney has to prove **beyond a reasonable doubt** that the actions you did, or did not, take violated what is known in the medico-legal arena as **standard of care**. Because this standard is what you are being judged against, it is vital that you understand—and, in turn, that the jury understands—exactly what the term means.

Standard of care is defined as **care generally given by well-trained physicians in your own specialty under similar circumstances**. Standard of care does not mean "ideal" care, as may be recommended in a medical textbook or other kinds of professional communication. The standard of care is, essentially, generally accepted practice: The level and degree of care most often used by your contemporary peers. You are guilty of malpractice only if the care that you gave fell below the care that would generally have been given to a patient by others, in your specialty, under the circumstances you faced.

Inside an attorney's bulging bag of tricks

What tactics might an attorney use to harass and intimidate you?

He'll bully you. Imagine this: A plaintiff lawyer is brought into a surgical suite for the first time. He is asked to participate in an operation but isn't allowed to speak unless spoken to. He is allowed to answer direct questions only in a format dictated by the senior surgeon. That lawyer would not know what was going on, would be continuously on the defensive, and would feel totally in over his head—if he didn't faint first!



Every educational activity in which you have participated, and every professional position you have ever held, is subject to inquiry by the plaintiff attorney

What I just described is the equivalent of what happens to you in a courtroom. An attorney is allowed great leeway over the types of questions that he can ask and the manner in which they can be posed. He often attempts to intimidate you with harsh language, a raised voice, physical gestures, and sarcasm. He might ask questions with implied premises that aren't true. His behavior might be confrontational. He might try to cut you off. And he might insist that your answers be solely "Yes" or "No."

He'll troll through your CV. Every educational activity in which you have participated, and every professional position you have ever held, is subject to inquiry. In addition to being asked if you have ever been sued or had disciplinary action taken against you, an attorney will review your education, step by step. He might imply that, if you were educated abroad or went to a less-than-well-known medical school, you are poorly trained or somehow not "of high quality." He will likely ask you how many times you took the specialty board exam before you passed it. You might even be asked how high you finished in your medical school class, or if you were given your first choice of residency program in a match.

He'll create artificial standards in the minds of jury members. You might be asked if you have published in your field or if you have an academic appointment—the assumption being that, if your answer is "No," your opinion about issues being discussed at the trial are not as authoritative as (he will claim) those of the plaintiff's expert witness, who may be well known in the specialty.

He'll take statements out of context. Articles that you published (even if years ago), previous depositions or trial testimony you have

given, and even PowerPoint presentations you made to nurses on your labor and delivery unit may be probed and quoted. Usually, the attorney presents only brief snippets of these works, which are likely to be read to the jury out of context.

He'll ask for specific references. Often, when an attorney asks about facts that you've mentioned or opinions you hold regarding issues that bear on the case in your trial, he will attempt to embarrass you by asking you to name the specific text, article, or author from which you obtained that information. Here's an example: You know that the threshold for macrosomia in a shoulder dystocia case is 4,500 g, and that random late decelerations in a fetal monitor strip marked by otherwise excellent variability do not demand immediate C-section—but you may not be able to cite, off the top of your head, exactly in which textbook or journal article you read this or the information can be found. You might also be asked what an ACOG *Bulletin* or your hospital's policy book says about a certain subject or aspect of care.

He'll drag in the medical record and informed consent. An attorney might try to convince a jury that "if it isn't written down, it didn't happen." He might cite a lack of an extensive written description of what occurred during the events in question as evidence of sloppy charting or poor care. He might claim that lack of a detailed note replicating a conversation that

took place during the consent process displays a lack of concern for the patient's right to know.

He'll imply the existence of a standard of care. Lawyers often try to convince a jury that a defendant physician committed malpractice by claiming that she should have taken certain actions, when, in fact, these actions would have been unnecessary or inappropriate under the circumstances. Examples: Asking whether clinical pelvimetry was documented in the chart of a multiparous woman who came in actively laboring, or asking if fundal height was measured in the office during a patient's last three prenatal visits.

Here are two other examples:

- In a case involving vacuum extraction delivery: "Doctor, have you ever read the vacuum device's product safety manual?"
- When a plaintiff has testified that she told you at her first prenatal visit that her previous pregnancies were uncomplicated: "Did you call for, or read, the record from any of her previous pregnancies?"

By asking these questions, the lawyer will be implying to the jury that, in fact, you *should* have done these things and that, by not having done them, you provided inadequate and substandard care.

He'll create a false impression. A common attorney's tactic is to pose questions to you that imply that certain things are true, when they are not. A common example of this tactic oc-



curs in shoulder dystocia cases, when putative risk factors are addressed.

Consensus in the shoulder dystocia literature is that there are only three or four statistically consistent risk factors for this condition: shoulder dystocia in a prior delivery, macrosomia, gestational diabetes, and (possibly) mid-vacuum or forceps delivery. Often, however, attorneys imply to the jury that many other risk factors exist—and that your patient had any number of them and that you should have been aware of them.

You might be asked if your patient underwent oxytocin induction, had a long first stage of labor, had an epidural anesthetic placed, or was post-dates—none of which have a proven association with shoulder dystocia. You'll be given little leeway, in answering questions posed to you, to try to refute the lawyer's false assumptions. The impression may thus be left by this concatenation of nonproven factors that your patient was at high risk of shoulder dystocia, that this was foreseeable, and that you were negligent in not having performed a C-section to prevent it.

Likewise, lawyers often deliberately misuse statistics—such as when they discuss sonographic variability in the estimation of fetal weight: “Don't you acknowledge, Doctor, that ultrasound estimates of fetal weight can vary by 15% of the actual weight? So why didn't you take into account that the 4,300 g estimate you were given could, in fact, have been as high as 4,700 g?” Given the rules that restrict how you can answer, you are rarely allowed to explain to a jury that, first, the 15% variability applies only to a baby whose weight is more than one standard deviation from average and, second, the weight-estimate

variability can be on the low side as well as on the high side.

How should you respond to interrogation?

Although you face disadvantages as a defendant physician in a courtroom, there are ways to fight back—to stick up for yourself and respond to the techniques that attorneys perpetrate. You aren't as defenseless as it might appear!

Never allow an attorney to bully you in the courtroom or at a deposition. If the attorney begins to use such behavior, call it by its name and demand that it be stopped. Your lawyer will likely have raised an objection before you do; if she does not, protest such inappropriate behavior yourself. Never allow an attorney who is questioning you to raise his voice or speak to you sarcastically or rudely.

You don't necessarily have to play by the rules for answering questions, despite any admonition by a plaintiff lawyer that you do so. Unless you are advised otherwise by the judge or by your lawyer, answer questions the way you want to, as long as your answer is a reply to the question that was asked. You are never obliged to answer a question with just “Yes” or “No.” If an attorney tries to impose such a limitation on you, declare that you cannot answer the question under those terms. If your answers are being cut off, don't hesitate to tell the jury that you are not being allowed to tell the whole story.

If questions posed to you contain false premises, point that out. For example, you might be asked, “Given the obvious fetal distress that was present, why did you apply forceps?” If there was no fetal distress, or if that is one of the issues in dispute, you can respond that the ques-

tion contains incorrect information or an unwarranted assumption, and therefore cannot be answered as asked.

Prepare to be asked about your background and training. Have your lawyer ask you preemptively, during her questioning, about anything in your professional life that might appear the least bit negative. This allows you to explain the matter fully without being cut off by the plaintiff attorney. Have your lawyer ask questions that show how your background and training compare with those of other physicians in your hospital and community. If you have been sued in the past, have your lawyer ask you about how many times an ObGyn is sued, on average, in her career (“three” is the answer), and use this fact to show the jury that being sued is not an anomaly but the rule in ObGyn practice.

Never answer a question about something you wrote in the past or about prior testimony without demanding to read it yourself, on the stand, in context. (The same is true for quotations from the medical literature read to you by the plaintiff attorney: You have a right to know the source and date of publication of quoted material, and you should insist on being able to read the quotation for yourself so that you can understand it in context.)

If asked from what text or article you learned a specific piece of information, point out the absurdity of being asked to remember such specifics from among the tens of thousands of things you have learned and read over your training and career.

When asked about your notes in the medical record and why you did or did not write a particular item, point out that the medical record is not a document that is intended to be used to prosecute or defend med-

ical cases years down the road but rather is meant to convey important clinical information among health-care providers. Tell the jury what sorts of notes are routinely written and how much information is generally put into a note. If the notes you wrote are appropriate, even if brief, be sure and explain to the jury that what you did is, in fact, the standard of care—not an idealized conception taken from a textbook or an expert’s talk as to how notes should be written. Don’t agree with a lawyer’s contention that “if it isn’t written down, it didn’t happen.” That may be a lawyer’s rule; it is not a medical rule. Do not let the jury go into the jury room thinking that it is.

Know the specifics of your case.

It is true that, as a defendant witness, several factors are out of your control. But don’t forget what you do have under your control: Knowledge of obstetrics and gynecology and experience in the field. You know the medical issues involved in the litigation better than anyone else in the courtroom.

Still, do your homework. Make sure that you know the specifics of your case, inside and out. Study the medical record of the case carefully and read all the depositions your lawyer provides for you. Know what the relevant ACOG *Bulletin*, major texts (such as *Williams Obstetrics*), and the literature say about the issues that are involved. Know who the experts are in this area of care and be prepared to quote pertinent articles that they have written. Work to never let yourself be surprised by the facts of the case or the medical information presented by the plaintiff’s side. Treat your testimony as a very important final examination. Do that, and you will be in an excellent position to successfully answer questions and refute incorrect statements.



A plaintiff attorney is out to make you appear incompetent, and his motive is clear: He’ll earn one quarter to one third of any award that he wins for his client

Preempt questions about informed consent. Ask your lawyer to have you explain, during the direct portion of your testimony, about informed consent conversations, how they are usually held, and how they are documented. Tell the jury the difference between a calm consent discussion in the office before a routine medical procedure and a consent discussion in an urgent situation. By the way: The general rule about informed consent is that a physician is obliged to discuss with a patient any significant risk greater than 1%. This is a documented standard.¹

Don’t let incorrect claims go unchallenged. Consider this scenario: A plaintiff attorney states that, given the circumstances of a certain clinical situation, you should have taken a particular action. This is often the case in fetal asphyxia cases, when experts for the plaintiff often testify that they can tell, from looking at the fetal heart rate monitoring strip, the exact moment at which a fetus was in trouble and should have been delivered by C-section. Consider having your lawyer issue an in-court challenge to an expert witness who makes such a claim to perform a blind reading of five fetal monitor strips for which the outcomes are known and to see if his predictions are correct. A plaintiff attorney will never take you up on such a challenge—and that refusal will be noted and appreciated by the jury.

This isn’t your backyard but you can play here

Amid what is often hostile treatment, it can be difficult to remember who you are: A highly trained, hard-working physician who has given most of your professional life to providing superb care. A plaintiff attorney is out to make you appear incompetent, and his motive is clear: He’ll earn one-quarter to one-third of any award that he wins for his client.

You are obviously convinced of the correctness of what you did in the case—or you wouldn’t have gone to court to defend yourself. You know the medicine better than the plaintiff lawyer does and, having been the caregiver, you can discuss all aspects of the case with much greater authority than he ever can. His only advantage? You’re in his backyard and he controls many of the rules.

But if you’re meticulously prepared, if you work with your lawyer and follow her advice, and if you are aware of the plaintiff attorneys’ tricks and techniques that I’ve described, you can neutralize much of the disadvantage you’re under in the legal system and defend your case on a greatly leveled playing field. ☺

Reference

1. Nichols DL, Caldwell JW. Medicolegal complications consequent to unauthorized surgery. In: Nichols DH, DeLancey JOL, eds. *Clinical Problems, Injuries and Complications of Gynecologic and Obstetric Surgery*. 3rd ed. Baltimore, Md: Williams & Wilkins; 1995:445–447.