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# The Health Care Provider's Guide to Facing the Malpractice Deposition



Constance G. Uribe, M.D.

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# **The Health Care Provider's Guide To Facing The Malpractice Deposition**

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## *Dedication*

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*To my mother, Modine Ashcraft Uribe,  
who taught me that false accusations,  
no matter how trivial, are ultimately harmful.*

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## *About the Author*

Constance G. Uribe, M.D., is a general surgeon in private practice. A graduate of the University of Arizona College of Medicine, she completed her general surgery training at the University of California at San Francisco affiliated program in Fresno, California. It was during this time that she developed an interest in the world of medical malpractice litigation.

Dr. Uribe has been working with physicians for almost 20 years preparing them to meet plaintiffs' lawyers in malpractice depositions. Her seminar, "Surviving the Inquisition," was created to assist health care personnel in developing a realistic attitude toward the business of malpractice litigation as well as offer survival tips when confronted with a plaintiff's lawyer.

A strong physician advocate, Dr. Uribe has been active in political issues at the state and local levels and has served as Delegate to the Arizona Medical Association (ArMA). In 1997 she authored resolutions to examine the statutes for the Arizona State Board of Medical Examiners with emphasis on board member competency and due process, and in 1998 she developed resolutions for dealing with testimonial abuse in Arizona. She is an active staff member at Yuma Regional Medical Center and has held many positions on the medical staff. She authored the policies for dealing with peer review and impairment, wrote the plan for re-engineering the credentialing system, and created the Voluntary Investigative Leave of Absence for the hospital medical staff. She currently serves as Chairman of the YUMA IPA Credentials/Bylaws Committee and she developed the IPA Member Bill of Rights which assigns control of patient panel size, provider compliance, and provider discipline to the IPA and its members.

Dr. Uribe is a Fellow of the American College of Surgeons, an Affiliate Faculty for the Arizona Heart Association, a member of the American College of Physician Executives, and a consultant for the Greeley Company. She has also lectured at clinical conferences on breast cancer and co-wrote the book, *My Wife Has Breast Cancer and I Want to Talk About It*.

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## *Foreword*

On a scorching afternoon in June, 1990, seventeen hundred physicians and supporters marched in protest in front of the Arizona State Capitol Building. The heat of the day was easily ignored in view of the steaming anger and disgust fueled by a jury verdict and judgment rendered only days earlier. Dr. Abraham Kuruvilla, a neonatologist, was found liable for medical malpractice and the plaintiffs were awarded 28.7 million dollars! The monstrous size of the award only confirmed the legal chaos possible in a state where no tort reform exists. A relatively minor point of fact — the doctor had complied with the standard of care.

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## *Acknowledgments*

Putting a work like this together is similar to accepting an Academy Award — I don't want to ignore anyone who helped get this effort off the ground. I am reminded of a comment made by a famous actor, "If you think writing and directing is easy, just try it!" As a novice this was a formidable undertaking for me because I have always looked at the written word as a two-dimensional means of communication and I am a three-dimensional thinker. I find it much easier to face a group of people gathered for a seminar or prepare a future witness than to pick and choose which pieces of information will be successfully communicated by the cold, written word.

To accomplish my goal, I drew upon my own experiences and the experiences of so many others who have endured the slings and arrows of medical malpractice interrogation. Putting this all together required the assistance of personal injury lawyers, defense lawyers, judges, court reporters, and insurance claims representatives as well as the physicians I have worked with over the years.

Among those who made that extra effort to help with my task were Dr. Steve Wallace, Dan Jantsch, Duane Olson, Larry Cohen, Dr. Chaman Luthra, Scott Seamans, Dr. Humberto Rosado, Bill Bort, Paul McMurdie, Bob Roberson, Dr. William Masland, Dr. Stanley Pense, Scott Nett, and Dr. Joan Stratton. I am especially indebted to Leone Neegan, librarian at Yuma Regional Medical Center.

Not to be forgotten are the many participants from my seminars and the individual physicians I have coached over the years. Without their support and success my mission would be meaningless.

Mother always told me that when you are in need of friendship you find out if you have true friends. She was absolutely right and I must admit I have been blessed. Edna Harvey, Elaine Gerlach, Hellen Newland, Colleen Langewisch, Dr. Emilia Matos and Dr. Jerry Hamm endured endless jabber from me about this project and they listened like caring amigos. My long-time friend and maid of honor, Dr. Carole Browdy, offered her encouragement from the very beginning, and Shay Patterson was always willing to step down from Mr. Blackwell's list and add style to my life as did author and photographer Robert Herko.

As a young girl I was told that any man who married me would have to be very tolerant of my independent nature. Mr. Right took the form of

Richard W. Donato, my greatest supporter in this project. He was only made privy to the content of the book during the final drafting stage, but his patience while I spent long hours glued to the computer and his help in fending off the interruptions were invaluable. Rick is and always will be my knight in shining armor.

A special note of appreciation must be given to my new best friend, Dr. Abraham Kuruvilla. Not only does his ordeal epitomize the twilight-zone atmosphere surrounding malpractice litigation today, but his warmth and humor opened a new window for me into the world of life after lawsuits. Despite the bittersweet lemonade that resulted from the lemons given him, his courage and endurance should be a model for us all.



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# Introduction

Litigation is the basic legal right which guarantees every corporation its decade in court.

*David Porter*

Reading this book will not protect anyone in the medical profession from malpractice litigation nor will it prevent pricey settlements and judgments. Its purpose is two-fold: 1) to introduce medical personnel to the culture of an alien civilization (law), and 2) to provide doctors and the non-physicians in our world a few options for dealing with our greatest nemesis — the plaintiff's attorney.

My quest for justice began years ago during my residency training in California. My program was blessed with visiting lawyers from major firms specializing in malpractice litigation. They would offer us tips on documentation and testimony. As a perennial student of human nature, my curiosity was piqued. I made it a point to study physicians, nurses, and other health care personnel as they embarked on their journeys through the creepy world of our legal system.

It didn't take long to realize that a large number of medical malpractice claims had little to do with medical negligence in the true sense. Carrying a *deep pocket* is tempting to a public that has access to pickpockets for hire.

There is no argument against a patient who becomes a plaintiff due to a mishap because of carelessness on the part of the caregiver, or a poor outcome as the result of care grossly deviant from that considered standard. Practitioners dancing to the beat of incompetence or imprudence should pay the plaintiff's piper.

Unfortunately, our society is filled with patients who are simply dissatisfied with their own care or the care rendered to a loved one. Many had expectations that were unrealistic to begin with and the best informed consent in history would not have brought them down to earth.

Several states require all malpractice complaints be taken before review panels where the litigation future of the cases depends on the panels' findings. Defendants in other states are not as fortunate, and complaints are taken *all the way* unless a process intervenes that leads to closure before trial. Such is the case in my home state, Arizona.

The Harvard Medical Practice Study III reviewed over 30,000 medical records from 1984 hospitalizations in the state of New York. Out of these came 47 malpractice complaints. Of the 280 patients who were identified as having adverse events caused by medical negligence only 8 filed claims, while the study estimates a statewide ratio of negligence to malpractice claims as 7.6 to 1.

Insurance representatives in Arizona report similar estimates: Only one out of every eight *victims* of malpractice ever files a complaint through the court system, and only one in 16 of all those filed ever lead to monetary compensation. Therefore, it is easy to draw the conclusion, as did the Harvard Study, that malpractice litigation fails to identify the true purveyors of substandard care and compensate the recipients of that care.

In the legal world, malpractice equates with negligence. The actual cause of mistakes and poor outcomes in the medical field may or may not reflect true negligence on the part of the health care providers. To err is human, but to be compensated for that error is every American's right in court. The law ideally cannot compensate based solely upon the occurrence of the error, but must show the error was committed as a breach of duty on the part of the care provider due to negligence that directly resulted in the outcome or injury suffered by the patient.

An anesthesiologist chipped a patient's tooth during a difficult intubation. He immediately contacted his insurance carrier who paid all the dental bills incurred by the patient as a result of the intubation. That is why we have liability insurance. Had the patient sued the doctor, a whole new world of accusations would have emerged using words such as *negligence*, *willful disregard*, and *deviation from the standard of care*. We know we live in an imperfect world, but it is the job of the plaintiffs' attorneys to convince juries that guarantees grow on trees.

The most important step in defending an unwarranted complaint is the deposition. This sometimes grueling ordeal is not only the first time the defendant has a chance to defend his actions or inactions, but it is also a tremendous opportunity to walk through the looking glass into a world where things are not the way they seem. The witness's performance during this deposition is carved in stone, so to speak, and will follow him or her around like a sword of Damocles throughout the remainder of the litigation.

This book contains a paucity of material related to The Law. I am not a lawyer. I am a student of human nature and that is the focus of this work. My concerns for my fellow caregivers are not whether or not legal processes have been followed or violated, as those are matters for the defense lawyers.

I have spent many years helping defendants alter their habitual logical and scientific approach to a more cautious, *out-of-the-box* way of thinking. After giving my Inquisition Seminars around the country, I am finally able to share the information with those who have not been able to attend.

Over the years the real challenge for me has been to help the health professional who believes that he has nothing to fear even though he has no background in deposition testimony from which to draw; especially the

physician defendant taking the position, "Hey, I'm just going in there to answer questions." He might just as well start digging his hole and save himself the trouble later.

The book is written with the health care provider in mind and, therefore, some of the terms may be foreign to a lay person. The basic content, however, can be applied to anyone sitting across from a lawyer inquisitor. Also, I have taken the liberty of using few multiple pronouns (he, she, him, her, etc.) since I believe the masculine form in our language denotes a human being, not necessarily a male. I have never taken personal offense in finding the female gender ignored in documents, contracts, etc. Not having to deal with gender shifts also saves ink.

Many times the examples used from depositions are paraphrased to make them more readable. We rarely speak exactly as we write, and reading one's own deposition can be an eye-opener. We often find fault with our grammar, our use of certain terms, or the proper conjugation of our verbs. Frequent pauses are also annoying to read as well as repetitive remarks. Therefore, I have simplified the original entries into a form that demonstrates my purpose more effectively, and all names have been changed to protect the innocent.

A malpractice deposition is nothing to take lightly. As reported by Albert Clement Shannon, the power of this exercise was even known during the Spanish Inquisition:

"All the evidence, the interrogations and the responses, were permanently recorded in writing, the names of the accusers and witnesses revealed, and the proofs opened for review."

From the standpoint of medical malpractice in our society today, we might rephrase the above to read:

All of the evidence from the deposition, the questions and the responses, are permanently recorded in writing, the names of the plaintiffs and witnesses revealed, and the documents opened for review.

Likewise, even the subject of closure or settlement was addressed during the Middle Ages:

"In cases where the Inquisitor and the local bishop could not agree on an equitable sentence, the entire case was to be referred to Rome in accordance with regular ecclesiastical practice."

By our current processes of dealing with malpractice litigation:

In cases where the counsel for the plaintiff and the counsel for the defense cannot agree on an equitable settlement, the entire case will be referred to the court in accordance with legal statutes.

The similarities with the Spanish Inquisition do not end there. As John Elliott writes:

“While burning and torture were in no sense the exclusive prerogative of the Spanish Inquisition, the tribunal did, on the other hand, possess certain distinctive features which made it particularly objectionable. There was, first, the secrecy and the interminable delay of its proceedings.”

Anyone who has been through the ordeal of malpractice litigation is all too familiar with the instructions pertaining to silence about the case except with counsel. The statute of limitations for adults filing a complaint in Arizona is two years. Attorneys have a penchant for having the complaint served on the defendant at 4:55 on a Friday afternoon. That gives the defendant the entire weekend to smolder over the event and usually prevents contacting the malpractice insurance carrier until 9:00 a.m. the following Monday.

The case can go on for years. Lawyers, judges, and even defendants have been known to die (of natural causes) during the course of legal proceedings. The *interminable delays* in these cases serve no purpose other than allowing ample time for the lawyers on both sides to prepare for settlement or trial. Many defendants in the health care industry have *rolled over* into inappropriate settlements simply because they wanted it to end (see Chapter five, *Weighing the alternatives*).

Whether a malpractice case ends in settlement or at trial, depositions are the most important pieces of evidence. All of the facts elicited from all the depositions will play a major role in negotiations at the settlement table or in the courtroom. It is my sincere desire that each witness enter the deposition arena prepared to answer the questions as truthfully and accurately as possible, keeping in mind that any answer given may come back to haunt him by resulting in a bigger check to the plaintiff from his insurance company, or having his testimony presented to the jury as deceptive or contrived.

It is my intention to prevent medical personnel from becoming self-damaging witnesses and, as such, their own worst enemies. No matter what the outcome of a medical malpractice lawsuit, I pray that every health care provider will walk away from his deposition feeling confident that he told the truth with the best possible accuracy and without an aching desire to go back and change an incorrect answer. After all, nobody expects the Spanish Inquisition.