



How to Prepare for and Give a Deposition

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You are sitting at a long mahogany table in an unfamiliar, yet very well-appointed, office wearing the same dark suit that you last wore at your cousin's funeral. A pale, gaunt man with what looks like a small typewriter scrambles furiously to keep up with your rapid-pressured response to the question, "Doctor, for the record, please state your name and current address."

Is this a bad dream? Only if you are unprepared for what comes next.

Black's Law Dictionary defines *deposition* as "a witness's out of court testimony that is reduced to writing for later use in court or for discovery purposes." Another, more practical, definition might be, "the modern day equivalent of the Spanish Inquisition where the opposing attorney attempts to get you to say something you will forever regret saying."

The deposition can determine the course of the entire trial and mistakes made during the deposition are often very difficult—and sometime impossible—to mitigate. A provider's testimony during the deposition will serve as the foundation for experts' opinions and defense theories. Given the importance of this phase of the litigation, it behooves the provider to be thoroughly prepared.

Preparing for the Deposition

Thoroughly Review the Record

Before taking your deposition, the opposing attorneys have already spent considerable time learning every detail of the record. They typically will have already thoroughly gone over the entire record with one or more experts who have advised them on what to ask you and where the care may have fallen below the standard.



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To be clear: The opposing attorney will be exceptionally well versed on the patient record and will ask questions, not only on your portion of the record, but often times on the entire record.

"Thoroughly review the record from beginning to end."

Take, for example, the case of a 38-year-old female who presents with a cough and cold symptoms. Her x-ray is normal and her oxygen saturation is 95%. You prescribe a Z-PAK and an over-the-counter cough preparation.

Being a very thorough provider, you have documented that you have considered the diagnosis of a pulmonary embolism but have, in your mind, ruled it out given her history, physical exam, and diagnostic findings. You admit, however, that if the patient was on oral birth control medication, smoked, or had a history of hypercoagulability, had hemoptysis, or had just had a prolonged period of being sedentary that you would have pursued the PE diagnosis more aggressively. You further agree that if she in fact had those factors in her history, it would be below the standard of care to not have pursued the diagnosis.

The plaintiff's attorney refers you to a page in the hospital record containing the intensivist's admitting note and asks you to read the following: "38 y/o intubated female on dopamine is received from the ED. Reportedly, this unfortunate young lady, who just returned from Europe, and who has a remote history of DVT, had quit smoking a week prior the event and was just taken off oral birth control pills, was being treated for URI symptoms with a Z-PAK."

His "question" at trial is, "Doctor, you agree of course, after the answer you gave in your deposition, that if you had taken the time to get a better history your care would not have fallen below the standard."

The take-home point is to thoroughly review the record from beginning to end. That way, you won't get tripped up by what other providers have documented, nor will you inad-

vertently impeach yourself by not knowing exactly what you documented.

Understand the Plaintiff's Case

Understand where the plaintiff is coming from, as opposed to simply discounting it. You will probably have a copy of his or her expert's opinions. If asked, be able to provide a rational explanation of why those opinions are not applicable to the case, or why the facts were different from their analysis. Understand what the opposing experts are basing their analysis upon; is it recent literature, an out-of-date textbook or a practice-pattern nuance specific to their local environment?

To fully prepare for your own deposition, it is important to know the basis for the suit. Think of Sun Tzu, who said, "If you know the enemy and know yourself, your victory will not stand in doubt...."

Giving the Deposition

Attempting to Talk Your Way Out of the Suit

Do not try to rationalize or talk your way out of a suit by explaining the basis for treating the patient the way you did in the hope that the plaintiff's attorneys will see the error of their ways and drop the suit. This approach often stems from not understanding the basis for the suit in the first place and often leads to volunteering information that was not asked for.

As providers, we are very used to explaining things to nearly everybody, often times in great detail. It is a great trait to have and suits us well in almost all aspects of our professional lives. After all, one of our jobs is to educate our patients.

However, for the 120 minutes or so that you will be seated at the mahogany table, lose this trait. The deposition is not the place to educate the opposing attorney. Answer what was asked, honestly and completely, and stop. Give your attorney an opportunity to object to the question before you begin your answer. If you don't completely understand the question, or if it is a two-part or compound question, ask for clarification. Many people giving depositions begin to answer a question before it is completed or without really understanding what was asked.

Like everyone else, attorneys will ask some really poorly worded questions. Don't guess at what they are trying to ask and don't say, "Are you trying to ask...?" Let them do their job, just ask for clarification if you are not 100% sure of where they are going with the question.

Lying, Becoming Argumentative or Overly Defensive

Be on your toes without becoming argumentative or overly defensive. It serves no purpose and may be very damaging to argue with plaintiff's counsel. Attorneys spend their days arguing; consequently, they are very good at it and the majority of physicians will lose an argument with a seasoned lawyer.

This is not to say that you should not disagree. State your dis-

agreement firmly and conclusively and leave it at that. I have seen physicians become overly defensive during a deposition. When this happens, they start disagreeing with even the most obvious statements ("Doctor, would you agree that your role is to treat the patient?"). Many providers start to think that every question is a trick question and, thus, will not agree with anything the opposing counsel says. When this pattern of behavior is woven through the deposition, a provider can lose credibility and the jury may start to doubt the provider's integrity on the important issues in the case.

In documenting, depositions, and trial, the rule of thumb is to simply be honest. Answer questions without expounding or letting your emotions get the best of you. If you are caught lying or have altered the records, you will lose, no matter how good your care was.

Blaming Others

During the discovery portion of the trial, other providers who may be liable for some aspect of the care will be uncovered. It is not your job to expose them, and you should not point fingers at other caregivers during the deposition. This invariably leads the other party to point their finger right back at you. The typical outcome is that you will both lose.

Court is Theater

As providers, we take this very seriously. After all, someone is questioning our ability and livelihood. While the facts and your responses are very important, so too is your demeanor and presentation. You need to remember that the jury will be looking at you in an effort to judge your credibility and competence. Act the part. The impression you want to give is that you are a very caring, honest, competent provider who will accept fault when appropriate and who is not arrogant, uncaring, or detached.

If you follow this, what should be very intuitive advice, you will greatly improve your chances of a favorable outcome at trial. Remember, the cards are already statistically stacked in your favor. ■

TAKE-HOME POINTS

- The opposing attorney may ask questions on the entire patient record, not just your portion; be prepared.
- Understand the plaintiff's perspective and the basis for the suit.
- Answer questions simply, honestly, and directly. Then stop talking.
- Fight the urge to become defensive or argumentative.