PRMS®
the psychiatrists' program®

LITIGATION HANDBOOK

A SURVIVAL GUIDE FOR PSYCHIATRISTS

INTRODUCTION

You have just been served with a lawsuit. As a physician who has devoted your life to helping patients, the accusation that your actions – or inactions – have actually brought harm to a patient, cuts to the core. But take a deep breath. This does not mean the end of your career. It does not mean financial ruin. It does not mean the scorn of your colleagues. It does not necessarily even mean that you have done anything wrong. What it does mean is that you have a battle ahead that will require your time, energy, and expertise to properly fight.

As you have already realized, being named in a lawsuit is an extremely stressful experience. One reason for this is that it engenders a sense of loss of control. You have been placed in a situation where you are seemingly powerless to affect the outcome. But this is not true. By becoming actively involved in the defense of your case, you can not only provide tremendous assistance to your defense attorney but you can also significantly reduce your anxiety.

This handbook was developed as a guide to assist you in this endeavor. In each section, we walk you through the various steps in the litigation process and provide you with examples of the various pleadings you are likely to encounter. Also included are a glossary of terms, answers to frequently asked questions, and suggested risk management strategies.

Being named in a claim or lawsuit is never a pleasant experience, but rest assured that we will be with you every step of the way.

THE LITIGATION PROCESS: SUMMONS AND COMPLAINT

The Summons and Complaint is the set of documents that is served on the defendant(s) to initiate a lawsuit. These documents may also be called a "Notice" or "Petition." Until an individual has been properly served with the Summons and Complaint, he or she has not been "sued." There are different means by which one can be served, depending upon the jurisdiction. In some states, service of the Summons without the proper Complaint is proper service. Do not assume that you have not been properly served just because you were not personally handed a Summons and Complaint.

The Summons is a court mandate that informs the defendant that a civil action has been commenced against him or her and requires the defendant to appear in the case and defend. In a malpractice lawsuit the Complaint generally outlines the patient's allegations against the defendant healthcare professional, and may name other defendants. The Complaint will require a formal answer that will be prepared by the named defendant's defense attorney. There are time restraints for answering a Summons or Complaint. The defendant must file an Answer within the time requirements set by law in the jurisdiction where the lawsuit is filed, or an extension for filing the Answer must be requested and granted.

If you receive a Summons and Complaint, the first thing to do is pick up the phone and call PRMS and ask to speak with a claim examiner. Do not email a lengthy explanation of what occurred. Your claim examiner will obtain some initial information and ask you to forward a copy of the Complaint. Do not send it without first speaking to a claim examiner. It is imperative that you notify PRMS immediately after you are served with the Summons and Complaint as they must be responded to within a given period of time (typically 20-30 days) lest a default judgment be entered against you. UNDER NO CIRCUMSTANCES, should you attempt to respond to the Complaint yourself.

As a condition of coverage, policies managed by PRMS require you, the Insured, to notify the insurance company (by contacting PRMS) as soon as possible of any suit or claim against you. You are also required to cooperate with your insurer in the defense of the suit. In that vein, you are prohibited from admitting liability, which you would do if a default judgment were entered against you. PRMS has the right and duty to defend you in a lawsuit, even one that is groundless. If you fail to timely notify us this may be considered a breach of your insurance contract. One of the rights PRMS may have in such a situation is to refuse to pay the judgment against you or help you to challenge the default judgment.

The fallout from a default judgment can be calamitous. You may find that the plaintiff has filed a lien on your property, or seized your bank accounts, or reported the judgment to credit agencies. But none of this needs to happen. As unpleasant as it is to be sued, the easiest and the best thing to do is call PRMS, report the claim to us, and work with us and your attorney to get it resolved.

Once your coverage is confirmed, the claim examiner will assign an attorney to defend you. PRMS' panel attorneys are experienced medical malpractice defense attorneys in private practice with specific expertise defending psychiatrists. One of these attorneys will be selected to represent you at PRMS' expense.

When your attorney contacts you, please make yourself available to talk with him or her privately, without interruptions or distractions. Remember, not only is your conversation with the attorney confidential and privileged, but you are talking about a confidential relationship between yourself and your patient. Protect your attorney-client communications from eavesdroppers while fulfilling your obligation to protect your patient's privacy by discussing his care where you cannot be overheard. Be ready to discuss the patient's care and the incident that is the subject of the suit. If you are the custodian of this patient's records, have the chart copied and send the copy to your attorney. It is imperative that you be completely candid with your defense attorney. He or she cannot provide the best defense for you if there is information that you are withholding or if you alter the facts. While a bad fact pattern may make a case more difficult to defend, it may be impossible to defend if your defense attorney is blind-sided with information during discovery or your malpractice trial.

FREQUENTLY ASKED QUESTIONS

After receiving notice of the lawsuit, I reviewed my medical records and I'm not happy with some of my documentation. What should I do?

There is no such thing as a perfect record and when viewing your care through a "retrospectroscope" it is very easy to find flaws in your documentation. Perhaps your session notes are scant, or you used abbreviations that you understood at the time, but can no longer recall. Perhaps you discover that the medications and doses reflected in the notes do not correlate with the patient's prescription records. In the worst case scenario, you may discover that the patient's chart has been lost, destroyed, or irreparably damaged.

Once you have received notice of a lawsuit, do not make any alterations to your records. This includes attempting to recreate missing records. Defense attorneys understand that there is no such thing as a perfect record, and are prepared to defend a doctor's care

even when faced with less-than-ideal documentation. What they cannot defend is an altered chart. Any indication that your record has in any way been altered will call into question every statement that you've made and will irreparably damage your credibility. Regardless of the intent or rationale, changing, editing, re-writing, or otherwise altering the original record will not only negatively impact the defense of your case, it is also a crime in many states, punishable by a stiff fine and/or potential jail time. In addition, alteration of medical records is a basis for revocation of a medical license.

If this is not discouragement enough, alteration of your medical records may also void your insurance coverage. Advise your attorney of any concerns you have regarding your record and follow the advice you are given. In the meantime, learn from the experience and improve your documentation for your current and future patients.

I see that my patient has not hired an attorney and is instead representing himself. Clearly this suit is completely without merit so can I just ignore it?

Absolutely not. Although a "pro se" case (a case where a plaintiff appears on his own behalf and is not represented by counsel) is often a sign that a plaintiff could not find an attorney who would take the case and that the case may ultimately found to be without merit, the pro se plaintiff will still be allowed to proceed with his or her case at least initially. Bear in mind also, that judges will often allow a great deal of latitude to pro se plaintiffs so as not to appear to deny them access to the legal system. Until the case is dismissed, you should proceed as you would were the case filed by an attorney.

I have a friend who is an attorney. Can I hire her to defend in my lawsuit and have PRMS reimburse me for the attorney's fees?

Under your insurance policy, you are entitled to a defense of the claims against you. PRMS works with an extensive network of attorneys across the country who have proven expertise defending psychiatric malpractice cases. Your claims examiner will assign one of these attorneys in your state to defend you at our expense.

How long will it take to resolve my lawsuit?

The short answer is, "It depends." If the lawsuit is truly deficient on its face, your attorney may successfully move the court to dismiss the case against you in just weeks without any discovery (the process during which disclosure of relevant documents and information possessed by parties to an action are exchanged). However, most cases do involve at least some measure of discovery which, depending upon the number of defendants, the number of experts needed, scheduling and many other factors over which you and your attorney have little or no control, may take anywhere from a few months to a year or more. Once discovery is complete, depending upon the case load of the court, and other factors such as the need for a hearing on pre-trial motions, there

may be an additional delay of several months before a case actually goes to trial. In the event that you and your defense attorney determine that the case should be settled, efforts will be made to do so expediently once discovery is complete.

How much time will this require of me personally?

You will be asked to meet with your attorney multiple times. There will be an initial meeting, when you and your attorney will discuss your background, the patient's care, and the incident that is the subject of the Complaint generally. Later, your attorney will need you to help respond to interrogatories, which are written questions answered under oath. Your deposition testimony will require preparation with your attorney, perhaps in multiple sessions, as well as the day or days of the deposition itself. You may be required to attend mediation or court-mandated settlement conferences. Finally, should your case go to trial, you must be present for jury selection and each day of the court proceeding.

Both your insurer and your attorney are sensitive to the fact that every moment you devote to the defense of your suit is one that could have been spent doing something else. They are also aware that you did not ask to be sued and to give up so much of your time. Your attorney will make an effort to accommodate your schedule, but the reality is that much of what needs to be done has to happen during business hours. If you purchased insurance coverage through PRMS, your policy includes a provision for reimbursement of a portion of the earnings you lose due to time spent defending your case. Ask your PRMS claims examiner for details about this provision. We are here to help you and answer your questions and concerns. Do not hesitate to call (800) 245-3333.

What effect will this suit have on my insurance rates?

If you have just been served with a suit, it is far too early to predict the ultimate outcome with any accuracy. Your underwriter will review the case periodically as it progresses. If you have questions about your rates or the effect of a suit on your future coverage, please call your underwriter at (800) 245-3333.

I'm worried about protecting my assets. What should I do?

While your concerns are certainly reasonable, if you have just been served with a suit chances are you are getting a bit ahead of the process. Your appointed defense counsel and claims examiner will work together throughout the life of the suit to evaluate your potential exposure, and will notify you promptly if they determine that your personal assets may be at risk. If you are advised that your potential exposure exceeds the limits of your insurance policy, you should consider consulting a personal attorney to address protection of your assets.

It's obvious the lawsuit is meritless, rather than having PRMS incur attorney fees, can I just call the other attorney or the court and explain the situation?

While it is understandable to think that a common-sense explanation from you will resolve a misunderstanding, the realities of the justice system frequently run counter to common sense. Moreover, if you act without notifying your insurer, you may jeopardize your coverage altogether. Remember, your policy prohibits you from admitting liability or compromising the insurance company's right to defend the case. An innocent comment in a conversation between you and the plaintiff's attorney or court may have this effect.

Most plaintiffs' attorneys will refuse to speak to you at all, but a crafty plaintiff's attorney may manipulate a conversation with you in such a way that you divulge information that you shouldn't, or unwittingly make admissions that may adversely affect your defense and compromise your insurance coverage. You must remember that as a party to a lawsuit, everything you say can be used against you. Without realizing it, you may identify potential witnesses against you or suggest additional defendants. Of all potential results, the one outcome of a conversation with plaintiff's counsel that is highly unlikely is a spontaneous, voluntary dismissal.

It is equally unwise to contact the court. Although common sense may suggest that a simple phone call to the court to explain your side of the case may cause a judge to dismiss the Complaint, there is no mechanism in court procedure for such a dismissal. Instead, you are likely to end up frustrated but without your desired result. Just as your office staff screens your calls, so does the court staff screen calls to judges. If you call the court you are unlikely to get any further than the judge's law clerk, who may sympathize with you but is not permitted to give you any legal advice. You will probably be advised to contact an attorney and file a written response.

With whom may I discuss my case?

Few events are more stressful than learning that you have been sued. All of a sudden, your professional judgment and capabilities are under attack and your reputation and livelihood are on the line. Given these circumstances, you may feel inclined to discuss your care with a fellow clinician. While this is understandable, it is also unwise. You should only discuss the case with your attorney and your PRMS claims examiner.

Now that you are a party to a lawsuit, you will be required to respond to a number of requests for information during the process of discovery. You can expect to be asked (more than once) for the names, addresses, and phone numbers of anyone with whom you have discussed the case or the underlying treatment. Unless your discussions are protected by a legal privilege, such as the attorney-client privilege, you will also be asked to describe what was said, and the person you were talking to will certainly be interviewed. Consequently, any questions or concerns you might raise with another

clinician regarding your care and treatment of the patient and whether you made the right clinical decisions would be fully discoverable and could be repeated in court. Your defense counsel can further address this issue.

RISK MANAGEMENT TIPS

- Contact your professional liability insurance company representative as soon as you receive a Summons or Complaint. A default judgment can be entered against you if there is not a proper and timely response filed on your behalf by your defense attorney.
- Do not answer the Complaint on your own.
- Do not contact either the plaintiff directly or his/her attorney. Be aware that any information imparted to anyone except your defense attorney and your professional liability insurance company representative can be used against you later and/or may form the basis of a breach of confidentiality suit.
- Confine your discussions about your lawsuit. There is a natural inclination to want to discuss your lawsuit with colleagues, family members and/or friends. Reviewing a course of treatment with a colleague may result in an individual being called as a witness in your trial, or conversely, preclude the defense from calling that individual as a witness. Discussions with anyone other than your attorney and professional liability insurance company representative may be discoverable and subsequently used against you.
- Establish a written policy for responding to a process server who enters the office and what steps to follow if any legal documents are found on the premises or are received by mail, fax, etc. This policy should be reviewed with office staff during orientation and regularly thereafter.

TO PLAINTIFF'S. ATTORNEY: PLEASE CIRCLE TYPE OF ACTION INVOLVED:-
TORT – MOTOR VEHICLE TORT – CONTRACT - EQUITABLE RELIEF - OTHER

COMMONWEALTH. OE MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION

NO. 06-00967

Estate of Ben Berber,
Mr. and Mrs. Berber, Co-Administrators Plaintiff(s)

v.

Dr. Mellott, Defendant(s)

SUMMONS

To the above-named Defendant:

You are hereby summoned and required to serve upon Attorney Franklin J. Rounds, Plaintiff's attorney, whose address is 83 Baltic Avenue Boston, MA 02110 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You are also required to file your answer to the complaint in the office of the Clerk of this court at Dedham either before service upon plaintiff's attorney or within a reasonable time thereafter.

Unless otherwise provided by Rule 13 (a), your answer must state as a counterclaim any claim(s) which you may have against the plaintiff which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim or you will thereafter be barred from making such claim in any other action.

WITNESS, ... *at* ..... *the* .....
day of ..... in the year of our Lord two thousand and .....

Clerk

NOTES:

1. This summons is issued pursuant to Rule 4 of the Massachusetts Rules of Civil Procedure.
2. When more than one defendant is involved, the names of all defendants should appear in the caption. If a separate summons is used for each defendant, each should be addressed to the particular defendant.

COMMONWEALTH OF MASSACHUSETTS **SUPERIOR COURT**
CIVIL ACTION

NORFOLK, ss.

THE ESTATE OF BEN BERBER
Mr. and Mrs. Berber, co-Administrators
Plaintiff)
)
vs.) **No. NOCV2006-00967**
)
DR. MELLOTT,)
Defendant)

COMPLAINT

NOW INTO COURT, through undersigned counsel, comes Plaintiff, The Estate of Ben Berber by and through his co-Administrators, Mr. and Mrs. Berber, which for its Complaint against the Defendant, Dr. Mellott respectfully avers as follows:

The Parties

1. The plaintiff is the Estate of Ben Berber as represented by its co-Administrators, who reside at 24 Ocean Hill Drive, Kingston, Commonwealth of Massachusetts.

2. Defendant, Dr. Mellott, was at all material times a physician licensed to practice medicine in the Commonwealth of Massachusetts, having a usual place of business at 64 Grove Street, Groton, Massachusetts.

Facts

3. In 2001, defendant undertook to provide psychiatric care to decedent, Ben Berber.

4. Defendant negligently, carelessly and with lack of skill failed to properly treat Ben Berber. As a result of defendant's negligence, carelessness and lack of skill, Ben Berber committed suicide. Ben Berber's suicide was the direct and proximate result of defendant's negligence, carelessness and lack of skill.

5. Defendant's negligence, carelessness and lack of skill resulted in conscious pain and suffering and death of Ben Berber.

Causes of Action/

(Each Cause of Action Specifically Incorporates by Reference All of Those Paragraphs Previously Set Forth)

FIRST CAUSE OF ACTION

6. This is an action by the plaintiff, The Estate of Ben Berber, against the defendant, Dr. Mellott, for negligence resulting in personal injuries and this wrongful death cause of action.

SECOND CAUSE OF ACTION

7. This is an action by the plaintiff, The Estate of Ben Berber, against the defendant, Dr. Mellott, for the infliction of conscious pain and suffering.

THIRD CAUSE OF ACTION

8. This is an action by the plaintiff, The Estate of Ben Berber, against the defendant, Dr. Mellott, for the wrongful death of Ben Berber in violation of Mass. Gen. Laws ch. 229 §2.

FOURTH CAUSE OF ACTION

9. This is an action by the plaintiff, The Estate of Ben Berber, against the defendant, Dr. Mellott, for negligent and/or intentional infliction of emotional distress.

FIFTH CAUSE OF ACTION

10. This is an action by the plaintiff, The Estate of Ben Berber, against the defendant, Dr. Berber for breach of contract, in that the defendant specifically or implicitly promised that he would perform psychiatric services requested by Ben Berber in a proper, caring, and professional manner and he failed to do so.

SIXTH CAUSE OF ACTION

11. This is an action by the plaintiff, The Estate of Ben Berber, against the defendant, Dr.

Mellott, for misrepresentation, in that the defendant made specific representations to the Plaintiff that he was competent to render psychiatric assistance and care to Ben Berber and he was not competent to do so.

Demands for Relief

12. The Plaintiff, The Estate of Ben Berber, demands judgment against Dr. Mellott together with interest and costs.

Jury Claim

13. The Plaintiff, The Estate of Ben Berber, claims a trial by jury.

Respectfully submitted,

The plaintiff,

By the attorney,

_____

Franklin J. Rounds

Dated:

AFFIDAVIT OF SERVICE

I hereby certify that the above document is being served within the time required by Superior Court Standing Order No. 1-88 or by leave of the Regional Administrative Justice.

_____

Franklin J. Rounds

THE LITIGATION PROCESS: ANSWER

The Answer is a formal written response by the defendant to the allegations in the Complaint. The defendant serves the Answer on the plaintiff and files it with the Court. In the Answer the defendant denies in part or in whole the plaintiff's allegations, asserts his or her affirmative defenses, and states a request for relief.

RISK MANAGEMENT TIPS

- Do not attempt to file an Answer on your own. Your defense attorney will do this.
- Do not contact either the plaintiff directly or his/her attorney. Be aware that any information imparted to anyone except your defense attorney and professional liability insurance company representative can be used against you later and/or may form the basis of a breach of confidentiality suit.
- Do cooperate with your assigned defense attorney. The defense attorney represents you, not the insurance company, and is legally and ethically bound to represent your best interests.

COMMONWEALTH OF MASSACHUSETTS — SUPERIOR COURT CIVIL ACTION

NORFOLK, ss.

THE ESTATE OF BEN BERBER,
Mr. and Mrs. Berber, Co- Administrators
Plaintiff

vs.

Dr. Mellott,
Defendant

No. NOCV2006-00967

DEFENDANT DR. MELLOTT'S
ANSWER TO PLAINTIFF'S COMPLAINT AND DEMAND FOR JURY TRIAL

The Defendant, Dr. Mellott, answers each of the serially numbered counts and paragraphs of the Plaintiff's Complaint as follows:

The Parties

1. The Defendant lacks sufficient knowledge or information to either admit or deny the allegations contained in Paragraph 1 of the Plaintiff's Complaint, and calls upon the Plaintiff to prove the same.

2. The defendant denies the allegations in Paragraph 2 of the Plaintiff's Complaint in the form alleged, except admits that at all material times he was a physician, licensed to practice medicine in the Commonwealth of Massachusetts.

Facts

3. The Defendant denies the allegations in Paragraph 3 of the Plaintiff's Complaint in the form alleged, except admits that he was Ben Berber's psychiatrist in 2001.

4. Denied.

5. Denied.

Causes of Action

The Defendant repeats and reaffirms his answers to the allegations contained in Paragraphs One through Five of the Plaintiff's Complaint as if fully set forth herein.

FIRST CAUSE OF ACTION

6. No answer is required to the allegations contained in paragraph 6 of Plaintiff's First Cause of Action in Plaintiff's Complaint as it contains an overview of the plaintiff's allegations, which the defendant calls upon plaintiff to prove. However, insofar as this paragraph may contain any allegations of wrongdoing on the part of the defendant, it is expressly denied.

SECOND CAUSE OF ACTION

7. No answer is required to the allegations contained in paragraph 7 of Plaintiff's Second Cause of Action in Plaintiff's Complaint as it contains an overview of the plaintiff's allegations, which the defendant calls upon plaintiff to prove. However, insofar as this paragraph may contain any allegations of wrongdoing on the part of the defendant, it is expressly denied.

THIRD CAUSE OF ACTION

8. No answer is required to the allegations contained in paragraph 8 of Plaintiff's Third Cause of Action in Plaintiff's Complaint as it contains an overview of the plaintiff's allegations, which the defendant calls upon plaintiff to prove. However, insofar as this paragraph may contain any allegations of wrongdoing on the part of the defendant, it is expressly denied.

FOURTH CAUSE OF ACTION

9. No answer is required to the allegations contained in paragraph 9 of Plaintiff's Fourth Cause of Action in Plaintiff's Complaint as it contains an overview of the plaintiff's allegations, which the defendant calls upon plaintiff to prove. However, insofar as this paragraph may contain any allegations of wrongdoing on the part of the defendant, it is expressly denied.

FIFTH CAUSE OF ACTION

10. No answer is required to the allegations contained in paragraph 10 of Plaintiff's Fifth Cause of Action in Plaintiff's Complaint as it contains an overview of the plaintiff's allegations, which the defendant calls upon plaintiff to prove. However, insofar as this paragraph may contain any allegations of wrongdoing on the part of the defendant, it is expressly denied.

SIXTH CAUSE OF ACTION

11. No answer is required to the allegations contained in paragraph 11 of Plaintiff's Sixth Cause of Action in Plaintiff's Complaint as it contains an overview of the plaintiff's allegations, which the defendant calls upon plaintiff to prove. However, insofar as this paragraph may contain any allegations of wrongdoing on the part of the defendant, it is expressly denied.

Demands for Relief

12. Paragraph 12 of the Plaintiff's Complaint is a demand for judgement, which requires no response from the defendant.

Jury Claim

13. Paragraph 13 of the Plaintiff's Complaint is a claim for a trial by jury, which requires no response from the defendant.

FIRST AFFIRMATIVE DEFENSE

The plaintiff's injuries, if any, were caused by actions of a third party for whose conduct the defendant is not responsible.

SECOND AFFIRMATIVE DEFENSE

Any alleged act or omission of the defendant was not the proximate cause of plaintiff's injuries and damages, if any.

THIRD AFFIRMATIVE DEFENSE

The plaintiff's injuries and damages, if any, were caused in whole or in part by Ben Berber's own negligence, which exceeded that of the defendant, any of which is expressly denied. Wherefore, plaintiff may not recover, or in the alternative, plaintiff's negligence requires a proportionate reduction in plaintiff's recovery, if any.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's Second Cause of Action fails to state a claim upon which relief can be granted.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff's Fourth Cause of Action fails to state a claim upon which relief can be granted.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff's Fifth Cause of Action fails to state a claim upon which relief can be granted.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's Sixth Cause of Action fails to state a claim upon which relief can be granted.

EIGHTH AFFIRMATIVE DEFENSE

The defendant states that the injuries and damages alleged, if any, were caused by the intervening and/or superseding acts of third persons for which the defendant is not liable.

NINTH AFFIRMATIVE DEFENSE

The Defendant has not knowingly or intentionally waived any applicable affirmative defenses. The Defendant reserves his right to assert and to rely upon other affirmative defenses as may become available or apparent during discovery proceedings, and to amend his Answer and/or affirmative defenses accordingly.

THE DEFENDANT DEMANDS A TRIAL BY JURY ON ALL ISSUES.

_____

Cecilia F. Adams, Esquire

THE LITIGATION PROCESS: RESERVATION OF RIGHTS

It is not unusual for a claim or lawsuit to include among its allegations both matters that are and are not covered by your professional liability insurance policy. For example, one of the allegations in the complaint might be that you "negligently and/or intentionally inflicted emotional distress" upon the plaintiff. Your policy would cover your negligent acts; however, it would exclude from coverage any harmful acts that are determined to have been intentional. Thus in this example, negligent infliction of emotional distress would be covered but if it were found that you had intentionally inflicted emotional distress upon the plaintiff, that would not be.

At the time the initial claim or lawsuit is made, it may not be possible to determine immediately if all of the allegations asserted are covered under your policy. It may only be after the case is resolved - following a thorough investigation of the claim by the company - that a determination can be made as to whether your actions may be deemed negligent or intentional, and thus whether the claim is covered under the terms of the policy.

Professional liability insurance policies include two types of coverage – defense coverage (which covers the expenses related to defending the action) and indemnity coverage (which covers damages, i.e., judgment or settlement expenses). While a determination is being made, the insurer may have a duty to defend the policyholder because the duty to provide a defense against allegations is broader than the insurer's duty to indemnify (i.e., pay damages). This is true because an insurer is obligated to provide a defense for the policyholder if any of the allegations in the case could be covered, although it would not be required to pay damages for allegations that are not covered under the policy.

If an insurer provides a defense to a policyholder for an allegation that ultimately is found to not be covered under the terms of the policy, the insurer may later be deemed not to have the right to deny coverage for the judgment related to this finding. To avoid this situation, a policyholder will routinely be sent a "Reservation of Rights" letter. The "Reservation of Rights" letter informs the policyholder that the insurer is handling the claim but "reserves the right" not to pay for certain losses that are not covered under the policy. The "Reservation of Rights" letter does not change the policy but, rather, gives notice to the policyholder about the parts of the policy and of the claim where there are questions about coverage.

Frequently, when policyholders receive a "Reservation of Rights" letter they think it means that their claim or lawsuit is not covered. It can be distressing to receive such a letter on the heels of being sued at the time the policyholder is looking to his or her insurer for help. It is important to understand that the letter simply states that the insurer is going

forward with managing the claim but preserves its rights under the policy regarding uncovered losses. Policyholders should talk to their claims representative and to their attorneys should they have any questions or concerns regarding the letter.

THE LITIGATION PROCESS: SELECTING EXPERTS

To assist juries in understanding the requisite standard of care, whether the defendant physician met that standard of care, and if not, whether the defendant physician's actions or inactions caused a plaintiff's damages, expert witnesses are retained by each side. If your attorney is not able to find an expert who is supportive of your care, he or she will be unable to successfully defend your care.

In order to ensure that those testifying as experts are appropriately qualified, each state will have its own specific requirements as to who mzay testify as an expert witness. Generally speaking, however, an expert in a medical malpractice case will be a licensed physician with the same specialty as the defendant physician, who is actively engaged in the practice of medicine. The trial court judge will make the ultimate determination as to whether a witness is qualified to testify as an expert. The expert's opinion must be based on a reasonable medical certainty; there must be a sound basis for the opinion(s). PRMS and our panel counsel have decades of experience working with numerous well-qualified experts who may be contacted to assist with the defense of your case. You may also suggest experts to your defense attorney.

FREQUENTLY ASKED QUESTIONS

I received a copy of a letter sent by my attorney to a potential expert witness, and I was surprised to find that my attorney did not provide much detail and I'm concerned that he will not have a clear understanding of what occurred. Can I call the expert and explain what happened?

Your anxiety is understandable. After all, the expert witness is a critical element of your defense and you want him to have an understanding of all the details of your case before he renders an opinion. Yet, the letter you received does not appear to convey any detail at all. Rest assured, your attorney has provided the potential expert with all the information needed to evaluate the case. Depending upon rules of discovery and evidence in your jurisdiction, your attorney's communications with the expert – particularly if the expert is not ultimately retained in your defense – may be discoverable by the plaintiff. Thus, your attorney made a conscious decision not to communicate the details of the case in writing.

I received a report of the expert witness's findings and I completely disagree with the expert's conclusions. Can I call the expert and discuss the findings?

In a word, no. Your discussions with your attorney are protected by an evidentiary privilege, and your attorney's communications with consulting experts may be similarly privileged. However, as a party to the litigation, your direct statements to others, including expert witnesses, are subject to discovery. While your concerns about the expert's findings should be raised immediately, the appropriate course of action is to call your attorney, who will be happy to discuss the issues with you and follow up with the expert as necessary.

THE LITIGATION PROCESS: DISCOVERY

Discovery is the pre-trial process by which the plaintiff and defendant obtain facts and information about the case from each other and conduct an investigation in order to fully ascertain the facts and to further develop the legal theories involved in the case. Interrogatories are one of the tools of discovery. Interrogatories are written questions from one party to another party. Answers to interrogatories are answered and signed by the party to whom they are directed and are based on all the information that is known about the questions at that point in time. The parties' attorneys may assist in preparing the answers to interrogatories and can object to improper interrogatories.

It is important for the answers be accurate and complete. The court can impose sanctions if a party purposely withholds or conceals information, or gives misleading and incomplete answers. Interrogatories must be answered and served within certain time periods.

RISK MANAGEMENT TIPS

- Do provide specific information about the treatment of the patient and forward copies of the legal documentation and treatment records requested by your defense attorney. Providing your professional liability insurance company representative and defense attorney with requested documentation and other information about the patient's treatment will assist in the development of your defense by allowing experienced individuals to analyze the information and obtain expert opinions. Your insurance policy usually has a provision that requires your cooperation in defending a lawsuit.

- Do be honest and candid with your defense attorney and claims representative. Attempts to conceal information, even if you think it is unfavorable to your case, seldom remain unexposed. Moreover, dishonesty can make a case indefensible. Honesty and candidness allow your defense attorney to review the facts in their entirety and prepare a defense.

COMMONWEALTH OF MASSACHUSETTS — SUPERIOR COURT — CIVIL ACTION

NORFOLK, ss.

THE ESTATE OF BEN BERBER,
Mr. and Mrs. Berber, Co- Administrators
Plaintiff

vs.

Dr. Mellott,
Defendant

No. NOCV2006-00967

DEFENDANT DR. MELLOTT'S ANSWERS TO INTERROGATORIES PROPOUNDED BY THE ESTATE OF BEN BERBER

Interrogatory No. 1
Please identify yourself fully by stating your full name, date of birth, residential and business address and your occupation.

Answer No. 1
Dr. Mellott; of legal age; 49 Robstone Lane, Newton, Massachusetts; Medical Associates, 64 Grove Street, Groton, Massachusetts; I am a physician.

Interrogatory No. 2
Please provide a full description of your professional credentials, by stating in chronological order the dates and places where you received your undergraduate education, your undergraduate degree, your medical school education, your medical school degree, your internships, your general residencies, your specialty residencies, indicating the branches of medicine covered by specialty residencies, all medical specialty boards and colleges which have certified you, indicating the specialties of such certifications, all state licensures and your complete employment history commencing with your graduation from medical school.

Answer No. 2
Undergraduate: Brown University, 1976 B.S., Biology, summa cum laude
Medical School: University of Massachusetts, 1982
Internship and residency: Massachusetts General Hospital, 1982-1985
Fellowship: Massachusetts General Hospital, psychiatry, 1985-1987
Board certified in Neurology and Psychiatry 1986
Massachusetts license, No. 14339

Employment: McLean Hospital; attending 1987-1998
Massachusetts Mental Health Clinic 1989-1996
Private practice 1996-present

Teaching: Professor of Medicine, Massachusetts General Hospital 1985-present

THE LITIGATION PROCESS: DEPOSITIONS

Depositions are another component of the discovery process. A deposition is a formal question and answer session in which one party's attorney asks questions of the other party - or witnesses - under oath. Depositions are usually conducted in an attorney's office with a stenographer or court reporter recording the questions and answers. Depositions may also be videotaped. The purpose of a deposition is two-fold: to discover additional information, and to preserve the testimony for use at trial.

The party who is being deposed (deponent) will be questioned by the attorney for the opposing party in the lawsuit. The deponent will be represented at the deposition by his or her attorney who may object to inappropriate lines of questioning and to questions about issues deemed irrelevant to the case.

FREQUENTLY ASKED QUESTION

I'm being asked to give up an entire day to sit in a deposition. Can I bill the other side for my time?

Unfortunately, no. Being a defendant in a lawsuit is time-consuming, and it will be very difficult to get through the entire process without having to give up time during work hours. This is an inconvenience, to be sure, and it certainly adds insult to injury when you believe the case against you has no merit. However, as distasteful and unfair as this may be, it is inappropriate to bill the Plaintiff or his attorney for your time.

RISK MANAGEMENT TIPS

- Do prepare for your deposition testimony. It is essential to prepare and review your testimony with your defense attorney. The plaintiff's attorney will be reviewing your transcribed testimony for any inconsistency in testimony, so preparation and honesty is essential for a successful deposition.
- Knowledge of the treatment records is the key to a successful deposition. If you are prepared and familiar with the records your confidence and honesty will come across in the deposition and transcript.
- Make certain you understand the question before answering. Do not be afraid to ask that the question be repeated or restated.

- Think before answering a question. If you are unsure of an answer to a question, you may respond that you do not know or do not recall. Never guess at questions or try to rely on your memory when records that contain facts are available for review. The transcript of the deposition does not reflect the length of time it takes to answer a question. Take your time and answer only the question asked.

- Keep answers short and to the point. Try to answer questions with a simple "yes" or "no." Explanations tend to give the plaintiff's attorney more information than needed and may prompt more questions. Of course, if an explanation is necessary, by all means, state it.

- Do not allow opposing counsel to restate your answer. Stand by your initial response unless you are absolutely certain that you made an inadvertent misstatement that needs to be corrected. Attorneys will sometimes use the tactic of restating your answer with a slight change that is beneficial to their case.

- Do accept the fact that a deposition is a fact-finding process and will probably not result in the plaintiff's attorney dismissing your case. Many individuals going into a deposition believe that if they are allowed to explain their actions, the plaintiff's attorney will "see the light," apologize for having been a nuisance, and ask for dismissal of the case but it is very unlikely this will happen. Medical malpractice cases are expensive cases to bring to trial. By the time the deposition is conducted, the plaintiff's attorney has most likely had the strengths and weaknesses of the case evaluated by an expert and has formed the opinion that there is validity to his or her client's claims.

- Do not get emotional or defensive. In addition to gathering factual information, the opposing attorney is assessing your presentation and credibility as a witness. Be courteous and professional and keep your responses calm and professional. If necessary, ask for a break so that you may collect yourself or confer with your attorney.

- Assist your attorney in the formulation of questions for the experts and other witnesses.

- Attend as many depositions as possible – particularly those of the plaintiff and the plaintiff's expert witnesses. It is not uncommon for experts who are brutally critical on paper to back down when the subject of their criticism is sitting across the table.

DEFENDANT EXPERT DR. JACOBS' RESPONSES TO QUESTIONS ASKED BY PLAINTIFFS AT HIS DEPOSITION

Q. Wouldn't you agree that the more information a psychiatrist has about a patient, the better it is for treatment of that patient?

A. Yes.

Q. Pertinent information can be gained from pediatricians, correct?

A. Yes.

Q. Did Dr. Mellott have any communications with Dr. Coss about Ben Berber?

A. Not that I saw in his record.

Q. Would you agree that significant information can be gained from an adolescent patient's teachers?

A. It depends.

Q. What does it depend on?

A. It depends on the adolescent's diagnosis. It also depends on whether the psychiatrist has been able to get sufficient information from other sources. Further it depends on the role of the psychiatrist and what his or her relationship is with the patient.

Q. Did Dr. Mellott have any communications with Ben's teachers?

A. Not that I saw.

Q. Wasn't that a deviation from the standard of care?

A. Not in my opinion because Dr. Mellott was managing Ben's medications. Ben was seeing a psychotherapist for therapy. Ben had noted improvement at his last visit. I do not feel that Dr. Mellott had any reason to call Ben's teachers.

Q. Pertinent information could be gained from the psychotherapist, couldn't it?

A. Yes, probably.

Q. Dr. Mellott never had any conversations with Ben's therapist, did he?

A. Not that I could tell from the record although he did write the name of the therapist in his record.

Q. What texts or treatises do you consider to be authoritative in psychiatry in general?

A. None in particular.

Q. Do you consider any text to be authoritative in the field of suicide assessment?

A. None in particular.

Q. Did Ben Berber's history have any clinical significance for you in forming your opinions?

A. Yes.

Q. In what way?

A. When Dr. Mellott inquired about substance abuse and other risky behaviors, Ben and his mother denied any risky behaviors. Substance abuse is a major comorbid risk factor for suicide in adolescent males. Ben was compliant with his weekly psychotherapy. He had been on an anti-depressant for several weeks and reported improvement at his last visit with Dr. Mellott. There was no evidence of any suicidal ideation or suicidal risk.

THE LITIGATION PROCESS: SETTLE OR DEFEND?

While everyone envisions a big courtroom drama when they hear the word "lawsuit," in fact, vast majority of cases are either dismissed or settled out of court. Once the discovery process is concluded (or sometimes prior to this time), a decision will be made whether to defend the case or to settle the matter before trial. Many considerations will go into this decision: whether the facts are favorable to the defendant, whether there are experts who will support the defendant's actions, the likelihood of winning at trial, etc. While your defense attorney and PRMS will make recommendations, rest assured that under the terms of your policy, you will have the ultimate decision of whether to settle or defend your case.

FREQUENTLY ASKED QUESTION

I'm concerned about the National Practitioner Data Bank. What has to be reported, and what is the effect of such a report?

Congress established the National Practitioner Data Bank as a flagging system, a central location for information affecting a healthcare practitioner's qualifications to practice medicine. State licensing boards, professional societies, and hospitals must report adverse actions affecting the licensure, membership, and clinical privileges of a healthcare practitioner. Professional Liability Insurance carriers (such as PRMS) are required to report any medical malpractice insurance payments made on your behalf to the Data Bank, regardless of the amount. This report is submitted online and consists of demographic information about you and the patient, information about the alleged malpractice and injury, and payment information. After PRMS submits the report, you will receive a copy and be given an opportunity to add your own comments.

Of the entities permitted to access Data Bank records, hospitals are the only entities that are required to query the database as a part of the process of granting, expanding, or reviewing clinical privileges. Your state licensing board and professional societies may but are not required to access the Data Bank. The report is intended to put these entities on notice that there has been a malpractice payment made on behalf of a particular practitioner, so that the entities may inquire further as appropriate.

This information is not available to the general public. The information in the Data Bank is confidential and only eligible entities, as defined by Federal regulation, are entitled to access it. Data Bank records are available to your State licensing board; hospitals and other health care entities; professional societies; and certain Federal agencies. Also, a pro se plaintiff or a plaintiff's attorney may query the Data Bank under certain limited

circumstances. Of course, practitioners are entitled to self-query at any time. However, the general public - including your colleagues and patients - may not access Data Bank reports.

THE LITIGATION PROCESS: MOTIONS

A motion is a request to the court for an order or ruling on some aspect of the case. Motions help to narrow or reduce the number of issues under consideration and to preserve a record for appeal. For example, a motion in limine is a very common pre-trial motion in malpractice cases. This type of motion is a request to the court to prohibit opposing counsel from referring to or offering certain evidence at trial which the requesting party claims is prejudicial, irrelevant, inadmissible, etc. If the court does not grant the motion, the requesting party may allege in an appeal that improper evidence was allowed to be presented to the jury at trial.

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION

THE ESTATE OF BEN BERBER,
Mr. and Mrs. Berber, Co- Administrators
Plaintiff

vs.

Dr. Mellott,
Defendant

No. NOCV2006-00967

PLAINTIFFS' MOTION TO PRECLUDE PRIOR SETTLEMENT

Now come the Plaintiffs, Mr. and Mrs. Berber as Co-Administrators of the Estate of Ben Berber, and hereby move that the Defendant Dr. Mellott be precluded from introducing the fact of, and the amount of, the settlement the plaintiffs reached with the co-defendants prior to trial. As reasons therefor, the Plaintiff states that, as a general rule, evidence of a prior settlement is not admissible to prove liability or the amount of a claim. *Moran v. Casco, Inc.*, 422 Mass. 601, 604 (1996). The exceptions to this general rule are very limited and should only be allowed if the benefit outweighs the inherent prejudice to the plaintiff. In the instant case, the introduction of the evidence creates the risk that the jury will perceive the settlement by the co-defendants as an admission of their liability and, therefore, as supporting Dr. Mellott's defense that he had acted properly.

WHEREFORE, the Plaintiffs request this Court to preclude any evidence of the fact of, and amount of, the prior settlement.

_____
FRANKLIN J. ROUNDS
Counsel for the Plaintiffs

COMMONWEALTH OF MASSACHUSETTS
NORFOLK, ss.

SUPERIOR COURT

CIVIL ACTION

THE ESTATE OF BEN BERBER, Mr. and Mrs. Berber, Co- Administrators Plaintiff	)	
vs.	)	No. NOCV2006-00967
Dr. Mellott, Defendant	)	

MOTION OF THE DEFENDANT DR. MELLOTT RELATING TO VARIOUS MATTERS

The Defendant, Dr. Mellott, respectfully requests this Honorable Court to limit and to enjoin the Plaintiffs, their attorney(s), and witnesses from making reference to the following matters at trial:

1. Any and all references to liability insurance that may provide professional liability coverage for Dr. Mellott. Such information is not relevant to the jury's determination of factual issues regarding the alleged liability of Dr. Mellott. Moreover, admitting such statements would unfairly prejudice Dr. Mellott, as these statements are intended solely to influence the jury regarding its consideration of any award of damages and such influence is improper. See, e.g., Goldstein v. Gontarz, 364 Mass. 800, 808 (1974).

2. Any and all references to other medical malpractice claims, cases, disciplinary actions or action of the Board of Registration in Medicine, involving allegations of malpractice. Such evidence is not relevant in this medical malpractice action. All that is relevant is whether his care and treatment of Ben Berber was in accordance with good medical practice and whether his care and treatment was

the proximate cause of Ben Berber's death. Circumstantial evidence as to what the plaintiff believes constitutes "similar circumstances" to this case should be viewed with disfavor, since it raises collateral issues that distract from the central questions in this case. Any indication to the jury of any previous, unrelated litigation is improper and highly prejudicial to this Defendant. As a general matter, evidence of prior conduct is not admissible to prove that the defendant acted in conformity with that conduct on a particular occasion.

3. Any and all references by Plaintiffs' counsel, whether in the opening statement, during trial, or in closing argument, that imply or state directly or indirectly that the jury should "send a message" to the medical profession, and/or that the jury should "punish" or "teach a lesson to," the Defendant, and that they do so by reaching a verdict in favor of the Plaintiffs, or statements of a similar ilk.

4. Any and all reference to the fact that a medical malpractice tribunal was convened under M.G.L .c. 231, §60B, and from stating the determination of the Tribunal.

Wherefore, the Defendant, Dr. Mellott respectfully requests that this Honorable Court grant this Motion in Limine and preclude the Plaintiffs from arguing, introducing evidence, or making any references before the jury consistent with the above.

_____
CECILIA F. ADAMS
Attorney for Defendant
Dr. Mellott

DATED: _____

THE LITIGATION PROCESS: JURY SELECTION – VOIR DIRE EXAMINATION

Voir dire is the process by which a jury is chosen. Juries may range in size from six to twelve people depending upon the jurisdiction. The process begins with a number of people equal to the size of the jury being called to the jury box. Potential jurors are then asked questions about their prior knowledge of the case and whether they have any other experiences, opinions, or connections that might prejudice them against one side or the other.

During voir dire, either attorney may ask that a prospective juror be dismissed if he or she reveals information that might indicate a bias. For example, if someone were a relative of the plaintiff or defendant. This type of dismissal is a dismissal for cause. Each side has an unlimited number of challenges for cause and the judge also may determine, on his or her own motion that a prospective juror should be struck for cause.

In addition, each side will be given a specific number of peremptory challenges that allow them to dismiss a prospective juror without stating a cause. This is typically done because the attorney believes that the juror – for whatever reason - may not be likely to find in his client's favor. The laws of the jurisdiction determine the number of peremptory challenges available to each.

Trial Voir Dire

1. Has any potential juror, family members or friends ever brought any suit or claim against any medical healthcare provider or, indeed, against anyone?

2. Has any potential juror, family members or friends had suit or claim brought against them?

3. Is any potential juror, family member or friend a member of the healthcare profession in any way (doctor, nurse, technician, etc.)?

4. Do the jurors believe that, simply because we are in a courtroom, the doctor/therapist/hospital must have done something wrong or do they realize that, anyone can file a suit and that there is no pre-screening process? (NOTE: Pre-suit filing requirements/procedures vary by state.)

5. Do the potential jurors understand that the other side must prove the doctor did something wrong and, separately, that such action caused injury?

6. Can each person promise to keep an open mind during the entire trial because the other side goes first and, except for defense opening statement, the jurors might not hear defense witnesses for days or weeks?

7. Does everyone understand that simply because the result was not desired does not automatically mean that someone did something wrong?

8. (If a corporation is involved, the jury would be asked to commit that the corporation would be treated the same as a live person.)

9. Will each juror be able to commit, as far as humanly possible, to place sympathy aside and decide the case on the facts even though they may grieve for the patient, family members, etc?

10. Do the jurors understand that when attorneys object, it is not to keep information from them but is merely asking the judge to make a legal determination that what is being done is in accordance with the law?

11. Are there any jurors who believe that medicine has all the answers and that a diagnosis and course of treatment should always be made during the first meeting with the patient? Can they accept that care is a continuing process?

12. Can the jurors understand, if the evidence is presented to them, that different doctors can look at the same situation and reasonably come to different conclusions?

13. Can the jurors promise to judge the doctor in accordance with the issues known at the time of interaction with the patient and, while doing that, set aside what ultimately occurred, if there was a result that was not desired?

14. Can the jurors commit to doing no independent research during the course of the trial whether it be on the internet, the family medical guide, discussions with others, etc.?

You are probably familiar with the concept of being tried by “a jury of your peers” but you should be prepared for the fact that the jury will not likely be your peers but rather a cross-section of your community who has little or no medical knowledge. However you may rest assured that your attorney will do his or her best to ensure that the jury picked will be conscientious and will do their best to understand the testimony and render a fair decision.

THE LITIGATION PROCESS: OPENING STATEMENTS

Once the jury has been chosen, the trial itself will begin with opening statements by each party's attorney. This is the attorney's first opportunity to present the jury with a description of the case from the perspective of his or her client. The attorney outlines the evidence that she or he expects to present on behalf of the client. The opening statements give the attorney an opportunity to provide the jury with frame of reference for the evidence that will be presented in the case. Parties should not be surprised by the fact that each attorney will be allowed to make very strong statements in his client's favor and against the other party.

RISK MANAGEMENT TIPS

- **Your presence at trial is critical**. Depending upon the circumstance of the particular case, the trial may last from a few days to several weeks. It is important for you to attend the entire trial. Your presence shows the jury you are more concerned about the case than attending to business outside the courtroom. This is generally interpreted positively by a jury.

- **Remember also that the jury will be watching you** the entire time you are in the courtroom and not just while you are on the witness stand. It is imperative that you remain attentive and maintain a professional demeanor.

- **When you are called to testify**, keep in mind the tips you learned for your deposition testimony.

- **While on the witness stand**, engage the jury by directing your answers to them rather than focusing exclusively on the questioning attorney.

- **An attentive defendant can be of great assistance** to his or her attorney listening for discrepancies and erroneous statements and suggesting questions for experts.

THE LITIGATION PROCESS: THE BURDEN OF PROOF

Following opening statements, the plaintiff will go about proving its case. In order to prevail, there are four elements it must prove: duty, breach, damages and causation. Just as with criminal trials, the defendant is presumed innocent until proven otherwise but in a civil case it is not guilt that is determined but liability. The burden of proof is on the plaintiff. However, whereas in a criminal trial the burden of proof is "beyond a reasonable doubt," in a civil trial it is by "a preponderance of the evidence." In other words, the plaintiff must convince the jury that it's version of the facts are more probable than not.

Duty

The first thing that must be established is that you had a duty of care to the patient in question. This is often established by proving the existence of a physician-patient relationship. For the most part this is relatively straight-forward but there may be situations where it is less clear. For example, the patient who was under your care but stopped coming to appointments and was not given notice of termination or the patient who was only seen by the nurse practitioner you supervised or the patient whom the ER physician called to discuss one evening when you were on call.

Breach

Once you are determined to have a duty of care to a patient, the presumption is that you will treat the patient within the standard of care. Thus element number two, is establishing that you have breached that duty by failing to meet the standard of care in your treatment of the patient. The standard of care is a legal principle but it is defined by the medical community. Although each state may define the standard of care in a slightly different way, generally speaking, the definition is the average degree of skill, care, and diligence exercised by similar physicians practicing in light of the present state of medicine.

In order to determine the standard of care in a particular situation, each side will rely upon the expert witnesses. The expert will testify not only as to what was the standard of care at the time of treatment but also whether the defendant physician deviated from that standard of care. Depending on the issues in question, several experts may be needed. Each side's expert(s) will base his or her opinions on personal training and experience and may also cite other evidence such as: state and federal statutes and regulations, learned treatises, journal articles, a facility's own policies and procedures, medical board statements, etc.

Damages

Damages are the third element that must be proved. Even if it is determined that you breached the standard of care, unless the patient was actually damaged by your action or inaction, the plaintiff will not prevail. Damages may be awarded for physical, emotional, or monetary injury. In some jurisdictions a plaintiff may not claim emotional injury without also sustaining a physical injury. There are three types of damages that may be awarded by a jury:

- Economic damages such as for previous and future medical care and expenses as well as past and future lost wages
- Non-economic damages such as for patient's pain and suffering, permanent impairment, wrongful death, disfigurement, and loss of consortium
- Punitive damages which are awarded to punish the defendant for willfully committing a wrongful act which harmed the patient. Punitive damages are typically not covered by malpractice insurance.

Causation

The final and often most difficult element to prove is that of causation. Here again we must rely upon the testimony of experts. It is not sufficient to establish that the defendant physician deviated from the standard of care. It must also be shown that this deviation was the proximate cause of the patient's damages.

THE LITIGATION PROCESS: THE CALLING OF WITNESSES

Beginning with the plaintiff, each side will have the opportunity to call witnesses to support its version of the case. Direct examination, takes place when an attorney is examining a witness he or she has called who is aligned with his or her client or other independent witnesses the attorney calls to testify.

Once the direct examination of a witness is concluded, opposing counsel will then have the opportunity to question that witness. During this cross-examination, the attorney will attempt to elicit statements from the witness that are more favorable to his client or to otherwise discredit the testifying witness. Here the questioning attorney is allowed to lead the witness and to exert more control over the testimony by suggesting the "correct" answer in the way the question is asked, leading the witness' testimony in a way not permissible on direct examination, and requiring the witness to be very specific in his or her answers.

Once cross-examination of a witness is concluded, opposing counsel will be allowed to "re-direct" the witness for the purpose of allowing that witness to clarify any unfavorable remarks made during cross-examination or to rehabilitate the witness if his or her credibility has been brought into question.

After the Plaintiff has called all of its witnesses, the Defendant will present its case following the same process.

RISK MANAGEMENT TIPS

- Prepare for your testimony with your defense attorney. An inaccurate or unfortunate statement may do irreparable harm to a case.
- Most physicians are natural teachers (in fact, the root of the word "doctor" comes from the Latin word "docere" meaning "to teach") and often want to offer juries more information than is necessary. Listen closely to the question being asked of you and answer only that question. If your attorney wants you to supply more information, he or she will ask additional questions to elicit the necessary testimony.
- The impression a witness makes will have an impact on the jury. Your appearance, mannerisms, patterns of speech, etc. may influence the jury and you should review these issues when preparing to testify.

THE LITIGATION PROCESS: EXHIBITS

At trial, exhibits are documents, charts, reports, illustrations, etc., which are entered into evidence in an effort to persuade or convince the jury. Exhibits are important to a party's case because tangible, physical evidence may illustrate a point more vividly than oral testimony. An item becomes an exhibit and a part of the record after it is identified by a witness and there is testimony establishing its relevance to the issues in the case.

RISK MANAGEMENT TIPS

- Be aware that, in any malpractice lawsuit, some portion or all of the patient treatment records will probably be used as an exhibit. Patient treatment records that are introduced as exhibits are available for the jury to review during its deliberations.

- Prior to making a claim or filing a lawsuit, the plaintiff's attorney will have obtained a copy of your record. Many attorneys subsequently subpoena the clinicians' records simply to identify alterations to records the patient previously obtained. If any alterations are made, they will destroy your credibility and/or possibly render your case indefensible.

- Good record keeping is a great defense in a lawsuit. In many lawsuits it will be your word against the patient's or the patient's family. In these situations, clear and concise treatment records are critical. Remember, if you review your records and find them lacking, do not, under any circumstance alter the records in any way. Poor records will simply be classified as poor records, but altered records will completely destroy your credibility.

- Sometimes at trial, portions of the record are reproduced on large display boards or projected via an overhead projector, and magnified several times their actual size, to illustrate a point. If you are ever tempted to alter a treatment record, even when you think there is legitimate information that should be added, imagine the impact on a jury when the alteration is projected onto a six-foot screen in the courtroom.

THE LITIGATION PROCESS: CLOSING STATEMENTS

closing statements The closing statement is a summation of the evidence that has been presented and the relationship of the evidence to the issues in the case. The attorneys for each side will also summarize the evidence presented by the opposing side and how they think the other side has failed to establish its case.Contrary to the view created by movies and television, trials are not won by dramatic closing arguments. Thorough pre-trial preparation and the effective presentation of witnesses and exhibits at trial win a lawsuit.

RISK MANAGEMENT TIPS

- Effective risk management techniques, such as proper documentation, good communications with patients and colleagues, and meeting the standard of care, provide the basis for evidence that will support a defense in the event of a professional malpractice lawsuit.

THE LITIGATION PROCESS: JURY INSTRUCTIONS

After closing arguments the judge will give instructions to the jury about the law and the procedures they should follow during deliberations. These instructions or “charge to the jury” are guidelines for the jury in applying the substantive law to the contentions of the parties and the evidence that was presented. Attorneys for each side may submit requests for charges to the jury. The judge then evaluates these requests and decides whether to incorporate any of them into the final instructions to the jury.

COMMONWEALTH OF MASSACHUSETTS NORFOLK, SS.	SUPERIOR COURT CIVIL ACTION
THE ESTATE OF BEN BERBER, Mr. and Mrs. Berber, Co- Administrators Plaintiff vs. Dr. Mellott, Defendant	))))) No. NOCV2006-00967)))

DEFENDANT'S REQUEST FOR JURY INSTRUCTIONS

A. The burden of proof rests with Plaintiffs. They must prove their case by a fair preponderance of the evidence (that is the greater weight of the evidence) and, further, they must prove each and every essential element thereof by the same fair preponderance of the evidence.

B. The Defendant is not required to prove anything. It is Plaintiffs who have the burden of proof and such a burden always remains with them and, unless they carry that burden of proof, they are not entitled to a verdict against the Defendant.

C. The Defendant is under no obligation to disprove that which Plaintiffs assert or claim. Rather, Plaintiffs must affirmatively prove that which they have asserted or claimed. Before a verdict can be given for Plaintiffs against the Defendant, Plaintiffs must show by a fair preponderance of the evidence that the Defendant had a duty to act or refrain from acting in a certain way, that he failed to act in accordance with that duty, and Ben Berber died as a proximate result of the breach of the duty.

D. Plaintiffs are not entitled to recover merely because Ben Berber died.

E. The mere fact that Ben Berber died does not justify an inference that the Defendant was negligent or that any such negligence proximately caused his death.

F. Under Massachusetts law, a doctor does not guaranty either successful treatment or a correct diagnosis.

G. The fact that a person has died, in and of itself, is not evidence that a doctor was negligent. A doctor does not have a duty to cure but rather is only obligated to exercise that degree of skill and care which was possessed and exercised by a reasonably competent doctor in his specialty at the time of care.

H. The law requires that a doctor make professional decisions after consideration of a patient, but when the decision depends upon an exercise of judgment, the law only requires that the judgment be made in accordance with accepted standards of physician practice at the time alleged.

I. Under the law in the State of Massachusetts, the Defendant was only obligated to exercise that degree of skill and care which was possessed and exercised by a reasonably competent doctor in his specialty at the time of care.

J. Unless you find that the Defendant's conduct was inconsistent with his duty to exercise that degree of skill and care possessed and exercised by a reasonably competent doctor in his specialty when caring for the patient, then your verdict must be for the Defendant.

K. In determining whether the Defendant fulfilled his duties imposed by law, you are not permitted to set up an arbitrary standard of your own. The standard is set by the learning, skill and care ordinarily possessed and practiced by others of the same profession in good standing at the time in question. Id. The focus is whether the care and treatment was executed in conformity with the recognized standard of care, the primary concern being whether the care was given in a reasonable manner in accordance with the standard of care.

L. If the Defendant brought to Ben Berber that degree of care, skill and knowledge that was possessed by the reasonably competent doctor in his specialty when caring for him, under like or similar circumstances, then the Defendant is not liable to Plaintiffs for any damages.

M. The law does not require of the Defendant absolute accuracy either in his practice or in his judgment. It does not hold him to the standard of infallibility, nor does it require of him the utmost degree of skill and learning known only to a few in his profession, but only to that degree of knowledge and skill commonly possessed by members of his profession in his specialty similarly situated and in such a situation as that shown by the evidence.

N. The test of the liability of a doctor for malpractice is not whether the care of the patient was the Doctor's best judgment or whether that judgment was mistaken. But, rather, the test is whether that care met the legal standard of care as I have so defined it for you.

O. Where according to accepted practice, the care involved is a matter to be subjected to the judgment of the doctor, a doctor must be allowed the exercise of that judgment, and he cannot be held liable if in exercising that judgment within the standard of care, he has selected care that did not produce the desired result.

P. As long as a doctor exercised the applicable degree of care, he may choose between differing, but accepted options of care within the standard of care and not be held liable.

Q. When a doctor exercises the same degree of skill and diligence which is commonly possessed by other reasonably competent doctors in good standing engaged in the same type of practice, he is not negligent in choosing options that later proves to be unsuccessful so long as the options chosen were appropriate within the standard of care based on the information then available to him.

R. In determining whether the Defendant was negligent in his care of Ben Berber, his judgment must be considered in the light of all the facts and circumstances with which he was confronted at the time. A doctor is not to be judged by after acquired knowledge or by the results of his care but the applicable test is whether, under all the facts and circumstances then confronting the doctor, the option chosen was that which a reasonably competent doctor in his specialty would have selected at the time and under the conditions then existing. The test is not what hindsight may reveal should have been done in light of after occurring conditions.

S. Plaintiffs claim that as a direct and proximate result of the negligence in treating Ben Berber, he died. You must decide whether the death was indeed directly and proximately caused by negligent conduct of the Defendant. In other words, negligence alone is not enough for recovery of money damages. To recover, the negligence must have caused the injuries claimed. This is proximate cause. The words "proximate cause" mean a cause in which a natural, unbroken, and continuous sequence produced the injury or injuries of which complaint is made. The fact that one sustains an injury does not entitle that person to recover. Plaintiffs must prove by a fair preponderance of the evidence that there is a causal connection between the Defendant's conduct and the damages suffered.

T. Evidence as to whether a doctor has used the proper skill and diligence in caring for a patient is an element that must be supplied by expert testimony.

U. Expert testimony, if it is to have any evidentiary value, must state with reasonable medical certainty that a given state of affairs is a result of a given cause.

V. Expert testimony is required not only to show the requisite standard of care to be followed in care of a patient, but also to demonstrate that there was a deviation from the standard of care and that such deviation caused injury.

W. An expert who testified as to a theory of causation must speak in terms of probability. Expert testimony, if it is to have any evidentiary value, must state with reasonable medical certainty that the death of Ben Berber was the result of the Defendant's alleged

negligent actions. The expert must report that the result in question "most probably" came from the cause alleged.

X. Expert testimony is considered in the same manner as any other testimony. You are not bound by the testimony of an expert. You can consider the testimony as that of any other person. It may be put to the same test and weighed in accordance with these instructions. You can believe it, you can believe it in part, you can disbelieve it, you can disbelieve it in part. You can completely disbelieve and disregard the expert testimony if you believe that it is improbable.

Y. You must not allow sympathy or prejudice for or against any party to influence your verdict. Sympathy for Plaintiffs should not influence you in determining whether the Defendant is liable. Your verdict must be entirely free from the effect of sympathy, compassion or prejudice.

Z. I will now instruct you on the subject of damages. The fact that you are instructed on damages is not to be considered by you to suggest that you must consider damages. If you first find the Defendant liable to Plaintiffs by a fair preponderance of the evidence, you must, of course, determine damages. Otherwise, you need not consider damages. The following instructions are given in order that these instructions will be complete.

AA. Damages must be reasonable. If you find that Plaintiffs are entitled to a verdict, you may award them only such damages as will reasonably compensate them for the injury and damage as you find, from a fair preponderance of the evidence in the case, that they sustained as a proximate result of the negligence. You are not permitted to award speculative damages.

BB. Plaintiffs must prove the damages with a reasonable degree of certainty. If you conclude that they have failed to prove any damages or some portion of their claim for damages with a reasonable degree of certainty, you must find against them on their entire claim for damages or that portion of the claim for damages and not award

damages accordingly. You may only award such damages as will reasonably compensate the Plaintiffs for the injuries which you find by a fair preponderance of the credible evidence they sustained as a proximate result of the Defendant's negligence, if you find such negligence. You are not permitted to speculate with regard to damages.

THE LITIGATION PROCESS: VERDICT FORM

The verdict form is given to the jury to complete during their deliberations. The form asks the jury to answer specific questions that thereby resolve the basic issues of fact in the case.

COMMONWEALTH OF SUPERIOR COURT
MASSACHUSETTS **CIVIL ACTION**

NORFOLK, ss.

THE ESTATE OF BEN BERBER,	)	
Mr. and Mrs. Berber, Co- Administrators	)	
Plaintiff	)	
	)	
vs.	)	**No. NOCV2006-00967**
	)	
Dr. Mellott,	)	
Defendant	)	

SPECIAL QUESTIONS TO BE ANSWERED BY THE JURY

1. **Was Dr. Mellott negligent in his care and treatment of Ben Berber?**

YES_____ **NO**_____

If your answer to Question #1 is "Yes," go to Question #2.
If your answer to Question #1 is "No," go no further. You have reached a verdict.

2. **Was the negligence of Dr. Mellott a substantial contributing cause of Ben Berber's alleged injuries?**

YES_____ **NO**_____

If your answer to Question #2 is "Yes," please go to question #3.
If your answer to Question #2 is "No," go no further. You have reached a verdict.

3. **What amount of damages represents the monetary value of Ben Berber to the heirs at law for the loss of his expected net income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel and advice?**

$_____
Amount in numbers

$_____
Amount in words

The above findings represent the responses of five/sixths (5/6th) of the deliberating jury.

Date:_____ _____
Foreperson of the jury

THE LITIGATION PROCESS: APPEALS

After the jury reaches a verdict, the trial court judge will render a judgment based upon that verdict. At this point, either party (but typically the party against whom the lawsuit has been decided) may ask an appellate court to review the proceedings to determine whether the trial court committed an error that adversely affected the outcome of the case. An appeal is not a retrying of the case. A party may not appeal just because it disagrees with, or is disappointed by, the outcome of the trial or believes it to be unfair or unjustified.

In an appeal the appellant (the party prosecuting the appeal) must specify what errors it believes the trial court made that negatively impacted the verdict. Examples of this might be an assertion that the trial court erred in allowing certain testimony to be heard or that certain evidence should not have been admitted. The appellate court then reviews the trial court record to determine whether the alleged errors did in fact occur and whether the errors may have prejudiced the outcome of the trial. If the appellate court finds prejudicial error, it can vacate the trial court's ruling and order a new trial or, as a matter of law, order the entry of a different judgment.

No trial is perfect; errors will be made by all parties involved. An appeal only comes into play if the error(s) made were likely to have had a significant influence on the outcome of the trial. As appeals are very costly and time-consuming, parties must carefully consider the potential for success on appeal before undertaking this action.

FREQUENTLY ASKED QUESTION

Is there any penalty for filing an appeal that ultimately fails?

While there is no separate penalty, depending upon state law, it may impact any report to the National Practitioner Data Bank. When a defendant has had monetary damages awarded against him appeals the verdict, should that appeal fail, the trial court may award the plaintiff interest that accrued on the verdict amount between the time of the rendering of the verdict and the actual payment to the plaintiff. Depending on state law, that amount may be classified as expenses or it may be considered indemnity and added to the total reported to the NPDB.

GLOSSARY OF TERMS

Actuary
A statistician who computes the degree of financial risk a physician/office/facility may incur from future malpractice claims.

Admission
The acknowledgement by a party of the existence of a fact.

Affidavit
A written ex parte statement made under oath before an officer of the court or a notary public. An affiant (person who swears to an affidavit) is subject to prosecution for perjury for making a false statement under oath.

Alternative Dispute Resolution (ADR)
Any procedure or method for resolving disputes between persons that does not involve the courts. Unlike a dispute in civil litigation, ADRs do not have to be based upon a claim of the type that courts will handle. The primary methods of ADR are arbitration and mediation.

Arbitration
A procedure by which the parties submit their dispute to another person or tribunal for a decision. The submission may be voluntary or pursuant to a contract or statute that requires arbitration.

Mediation
A procedure in which an intermediary facilitates communication between the parties, helps the parties overcome barriers in the negotiation process, and identifies the parties' real interests and needs so that they can make their own agreement. The mediator does not have the authority to impose a solution on the parties.

Appellant
An aggrieved party who appeals to a higher court to review the proceedings of the trial court's order or judgment on the grounds that the trial court committed an error of law or procedure that adversely affected the outcome.

Appellate Court
A court having jurisdiction to review the law as applied to a trial court's orders and judgments. The court's function is limited to reviewing the lower court's handling of the case; it does not "re-try" the case.

Appellee
The prevailing party in a lower court who argues against the appellant's appeal to a higher court to set aside the determination of the lower court.

Attorney-Client Privilege
The client's privilege to refuse to disclose and to prevent others from disclosing confidential communications between himself and his attorney. Such privilege protects communications between an attorney and client made for the purpose of furnishing or obtaining professional legal advice or assistance.

Attorney Work Product
A doctrine that prevents one party from discovering what another party's attorneys have tried to do and have accomplished in preparation for trial. The work that attorneys have done for a client.

Burden of Proof
The requirement that a plaintiff in a civil lawsuit show by a "preponderance of the evidence" or "weight of the evidence" that all the facts necessary to win a judgment are presented and are probably true. The ultimate decision as to whether the plaintiff has met the burden of proof rests with the jury or the judge if there is no jury. There are situations in which the burden of proof shifts to the defendant, but these are not common.

Cause of Action
A claim that is recognized by law and enforceable through the courts; a claim upon which a court may grant relief. A cause of action presumes that the defendant has breached a legal duty and in doing so directly caused the plaintiff to sustain an injury or property damage or other loss.

Claim
A demand for compensation or restitution for personal injury, property damage, or loss of profits. A claim may be made without actually starting a lawsuit or having a lawsuit pending. A mere claim may or may not be based upon a legal right. A claim may or may not qualify as a cause of action.

Claims Evaluation
The determination, through review of the claim and discussion with the claimant, of what the insurance company or physician/office/facility is willing to pay on the claim, or whether the claim will be denied.

Claims Management
The process of responding to claims and potential claims.

Closing Argument
The final statements by the attorneys to the jury and the court summarizing the evidence that they think they have established and the evidence that they think the other side has failed to establish.

Common Law
A system of law that is based upon precedent rather than a civil code of laws. The law is derived from court decisions that evolve into rules of law that are followed as precedent unless or until the court that established them decides to replace or modify them. Most states rely upon the common law to resolve disputes in civil litigation.

Complaint
The legal document which formally initiates a lawsuit. A complaint contains 1.) a statement of the grounds upon which the court's jurisdiction depends, 2.) a statement of the claim showing that the plaintiff is entitled to relief, and 3.) a demand for judgment for the relief to which the plaintiff deems himself entitled. The complaint, together with the summons, is required to be served on the defendant.

Contribution
The sharing of a loss by each of several persons who may be jointly responsible for injury to a third party. Quite often this arises when one responsible party pays more than his share of the judgment and then demands contribution from the others in proportion to their share of the obligation.

Cross Examination
The examination of an adverse party or hostile witness in which the examiner may ask leading questions and may seek to limit answers by asking very narrow, circumscribed questions.

Damages
(1) The injury, loss, or other harm to a person or property that is proximately caused by another person's breach of a legal duty. (2) An abbreviation of the term "money damages", which is compensation for the injury, loss, or other harm caused by another person's breach of a legal duty. There are several types of damages, including:

Economic
In a medical malpractice case, the sum of money that is awarded to a person to reimburse him or her for economic loss due to the doctor's wrongful conduct. This may include such things as compensation for past and future medical expenses and past and future lost wages.

Non-economic damages
Money damages awarded to compensate for those losses to which a precise dollar amount may not be determined such as pain and suffering, disfigurement, wrongful death, permanent impairment, and loss of consortium.

Punitive Damages
Money damages awarded to a plaintiff in a civil action to punish the defendant for willfully committing a wrongful act that injured the plaintiff. Punitive damages are recoverable in addition to other damages and are typically excluded from coverage under a professional liability policy.

Decedent
Any deceased person.

Defendant
The person defending or denying; the party against whom relief or recovery is sought in a civil action or suit, or in a criminal case.

Deponent
A person who gives testimony under oath in an affidavit in an oral deposition, in a written deposition, or in court.

Deposition
Both the procedure for taking a person's testimony and the transcript of a person's testimony. A formal question and answer session in which one party to the lawsuit asks oral questions of the other party or parties or witnesses under oath. It enables a party to obtain testimony for the purpose of discovering information or to preserve the testimony for use at trial. The deponent may be compelled to testify by serving a subpoena on the deponent.

Directed Verdict
A ruling by the court in favor of a party when the opposing party fails to present a sufficient case or a necessary defense.

Discovery
The pre-trial process by which the plaintiff and the defendant obtain facts and information about the case from each other and conduct an investigation in order to fully ascertain the facts and to further develop the legal theories involved in the case. Tools of discovery include: depositions, interrogatories, production of documents or things, physical or mental examinations, and admissions.

Evidence
Anything that tends to prove a fact, especially testimony and exhibits at a trial.

Ex parte
Done for, on behalf of, or on the application of one party only. An ex parte judicial proceeding is one initiated on behalf of and for the benefit of one party, in which the opposing party does not participate and of which the opposing party receives no notice.

Expenses
Costs incurred in bringing or defending a claim or malpractice suit which may include, but are not limited to, attorneys' fees, expert witness fees, deposition costs, court reporters' fees, court costs, and filing fees.

Expert Opinion
An opinion given by an expert witness. The opinion must have a foundation in the evidence presented by the parties.

Expert Witness
A person with special education, training, and experience in a particular subject or field, who possesses superior knowledge respecting a subject about which persons having no particular training are incapable of forming an accurate opinion or deducing correct conclusions.

Fact Finder
The person or persons who resolve disputed facts and the ultimate questions of fact from the evidence presented by the parties. When the trial is by jury, the jury is the fact finder. When there is no jury, the judge is the fact finder.

Hearsay
Evidence proceeding not from the personal knowledge of the witness, but from the mere repetition of what the witness has heard others say. The very nature of hearsay evidence shows its weakness, and it is received at trial only in limited situations owing to necessity.

Impeachment
The casting of doubt on the credibility of a witness or exhibits by showing inconsistencies in what the witness says or in the use of the exhibits.

In camera
A judicial proceeding is said to be heard in camera either when the hearing is had before the judge in his private chambers or when all spectators are excluded from the courtroom.

Incident/Occurrence
An episode of harm or potential harm.

Incompetent
Lacking the capacity, fitness, qualifications, or abilities to act.

Indemnity
The obligation to compensate another for any loss or damage incurred, or that may incur, as the result of one's negligence.

Interrogatory
A written question to another party to a civil action that must be answered under oath.

Judgment
(1) A court's ultimate determination of the parties' rights and obligations concerning a particular matter. (2) The official decision of the court regarding the respective rights and claims of the parties. (3) The clerk of court's record of the court's declaration(s) in a particular action.

Judgment N.O.V.
A ruling by the judge which reverses the jury's verdict when it is obvious that the verdict was not supported by the facts or was contrary to the law. Abbreviated from the Latin meaning "not withstanding the verdict".

Jurisdiction
The power and authority of a court to determine a case. Also the geographic area over which a court's authority extends.

Jury
A body of people selected according to the law and sworn to inquire of certain matters of fact and declare the truth based upon the evidence presented to them.

Legal Duty
A duty that the law imposes upon a person to act or refrain from acting. The breach of a legal duty gives rise to a cause of action against the violator for compensation for any injuries or damages caused by the breach.

Liability
The legal responsibility for one's acts or omissions. It also refers to the legal obligation to make restitution or pay compensation.

Malpractice
Negligence committed by a person while rendering professional services. The elements of a malpractice case are almost always the same: (1) the defendant owed a legal duty to the plaintiff, (2) the defendant breached that legal duty, and (3) the breach of that duty proximately caused (4) the injury to the plaintiff.

Material
Having to do with matters of substance, as distinguished from mere form. In a civil action, evidence is material if it relates to the issues raised by the pleadings.

Motion
An application to a court for a ruling or order concerning a matter of procedure or law.

Negligence
A failure to exercise the degree of care that a person of ordinary prudence would exercise under the same circumstances. All persons owe the legal duty to conduct themselves with reasonable care so as not to injure another person or another person's property. However, a person does not have a duty to act to protect another person from harm unless the person has a special relationship recognized by law that imposes upon that person a duty to act and protect.

Notice
(1) In legal proceedings, information, usually in writing, of all documents filed, decisions, requests, motions, petitions, upcoming dates, etc. Notice is a vital principle of fairness and due process in legal procedure and must be given to both parties, to all those affected by a lawsuit or legal proceeding, to the opposing attorney, and to the court. (2) In general terms, having been informed of a fact, having reason to know it, or should know it, based on the circumstances. Subsequently, one cannot claim ignorance.

Opening Statement
A lawyer's statement to a jury made at the beginning of a trial, in which the lawyer outlines the evidence that she or he expects to present on behalf of the client. The opening statement is not supposed to be an argument.

Party
A natural person, corporation, or other legal entity that is the plaintiff or defendant in a civil action.

Plaintiff
A person who brings an action; the party who sues in a civil action.

Polling the Jury
A trial procedure in which the judge asks each juror whether the juror agrees to the verdict after it has been read in open court.

Potential Incident
An occurrence or series of occurrences, a situation or set of circumstances, which, if allowed to continue, may give rise to harm to patients, visitors, or staff, or which may give rise to serious patient dissatisfaction and complaints.

Potentially Compensable Events
A problem, incident, or occurrence that has caused harm and that may possibly expose the physician/office/facility to professional or general liability claims and may possibly require the physician/office/facility to pay damages to the persons(s) injured.

Premium
The sum of money paid for an insurance policy.

Preponderance of the Evidence or Weight of the Evidence
As a standard of proof in a civil action, it means evidence which is of greater weight or is more convincing than the evidence which is offered in opposition to it. Although not quantifiable, basically, it is the amount of evidence necessary for the plaintiff to win the case.

Pretrial Conference
A conference ordered by the court for the purposes of expediting a disposition of the case, establishing a plan for managing and moving the litigation toward trial and avoiding unnecessary delay, determining the state of preparedness of the parties and encouraging full preparation, and helping the parties to avoid unnecessary expense.

Privileged Communication
A communication that is protected by law from disclosure. A court will not require a party to a privileged communication to disclose it to another party, another person, or even the court. However, there are exceptions to privileged communications, and the party who holds the privilege may waive it voluntarily.

Procedural Law
The rules of law that govern the conduct of a legal procedure or process, as distinguished from the law that determines the parties' substantive rights.

Proximate Cause
A cause that has a direct and substantial part in bringing about an occurrence, injury, loss, or harm for which a party seeks a remedy in court.

Relief
The generic term for all types of benefits which an order or judgment of court can give to a party to a lawsuit, including a money award, an injunction, the return of property, property title, alimony, and many other possibilities.

Risk Management
The dynamic process of systematically identifying and anticipating risk and acting to minimize and/or prevent actual or potential loss. The emphasis is on being proactive; it involves balancing the chance of an unfavorable outcome with the costs involved in reducing that risk.

Sanction
A penalty a court imposes upon a party who fails to comply with the court's order or rules.

Scheduling Conference
A court-ordered conference convened to create a schedule that will keep the case moving toward trial and meet the needs of the case and of the parties.

Service of Process
The delivery of legal documents relating to the lawsuit - such as the summons and complaint. Depending upon the rules of the particular jurisdiction, service may be made by personal delivery to the person to whom the documents are directed, left at that person's address with another adult, or mailed.

Settlement
An agreement between parties that results in a resolution of their dispute. Settlement agreements are usually made on the basis of a compromise between parties and are arrived at without a judicial order or decree. Where money is paid as a result of a settlement agreement, the sum is often also referred to as the settlement. A jury verdict is not a settlement.

Spoliation of Evidence
Spoliation occurs when evidence needed for the discovery process is destroyed or significantly altered. In a medical malpractice action, intentional or negligent hiding, altering, destroying or withholding a medical record would constitute spoliation of evidence.

Standard of Care
In the law of negligence, that degree of care which a reasonably prudent person should exercise in same or similar circumstances. If a person's conduct falls below such a standard, he may be liable for injuries or damages resulting from his conduct. In medical/professional malpractice cases, the standard of care is applied to measure the competence of the professional. The traditional standard for doctors is that they exercise the average degree of skill, care, and diligence exercised by similar physicians practicing in light of the present state of medicine. The standard may be either a local standard or a national standard depending upon the jurisdiction.

Statute of Limitations
A statute that limits the time during which a lawsuit may be brought against a person.

Subpoena
A process commanding a party, witness, or deponent to set aside all pretenses and excuses, and appear before a designated lawyer, court, or magistrate at a specified time and place to testify. Failure to comply places the person under penalty by the court. The document used to command the appearance is also called a subpoena.

Subpoena Duces Tecum
A subpoena that directs a witness to bring and present specified documents or things to be reviewed when the witness testifies at court or in a deposition.

Substantive Law
Law that creates, defines, and regulates legal rights between persons.

Summary Judgment
A procedure by which a party may avoid a trial by showing the court that the material facts are not in dispute. The procedure allows the court to apply the law to the undisputed facts and order entry of a judgment for a party. A summary judgment may be dispositive of the entire action or resolve only part of the dispute.

Summons
A court mandate that informs a person that a civil action has been commenced against him or her and requires that person to appear in the case and defend. The summons is almost always served with the complaint.

Testimony
Evidence given by a competent witness speaking under oath; as distinguished from evidence derived from writings and other sources.

Third Party
Someone other than the plaintiff or the defendant.

Trial
A lawful judicial examination of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has proper jurisdiction. The trial process involves the selection of a jury, opening statements, the introduction of evidence through the testimony of witnesses and the presentation of exhibits, closing statements, jury instruction and deliberation, and the rendering of a verdict.

Venue
The judicial district in which an action is brought for trial and from which the panel of jurors is drawn.

Voir Dire
The questioning of potential jurors in which competency, interest, bias, and so forth are tested. During voir dire, potential jurors may be dismissed for either of two reasons: (1) for cause (i.e. for a reason) or (2) in a peremptory challenge (i.e. without a reason given). The number of peremptory challenges is limited. The number of for cause dismissals is unlimited.

Witness
A person whose declaration under oath is received as evidence for any purpose, whether such declaration is made on oral examination or by deposition or by affidavit. A witness may be compelled to testify by serving a subpoena on the witness.

Work Product
A doctrine that protects from discovery the impressions, mental processes, legal theories, and strategies that a party and the party's attorney formulated while preparing to prosecute or defend a civil action. The doctrine is separate from but complements the attorney-client privilege.

Wrongful Death Action
An action at law, created by statute, that permits the heirs and next of kin to recover money damages for the pecuniary losses resulting from the decedent's death.

PRMS

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MORE THAN AN **INSURANCE POLICY**