How To Be More Effective at Your Deposition

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The deposition of the defendant in a medical malpractice case is one of the most important events in the defense of a medical malpractice claim for two reasons. It establishes precisely what a defendant physician has to say in defense of the patient's allegations, and
It establishes the physician's effectiveness as a witness.

The key to giving a successful deposition that not only creates a successful defense, but also establishes the physician as an effective witness is preparation. Each attorney who represents a physician in a malpractice claim has his or her own approach to this deposition. The following are my comments and observations, and I am certain that some attorneys have differences of opinion on some of the points.

Establishing the Defendant Physician's Testimony

The objectives of deposition testimony are not the same as the objectives of trial testimony. The physician's deposition testimony should be geared to members of his or her specialty, while trial testimony is geared to lay people, i.e., judges and/or juries. I advise physicians to answer deposition questions as though there were three physicians of his or her specialty from three different areas of the United States listening to the answers and grading them. The reason for maintaining this professional dialogue is that the only relevant individuals who are going to read the physician's deposition testimony concerning medical issues are other physicians. Therefore, the physician deponent should be addressing answers to members of his or her professional specialty.

Often the plaintiff's attorney will ask the physician to explain an answer in "layman's terms." When asked for layman explanations, the physician should proceed with caution. The physician does not want to appear obstinate in deposition testimony, but he or she should not be too relaxed or generous in explaining complex medical observations, procedures, or phenomena in "layman's terms" that are not accurate.

For example, what will occur if a physician deponent indicates that a vein or artery is "just like" or "the same as" a garden hose? The physician will no longer be questioned on properties of arteries and veins. Rather from that time on the plaintiff's attorney will talk about nothing but garden hoses; i.e., the properties of garden hoses, how garden hoses react when they are placed under tension, how garden hoses react when they are clogged, how garden hoses react when they are bent, how garden hoses react when they are clamped, how garden hoses react when they are cut, how effective garden hoses are when they are repaired, etc.

The lawyer will naturally proceed in this direction because he or she is very familiar with garden hoses and not familiar with the properties of arteries and veins. This is a very simple example, but hopefully it illustrates the point. The main objective of the deposition is to have the physician answer the questions posed concerning his or her medical rationale and

motivation in treating the patient. The defendant physician should not feel an obligation to explain his or her rationale and motives until the plaintiff's attorney understands them.
In answering requests for "layman's explanations," I think it appropriate for a physician to "caveat" his or her response. For example, the physician should indicate that in layman's terms an artery or vein is somewhat similar to a garden hose in that they both have a lumen, but that this analogy is a very rough one. In other words, unless the "layman's term" is a term that would be used in medical school, or in residency programs, or in discussing a particular case with colleagues, the physician should not use the "layman's example" in a deposition without clearly limiting the use.

The physician should clearly identify in testimony the fact that he or she is talking in "gross generalities" and constantly remind the record that he or she is discussing something in other than usual medical terminology at the request of the plaintiff's attorney. Despite what many physicians think, the purpose of the deposition is not to present in its entirety the rationale for the treatment of the plaintiff. Explaining the physician's position clearly to the plaintiff's attorney in a deposition will not result in the plaintiff's attorney dismissing the lawsuit or medical review panel complaint.

The purpose of the deposition is to answer the questions that are asked and to answer them completely, precisely, and concisely. Once a physician's opinion or testimony is given in a deposition it is frozen forever, and a successful trial attorney will pick up and point out any inconsistencies between later trial testimony and the deposition testimony. For that reason, the physician's preparation for the deposition should be as intense as preparation for trial testimony.

A physician should not answer the question that the plaintiff's attorney wanted to ask but did not ask. Answer only the question that was asked.

The physician should not answer a question that he or she does not understand or finds confusing. If he or she does not understand the question, the physician has the right and duty to request clarification. He or she should ask the attorney: "Please repeat your question, I do not understand." Or say to the attorney: "Are you asking me if a CT scan is ordered each and every time a patient tells me that he has fallen on his head from more than five feet? Is that your question?" The physician should understand exactly what is being asked before answering.

The physician should not state unequivocally that he or she has given every possible reason why he or she did something or every possible indication or symptom of a particular disease. No matter how familiar the physician is with the particular medical issue being discussed, I think it is always appropriate for the physician to indicate that he or she listed all that can be recalled at the moment, or all that comes to mind, or all that he or she can think of at the present time. The physician should leave the opening that he or she may have, despite the best of efforts, not listed all the complications or all the complaints or all of the particular indications for particular treatment.

The physician may be asked if an article or author is authoritative. This is an attempt to have the physician indicate that only that article or author's opinion is acceptable medical practice or

is the only acceptable standard of care. If the physician agrees, then any deviation from the exact practice presented by the article or author is a deviation from the standard by the physician's own testimony. Physicians may indicate that a medical source is well respected, widely followed, well known, an accomplished expert, etc. However, a physician should never indicate there is only one absolute acceptable medical opinion. To admit that a publication, article, or author is "authoritative" is in legal jargon stating just that. This should be avoided because it is almost always incorrect.

Establishing the Effectiveness of the defendant Physician's Testimony

The second purpose of a deposition is to allow the attorney taking the deposition to evaluate the physician's effectiveness as a witness. This goes beyond any evaluation of medical knowledge and acumen. Therefore, it is important that the physician's demeanor and appearance at a deposition convey that he or she is in command. The physician should appear to be conservative, conscientious, and concerned. The physician should be aware of his or her speech and speech patterns. The physician should practice good eye contact during the deposition. If a video deposition is being taken, the physician should remember to look into the camera when giving testimony.

In a malpractice deposition a defendant physician deponent is going to be extremely nervous and may be defensive. He or she may feel as though the entire medical community or the entire world is listening to everything said in the deposition, and the listeners will be critical. The degree of these feelings will vary with each individual. However, having observed a large number of defendants being deposed in professional malpractice claims, I know that all are under stress, nervous, and apprehensive. This attitude is understandable. It is similar to the situation a patient faces when taken into an operating room or a procedure room for the first time. The patient sees all of the apparatus, equipment, machinery, etc., and it scares him or her. No matter how many depositions a physician has given in lawsuits involving automobile accidents, or other types of cases, the deposition that a physician gives as a defendant in a medical malpractice action is totally and completely different. The physician should be aware of that difference.

Take Time to Respond

During a deposition, a deponent will often lose confidence in or doubt himself or herself. The physician should expect such feelings to occur more than once during the deposition. At these times, the physician should refer to the hospital records, office charts and other material until he or she recalls the rationale or reasons for his or her actions.

There is an answer, and it will be found by a review of the records. The key is not to speak until the physician knows what to say. The physician should take time to reread the office chart, entries, progress notes, nurses' notes, etc., before responding. The physician should utilize these records to his or her advantage. There is no reason why the physician should not review entries when asked about a particular treatment decision during the deposition.

For example, if there is a question concerning a progress note written on the 14th of October, the physician should take time in the deposition before answering to find the progress note for the 14th. He or she should read that progress note again. Also, the physician should read the progress note for the 12th and 13th and perhaps even the progress note for the 15th and 16th. It is not the speed with which the physician answers the deposition question that is important; it is the correctness of the answer. By reviewing the progress notes for the days before and after, the physician is refreshing himself or herself with the "trend of care."

In making medical decisions a physician often reviews prior progress notes. Why shouldn't the physician do the same in giving a deposition? By taking time to refresh the memory about the patient's condition during the relevant period of time, the physician's answer will be more precise, concise, and accurate. It is the quality, accuracy, and preciseness of the answer that is important, not the speed with which the answers gush out. The physician should not guess. If he or she cannot recall at the time of the deposition, the physician should so testify.

The physician should pause before answering every question. This is a good habit to acquire.

First, it allows the defense attorney to enter any objections he or she may have to the question. The physician should listen very carefully to the basis for the objections. Second, it will force the physician to organize his or her thoughts and have everything in line before beginning to speak. Often, a deponent, who is nervous, will tend to speak a great deal more than is necessary as a response to his or her apprehension and uneasiness. This can be extremely damaging. The objective is to answer the question asked precisely and completely; then to stop talking.

Maintain Self-Control

The physician should not argue with the plaintiff's attorney and, if at all possible, should not let the plaintiff's attorney see discomfort or anger. Physician frustration and anger uses up a great deal of energy, is counterproductive, and will work to the advantage of the attorney deposing the physician.

If at any time during the deposition the physician feels that he or she is losing composure and control, getting angry, uneasy, or in need of a break, the physician should request a break. A simple: "Excuse me, gentlemen, may I take a break?" or "I would like a cup of coffee" or "Could I get a drink of water?" is acceptable and recognized. An angry and agitated physician is exactly what the plaintiff's lawyer wants. A tired, fatigued, angry, frustrated, and exhausted physician deponent cannot and will not give an effective deposition. The physician should take frequent breaks to refresh himself or herself and, if need be, recess the deposition if too tired or exhausted. The deposition testimony is too critical for the physician not to be at his or her best.

Unfortunately, physicians must know how to articulate their position in a straightforward, calm and composed manner while under fire. The deposition is often a test of endurance and determination. The plaintiff's attorney hopes the physician will become angry since this may, and probably will, distract the physician from giving good, precise, and accurate answers. An exasperated, fatigued or angry witness does little good.

Also, the physician should not discuss with his or her attorney any aspect of the case in front of the court reporter, other attorneys or individuals unless the comments are not confidential or are not material to the case. The attorney-client privilege can be lost if personal comments are made to your attorney in the presence of a third party.

The physician should avoid making condescending, sarcastic, disparaging, or derogatory comments. Although the comments may be amusing during the deposition, the same remarks repeated later in a court of law may be used to illustrate the physician as "uncaring" or "unmoved by human tragedies" or "callous and indifferent." Remember everything said during the deposition will be recorded and reduced to writing for use against the physician at the later trial.

Choose an Appropriate Location

In order to increase the physician's effectiveness in a deposition, I think the physician deponent should select the place where the deposition is being taken, if that is possible. If the physician feels comfortable in taking a deposition at his or her office, then the physician should request that the attorney have the deposition scheduled there.

However, for some physicians, the taking of a deposition in the office is an unwise decision. Taking a deposition in a physician's office alerts all of the staff, nurses, secretaries, etc. that there is in fact a malpractice claim filed. Having all of the lawyers, court reporters, and anyone else present in the physician's office may cause a great deal of disruption and discussion among the staff. Additionally, the physician's office may not be equipped for the taking of the deposition.

The objective in choosing an appropriate locale for the deposition is to make the physician comfortable. The location chosen should be one that will give the doctor the best advantage. It is not chosen for the convenience of the attorney or court reporter.

The Key to a Successful Deposition is Preparation

Prior to the deposition, the physician should meet with his or her attorney and openly, candidly, and thoroughly discuss the case. This meeting should occur a few days before the deposition. The physician cannot rely upon the attorney to know each and every medical issue or question that will be presented. A lawyer, no matter how many years spent in working with physicians, is not a substitute for a physician's review of a case for problem medical areas. For that reason, the defendant physician must candidly look at his or her records and treatment for areas that might cause difficulty.

The physician defendant should start by going to medical text and medical journals that deal with the particular procedure or disease in question and review them. That is probably where the plaintiff's attorney is going to start in terms of preparing his or her case against the physician. The deponent should not be afraid or feel uneasy about discussing with his or her attorney issues or questions that the physician thinks will cause difficulty, or answers with

which he or she is not particularly comfortable. Dealing with wording is the attorney's stock in trade.
The physician should know the involvement of other physicians in the patient's care prior to his or her deposition. The fact that the deponent is a medical doctor does not mean that he or she should, or can, give opinions as to what is, in fact, the standard of care for a particular specialty that is not his or her specialty. Therefore, the physician should not feel embarrassed to defer to a physician in another specialty as to a particular procedure that would be involved in that specialty. To defer to the other physician is an act of professional courtesy.

Be Attentive

The physician should pay close attention to the objections that are lodged by his or her attorney during the deposition. The attorney's objections are often focused on the form of the question because the attorney feels that there is something inherently wrong with the wording of the question being asked. For example, the physician's attorney may feel that the plaintiff's attorney is misstating the record or adding facts not present in the case. There are no "trick" questions if the physician plays close attention to each question asked and only answers questions he or she understands.

Also, the physician should not allow the plaintiff's attorney to put words in his or her mouth or misstate the physician's testimony in a preamble to a question. The physician should not accept the plaintiff's attorney's "summary" of the physician's earlier testimony if it is inaccurate. If part of any statement made by the plaintiff's attorney is incorrect, the physician should correct it.

Also, a physician need not simply answer yes or no to a question unless that is the answer. If the physician's answer must be explained or conditioned, the physician has the right to do so.
A physician should listen very carefully to all hypothetical questions. The plaintiff's attorney is asking questions about how to treat a "hypothetical" patient in hopes that the answer to the "hypothetical" will be different than the care given to the plaintiff. Why else is the plaintiff's attorney using a "hypothetical case" question rather than discussing the plaintiff's treatment?

Later, the plaintiff's attorney will attempt to show that the physician's answer to the hypothetical question proves that the physician provided substandard care to the plaintiff. The physician should be very alert and listen very carefully whenever hypothetical questions are posed. The physician should not answer the hypothetical question based only upon the facts to the hypothetical question as given by the plaintiff's attorney and should never assume other facts. If there are not enough facts given in the hypothetical question so as to allow the physician to give an opinion, he or she should so state. Hypothetical questions serve no purpose other than to establish that the physician did something substandard in his or her treatment of the plaintiff.

Some Guidelines for Responding to Questions

The physician should readily admit in the deposition that he or she has discussed the case with his or her attorney. That is why the physician has an attorney.

The physician should try to give answers in a positive and straightforward manner. The physician should try to avoid saying “I guess” or “I assume” before answering any question. In some circumstances the physician may not be certain and should preface an answer with “to the best of my recollection...”

If a plaintiff’s attorney is being repetitive in questioning, it is appropriate for the physician to state “I’ve already answered that question…” The guidance of the physician’s attorney should be followed as to how many times the physician must answer a question. Remember, the reason for the plaintiff’s attorney asking a question more than once is the hope of getting a different answer from the physician.

Should the attorneys argue over procedure or the propriety of deposition questions, the physician should listen but not become actively involved in the dispute. When his or her attorney begins speaking, the physician should stop talking and listen.

The physician should be on guard against the friendly attorney, who simply wants to understand, and seems very eager to listen to every word the physician wishes to utter. A good attorney will allow the physician to speak to his or her heart’s content. This is dangerous. When the question has been answered, the physician should stop testifying. More often than not, the plaintiff’s attorney will attempt to lower the physician’s concentration level by giving the feeling that the plaintiff’s attorney is a “good ole boy” who will drop the case if he only “understands” the medical issues involved. The case will be dropped only if the plaintiff attorney’s physician experts say he or she has no case.

Post-Deposition Reading and Signing

A careful reading of the deposition after it has been transcribed is critical. Louisiana Code of Civil Procedure Article 1445 provides for submission of the deposition to the witness for reading and signing. The witness may make any changes in form or substance, which are then entered in the deposition by the court reporter with a statement of the reasons given by the witness for the changes. The physician should obtain a copy of La. Code of Civil Procedure Article 1445 from his or her attorney and read it before reading and signing the deposition.

There are several books and publications available for physicians who are going to be deposed. The Louisiana State Bar Association’s pamphlet entitled “So You’re Going to be a Witness” addresses preparation for trial testimony but is also beneficial when preparing for a deposition. Remember, the unprepared defendant physician can lose his or her professional liability case in the deposition. Therefore, it is imperative that the defendant physician properly prepares for this most important legal event.