

Continued from page 3

Can You Provide Guidelines for Answering Questions?

While this topic could be the subject of an entire article, brief and direct answers are often best. Hypothetical questions can be challenging and preparation is key for those types of questions. If an explanation is required, try to keep it concise. Be thoughtful in responding. If you don't know the answer, say so. If you cannot give an opinion, say so.

Remember, many areas of medicine are not black and white, and every case is unique. Very few defendants know all of the facts of each case. That role is typically left to retained experts who have reviewed all of the materials in the case.

If You Had One Piece of Advice, What Would It Be?

In addition to consulting with a lawyer and being prepared, listen to the entire question, pause and give a thoughtful, concise answer. Treat a deposition just as you would a presentation of this patient's case before a panel of professionals.

Conclusion

This article provides insight into what happens at a deposition, why it is important and what resources can help physicians and medical professionals prepare. All examples were based on testimony in real cases, by real witnesses. By using the resources available and treating each deposition as an important event that can affect your

professional reputation, your case will be better positioned for success.

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What Can We Learn?

By Veronica Brattstrom, PSIC Senior Risk Management and Patient Quality Analyst

The following are suggestions to improve a physician's deposition testimony:

- Speak in full, complete sentences.
- Do not volunteer information.
- Be consistent. Changing your testimony can be detrimental to your credibility.
- Do not guess, give opinions or share rumors.
- Never characterize your own testimony. For example, avoid: "in all candor," "honestly," "I'm doing the best I can."
- Avoid adjectives and superlatives, such as "I never" or "I always." Such statements could come back to haunt you.
- Do not testify to what other people know unless specifically asked to

provide such a statement.

- Do not bring notes, diagrams, visual aids or anything else related to your case to your deposition.
- Never express anger or argue with the examiner. If your deposition becomes unpleasant, it is your attorney's job to manage it.
- If you experience a "flash of brilliance" while testifying that you have not previously discussed with your attorney, keep it to yourself until you discuss it with your attorney.
- Remember that plaintiff attorneys are not your friends. They may appear sympathetic to get you to let your guard down and provide harmful testimony against yourself.

Deposition Testimony: Why You Must Prepare, Prepare, Prepare

By Linda J. Hay, JD

Many practitioners approach the deposition process with great trepidation. They know their testimony and that of other treating practitioners can make or break their case. As an attorney who defends medical professionals, I've learned that presenting well, both as to substance and appearance, comes with preparation. Strong deposition testimony by defendant physicians and witnesses for the defense provide a foundation for mounting a solid defense.



Lawyers take depositions to learn about the facts of the case and to assess how a witness will appear before a jury. In general, effective witnesses:

- Appear professional, prepared and serious.
- Express compassion for patients and colleagues.
- Readily admit they might not know all the facts beyond their care.
- Do not opine beyond their scope of expertise or speculate outside their personal knowledge.
- Are thoughtful and well prepared.
- Do not show bias toward one side or the other, but exude a quiet confidence.

What Triggers the Deposition Process?

If you are a defendant in a lawsuit, your deposition often takes place early in the lawsuit. Upon reviewing the deposition or subpoena notice, your defense attorney and PSIC will set the preparation and deposition dates with other parties.

If you are involved as a witness or treating practitioner, you may receive a formal written request from a court/lawyer. This is typically in the form of a subpoena or a court-ordered request for an attorney to take your oral deposition or testimony (similar to a subpoena for records).

If you receive a subpoena or something that appears to be a request for your deposition, your first step should be to contact the PSIC claims department to determine whether you need a defense attorney assigned to you. Your attorney will look out for your interests and ensure communications go through them. He or she will take steps to keep you from becoming ensnared in another lawsuit.

What Should I Review Before a Deposition?

Familiarity with your own records before a deposition is paramount. This will help you answer clearly, properly and not falter with your notes, records, terms or details of the care. It can be embarrassing if you struggle to read handwriting, don't follow a clear

chronology or realize key records or films are missing. Problems like this prolong questioning and suggest a sloppy caregiver. It's also helpful to have your professional resume or curriculum vitae available to reduce questions about your experience.

Example: Questioning of a Prepared Practitioner

Q: Doctor, prior to the deposition today, what did you review?

A: I reviewed all of the documents in my chart, electronic and handwritten, as well as the digital radiographs.

Q: Do you remember this patient?

A: Somewhat, but I had to rely, in part, on my chart.

Q: Can you summarize what kind of care you gave to this patient based on your review of the chart and the films?

A: The patient first came to see me on April 11, 2018, for an evaluation of XYZ. He came in for pain in his XYZ, and after a clinical exam, I explained the findings, recommended a course



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Continued on page 2

Continued from page 1

of care and some options. The patient wanted to try a course of pain reliever before deciding whether to pursue other attempts. The patient returned seven days later and indicated the pain was still present. We discussed the case, and the patient decided he wanted to pursue other treatment options previously discussed. The patient never returned. Our office attempted to follow up with him but even after two reminder calls he never returned.

Example: Same Questions, Bad Answer

A: I do not remember the patient and just pulled the chart out now. I think there was an issue with this guy not paying his bills, but you would have to ask my office manager. I don't handle or know the details about the money part of the practice. As I look at the chart, I can't really read the writing on my notes. I don't know what I said to him about the options for treatment, I usually document that but I see that I didn't finish or close this note.

What is Your Role at the Deposition?

In a lawsuit, we are often defending cases based on care provided years earlier. Although much more information will be known at the time of the lawsuit, try to limit your comments to what you knew when the treatment was provided. Preparation will help you avoid speculating on issues outside that treatment. Similarly, as a practitioner, your role should be to evaluate and testify about what you personally know about, which is your own care and treatment. Opposing lawyers may attempt to get you to speculate and opine about the standard of care, causation or damages outside and beyond your personal knowledge. They will use that as expert testimony to benefit their case. That should not be your role as the treating

practitioner—it would be unfair to ask you to speculate without complete preparation, compensation or a review of the important components of a lawsuit. That role is typically reserved for an expert who has been paid to review ALL of the records and testimony and render a reasoned opinion.

Example: Question of Defendant With Good Answer

Q: Doctor, do you agree that six months after you last saw the patient, the patient was doing terribly, had gone back into the hospital, and was diagnosed with some very serious medical issues?
A: I cannot answer that question. I don't have personal knowledge as to what occurred. All I can say is that this patient left my care and was last seen on X date, and as of that last date I saw him, he was doing well. The patient was supposed to return if he had any issues and never chose to come back for his next follow-up appointment, despite our attempts to get him to return.

Example: Treating Practitioner Question with Bad Answer

Q: Doctor, do you have any opinions about the care provided prior to your care?
A: Yes, I do. The patient received terrible care when he went to the Emergency Room and should never have been discharged.
Q: Did you ever review records or films from that ER visit?
A: No.
Q: How can you give those opinions then?
A: This is based on what the patient told me about that visit.

Are My Conversations With My Lawyer Confidential?

Yes, communications between lawyer and client are protected by the attorney/client privilege. Be honest and open with your lawyer so he or she can best help prepare you for your deposition. Let your attorney know if you have had other lawsuits, disciplinary issues, communications with the patient or their



counsel, or concerns about your care or that of others. Being completely open and honest will help your lawyer best prepare you. You don't want your lawyer to hear about actions you took, calls you placed or letters you sent to the patient from the patient's attorney, or in the middle of your deposition.

What Actually Happens in a Deposition?

A deposition may occur in a conference room, office or practice. It is attended by the parties' lawyers, the deponent (the person taking the deposition) and a court reporter. The lawyer taking the deposition sets the place, usually near the deponent's residence or business (rules vary). Physicians being deposed and their lawyers can request but cannot dictate deposition locales. Strategy often plays a role in whether to put the deposed physician in comfortable or uncomfortable surroundings. As a practitioner, think carefully about having a group of lawyers invade your office space when patients may be present. You should also be cautious about giving them access to areas where sensitive and confidential information may be visible. Regardless, people attending depositions should be closely monitored and ushered in and out quietly to protect the sanctity of the practice and its patients.

All lawyers involved in a lawsuit have the opportunity to ask questions or object to questions of the deponent. Some courts have rules for how long testimony can take. Testimony can range from three to eight hours or more. Additionally, both videotaped and remote depositions are becoming more prevalent. Traditionally a videotaped deposition means a videographer, and everyone else attends the deposition in the same room, together, and setup includes a large screen, microphones and digital taping of the deposition. Remote depositions can mean that some or none of the attendees are in the same room together, and everyone is

connected through internet, computers and computer screens. More preparation is necessary with videotape as well as remote depositions to handle documents, communications with counsel and to appear on video or a feed with a competent, pleasant and professional demeanor.

Example: Bad Exchange During Videotape Deposition

Q: Doctor, can you tell us whether the lesion you evaluated on February 20 had improved or changed since the last visit?
A: I don't really remember. My notes don't say one way or the other. You know, it is getting late, I thought we were going to be done by 6 p.m., and I really need to take a break to get something to eat.
Simultaneously ...
Well doctor, we can keep going and just bring in some food and eat while we continue the questioning.
Statement by the physician's lawyer:
Let's go off the record and let me talk to my client to find out if we need to take a break or reconvene. (Followed by a private confidential exchange with the client recommending that comments like this should be done off camera and privately. Imagine the impact of a video showing a physician eating while testifying.)

How Should I Dress and Act?

Sloppy appearance can suggest sloppy care. Treat every deposition as if attending a professional and important meeting. Clothes, personal grooming, language and demeanor should be more formal. A deposition is not the place for sly or sarcastic remarks; it is not the place for jokes. Err on the side of looking and acting more professional. Avoid a demeanor that points fingers at staff or the plaintiff. An attitude of care for patients is important in the health care profession. No one expects a defendant physician to be happy about being sued. However, it is important to sensitively address what

the patient did or failed to do that could have caused or prevented the injury.
Example: Bad Defendant Testimony
Q: Doctor, you saw the letter the patient wrote to your practice after she left your practice in which she claimed you told her you were in her insurance network when you were not, correct?
A: I saw that and she is a liar. Neither I, nor anyone in my office, would have ever told her such a thing.

Example: Good Testimony
Q: Doctor, you saw the letter the patient wrote to your practice after she left your practice in which she claimed you told her you were in her insurance network when you were not, correct?
A: I did. She was mistaken. Our office staff is instructed not to misrepresent coverage benefits. In fact, we tell patients that if they want to find out about coverage before deciding on a procedure, they can wait for a response from their carrier. If they don't want to wait, we ask them to fill out a financial responsibility form to ensure they understand their own costs.

THE FAR-REACHING IMPACT OF DEPOSITION TESTIMONY

In the world of litigation, written deposition transcripts are often available to lawyers on both sides. Even if you are only called into a case as a treating physician, it is important to know that a written transcript of the testimony will be available to the case's lawyers, parties, experts and others.

Continued on page 4