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PROFESSIONAL LIABILITY

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Deposition Dos and Don'ts: How to answer 8 tricky questions

You must tell the truth, but you can answer skillfully to avoid falling into traps set by plaintiff's attorneys

CASE Direct question at deposition

During your deposition in a malpractice suit, plaintiff's counsel asks you: "Are you saying it was impossible to foresee Ms. Jones's preterm premature rupture of membranes?"

How would you reply?

Ninety percent of malpractice cases are settled before trial, and the deposition often is the turning point in those cases.¹⁻³ Your answer to tricky questions such as the one in the case fragment above could favorably affect a critical stage of litigation—or it might spur the plaintiff's attorney to pursue the case more vigorously. Even if a case is settled in the plaintiff's favor before trial, the effectiveness of the deposition may determine whether the settlement is \$300,000 or \$1 million.

Our central message in this article is: Don't go to a deposition unprepared. We offer guidelines to help you anticipate many different scenarios, and we include examples of honest, skillful answers to difficult questions (see "Honest, skillful answers to 8 tricky questions at deposition," on page 37).³⁻⁷

Digging for pay dirt

Discovery begins after a formal complaint alleges malpractice. The parties to a lawsuit gather information through written



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interrogatories, requests for documents, and witness depositions—out-of-court testimony to be used later in court or for discovery purposes.⁸ The rationale for discovery is to reduce surprises at trial and encourage pretrial settlement. The witness being deposed is the *deponent*, and testimony is given under oath.⁹

A discovery deposition is designed to gather information, with almost all questions asked by opposing counsel. If you are sued for malpractice, this is the type of deposition you probably will encounter.

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Rules of engagement. The plaintiff's attorney initiates the discovery deposition. Ground rules vary by jurisdiction, but, in general, the Rules of Civil Procedure give deposing counsel substantial latitude in the questions that can be asked.¹⁰ The deponent and defending counsel, opposing counsel, and transcriptionist typically attend the deposition. To help you prepare appropriately, confirm with your defense counsel if other attorneys or the plaintiff will be present.

Not-so-hidden agendas. The plaintiff's attorney's primary goal is to gather as much information as possible about your side's case⁴ (TABLE 1). No matter how accurate medical records may be, they require interpretation and follow-up questioning of key players to get the full story. Opposing counsel also wants to:

- “lock down” your testimony for use at trial (testimony captured at a deposition can be used to impeach a witness who gives inconsistent testimony at trial)⁹
- “size up” your potential impact on a jury by assessing your strengths and weaknesses as a witness.¹¹

The impression you make may influence the opposing attorney's decision about how far to pursue the case. Plaintiff's attorney Bruce Fagel once told an interviewer that defense attorneys, too, may consider settling a case “if their client shows such arrogance in our deposition that they're afraid to let him appear in front of a jury.”¹²

Choosing a site. Most depositions take place in a conference room in the law office of one of the attorneys or at a neutral site. Avoid any temptation to schedule the deposition in your office, even though meeting there might seem more expedient and comfortable for you.⁹ Scheduling the deposition at your site:

- might make you feel it is “just another day at the office” and dissuade you from preparing sufficiently or taking the deposition seriously
- allows opposing counsel to scrutinize diplomas, books, journals, and other

TABLE 1

Plaintiff's attorney has 5 goals at deposition
Lock down testimony for trial
Scrutinize the defendant's qualifications
Size up the defendant's effectiveness as a witness
Probe the defendant for bias, arrogance, or hostility
Learn as much as possible—known as “fishing”

materials in your office.

Questioning you about these materials during the deposition is not off-limits for the plaintiff's attorney. You might find it difficult to explain why a book on your bookshelf is not “authoritative.”

Prepare, prepare, and ... prepare some more

Your emotional stress will probably wax and wane during the lengthy litigation process.^{13,14} Knowing what to expect and being well-prepared for the deposition may relieve some anxiety.

Review the case. At least twice, carefully review the entire database—including medical records and other depositions. Perform one of these reviews just before the deposition.³ Having the details fresh in mind will help you if opposing counsel mischaracterizes information when questioning you.

Meet with your attorney. Insist on at least two predeposition conferences with defense counsel.

At the first conference, volunteer all pertinent information about the case as well as any noteworthy medical inconsistencies.² Find out what documents to bring to the deposition, who will be present, and how long the deposition is expected to take. You might wish to prepare mentally by inquiring about the style and personality of opposing counsel.

Defense counsel does not control how long a deposition lasts but might

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FAST TRACK

Don't conduct a deposition in your office, where opposing counsel will be able to scrutinize your books, diplomas, and other materials

TABLE 2

Step by step, prepping for a deposition

Thoroughly review case records

Master the case (memorize key names, dates, facts)

Meet with defense counsel at least twice to:

- find out where the deposition is being held, who will be present, and how long it is expected to take
- learn what documents to bring
- understand opposing counsel's style and personality
- prepare for difficult questions
- consider holding a mock deposition

Double-check your curriculum vitae for accuracy and updating

Come to the deposition well-rested

be able to give a rough estimate. Plan accordingly, and allow for sufficient scheduling flexibility. Depositions typically last half a day but can last more than 1 day.

At a later predeposition conference, defense counsel might walk you through a mock deposition that involves difficult or anticipated questions. This is a good opportunity to master your anxiety and improve your effectiveness as a witness.

You also may wish to go over your curriculum vitae with defense counsel and check it for mistakes or other content that might raise problematic questions during the deposition (TABLE 2). Make sure your CV is up-to-date, and refresh your memory if it lists lectures given or articles written—no matter how long ago—on topics related to the litigation.

On deposition day

Don't open Pandora's box! Keep your answers to deposition questions brief and clear. Opposing counsel may ask broad questions, hoping to encourage rambling answers that reveal new facts. Answering questions succinctly and briefly is the best strategy under most circumstances.

One exception may involve scenarios

in which the defense attorney instructs you, for various reasons, to provide information beyond the question asked. For example, when a case is close to settling, your attorney might instruct you to lay out all evidence that supports your professional judgment and clinical decisions in the case. Do not use this approach, however, unless your attorney specifically instructs you to do so.

You are under no obligation to make opposing counsel's job easier. In a discovery deposition, volunteering information may:

- open up new areas for questioning
- equip the deposing attorney with more ammunition
- eliminate opportunities for your attorney to use surprise as a strategy, should the case go to trial.

Consider, for example, a scenario in which you and a hospital are sued in regard to a labor-and-delivery case. At deposition, you might be asked whether you can identify written evidence in the patient's chart that the mother was checked every certain number of minutes.

The correct answer is "No," even though you know such checks are documented in a log kept at the nursing station in that hospital. You might be tempted to reveal this information, but don't—instead, leave the timing of its disclosure to the defense attorney. Your attorney's strategy may be to reveal this critical piece of information at trial, when the plaintiff's attorney has less opportunity to strategize ways to discredit the evidence.

Keep your cool. Attorneys have different styles of questioning. Some may be excessively friendly or polite to get you to let down your guard—only to set you up for a devastating blow at the end of the deposition (or to save this for trial). Other attorneys might employ a bullying style that seeks to intimidate. In responding, always remain composed and resist the urge to counterattack.

In all circumstances, strive for humility and dignified confidence. Oppos-

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FAST TRACK

Before a deposition, check your CV to be sure it's up-to-date, clear of error, and free of any information that might raise problematic questions

TABLE 3

Deposition Dos and Don'ts

Always tell the truth
Actively listen to questions, and pause before answering
Keep your cool; never lose composure
Answer only the question asked
Stop speaking and listen carefully if your attorney makes an objection
Avoid long narratives, and don't volunteer information
Don't speculate or guess
Avoid absolutes such as "never" or "always"
Avoid jokes, sarcasm, and edgy comments
Ask for breaks if needed to keep from becoming inattentive
Carefully examine documents, reports, etc., before answering opposing counsel's questions about them
Ask for clarification of confusing questions
Remember: Nothing is "off the record"
Don't waive your right to read and sign the deposition transcript

FAST TRACK

Never answer a question you don't fully understand. Ask for clarification!

ing counsel gains the advantage when defendants lose composure or become angry, defensive, or arrogant. Indeed, experienced plaintiff's attorneys may be testing for precisely this reaction in the hope that a defendant will "demonstrate his arrogance" during the deposition or later on the witness stand.¹²

In working as expert witnesses in malpractice cases, we have observed many instances in which a defendant physician's arrogant or hostile remarks at deposition played a key role in causing the case to be prematurely settled in the plaintiff's favor.

Avoid making jokes or sarcastic comments. Even a well-timed, self-deprecating joke may backfire should opposing counsel take the opportunity to point out that the case is a "serious matter."

Listen carefully to each question during the deposition. Pause for a moment to consider the question and allow time for other attorneys to object.⁵ Your attorney's objection may suggest the best way for you to respond to the question. Refrain from answering any questions when defense counsel advises you to do so (**TABLE 3**).

Don't answer questions you don't understand. Rather, ask for clarification. Avoid using adjectives and superlatives such as "never" and "always," which may be used to distort or mischaracterize your testimony at trial.

Don't guess. No rule prevents opposing counsel from asking a witness to speculate, but you should generally avoid doing so. You are required to tell the truth, not to speculate or to volunteer guesses. The best way to cause a jury to disbelieve your testimony is to make inaccurate or unfounded statements, which opposing counsel will surely point out at trial.

Don't be tempted to "plumb the depths" of your memory for a forgotten piece of information, however. If you're asked, for example, if a patient displayed a specific symptom during an appointment 4 years ago, the true answer is likely to be "Not that I recall," rather than "No." Qualify similar answers with statements such as "To the best of my recollection" or "Not that I recall at this time."

If opposing counsel asks questions based on a particular document, ask to see the document. Review it carefully to determine:

- who signed or authored it
- when it was prepared and dated
- whether it is a draft copy
- whether it contains confidential information relating to patients other than the plaintiff
- whether it carries attorney-client privilege
- most important, whether opposing counsel has quoted it out of context.

Procedural pitfalls. Throughout the deposition, attorneys may periodically tell the

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Honest, skillful answers to 8 tricky questions at deposition³⁻⁷

THE IMPOSSIBLE DREAM

In law, there is a distinction between possibility and probability. The law considers anything possible, but something isn't probable unless it is more likely than not—that is, when expressed mathematically, its chances are $\geq 51\%$.

Q. Doctor, are you saying it was impossible to foresee Ms. Jones' preterm premature rupture of membranes?

A. I don't know of any way that the rupturing of membranes could have been foreseen. It was an unfortunate event that was not possible to foresee.

THE HYPOTHETICAL

When confronted with questions containing a hypothetical, identify the hidden assumption before answering.

Q. Doctor, with a depressed pregnant patient, would you agree that the standard of care requires you to...?

A. I can't agree with you that, in this case, we are talking about a depressed patient. Do you still want me to answer the question? *OR*

A. I can't answer that based on the few facts you've given me. I'd need to examine that patient first.

INVITATION TO SPECULATE

Refrain from speculating, especially when you've been presented with an incomplete clinical picture.

Q. Doctor, is it fair to say that a patient with this history should be referred to a specialist in high-risk pregnancy?

A. I really can't speculate based on that limited information—I'd just be guessing.

DID I SAY THAT?

Opposing counsel may mischaracterize or distort your testimony by attempting to paraphrase what you've said.

Q. Now doctor, as I understand it, what you're really saying is that the patient...?

A. No. *OR*

A. No—that's not an accurate summary of what I just said.

THE AUTHORITATIVE TREATISE

Opposing counsel wants you to acknowledge a specific piece of literature as 'authoritative' in

gynecology, so that counsel can then impeach you at trial with points from the literature that contradict your testimony. Although you may be made to look foolish if you refuse to acknowledge anything as authoritative, that usually is the safest course.

Q. Doctor, do you accept *Williams Obstetrics* as an authoritative reference in your field?

A. It is certainly well-respected, but the entire text can't be considered authoritative. *OR*

A. Significant portions may be authoritative, but I would need to see the portion in question to be able to answer your question.

THE TYRANNY OF YES OR NO

In an effort to control you, opposing counsel may demand only "Yes" or "No" answers. Listen closely to each question, and determine if you can convey the whole truth with "Yes" or "No." Asking to further explain to avoid giving a misleading answer will make opposing counsel appear defensive if he (she) does not agree.

Q. Doctor, please answer the question; it requires only a simple "Yes" or "No."

A. I cannot answer that question with only a "Yes" or "No." Would you like me to explain? *OR*

A. A mere "Yes" or "No" answer to that question would be misleading. May I explain?

CONVOLUTED COMPOUNDS

When opposing counsel asks you a double- or triple-jointed question, ask her to reframe or break down the inquiry into simpler questions.

Q. Doctor, would you agree that a woman with a family history of diabetes who is taking ... should be tested for ... at least once a month, and that if there is evidence of ... then the standard of care requires you to ...?

A. Please repeat those questions again, one at a time.

GIVE ME MORE

Opposing counsel may try to "fish" for more information. You are under no obligation to make his job easier. Answers that contain a qualifier are useful.

Q. Doctor, to your knowledge, have you told me everything you consider important about your patient's death after she hemorrhaged?

A. I have told you all the information I can remember at this time.

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Personae sometimes adopted by plaintiffs' attorneys to obtain information at deposition

"Mr./Ms. Friendly" Some attorneys look for an opportunity, before the deposition begins, to show that they are "friendly" and not to be feared. Remember: Discussions with opposing counsel without defense counsel present are inappropriate.

"Eager Student" Opposing counsel may play the "eager student" to massage your ego and pave the way for long narratives and volunteered information.

"Counselor Clueless" Opposing counsel may appear so ignorant of certain facts that you can scarcely resist jumping in to educate him or her.

"Mr./Ms. Silent Treatment" After you give a brief, honest answer, opposing counsel may sit silently as if expecting a more substantive response. Resist the temptation to fill the silence.

FAST TRACK

If plaintiff's attorney appears confused, it may be a ploy. It's not your role to clear up matters!

court reporter that they wish to have a discussion "off the record." Nothing is off the record for you, however. If you make a statement when the court reporter has been told to stop, opposing counsel can summarize on the record everything you said during that time.

At the beginning or end of the deposition, one of the attorneys may ask if you wish to waive the right to read and sign the deposition transcript. Seek your counsel's advice, but defendants usually choose to retain this right. Typically, you have 30 days to read the transcript and correct errors. Keep in mind that substantive changes beyond typos are likely to be the subject of intense cross-examination if the case goes to trial.⁹

Depositions are sometimes videotaped, usually because a witness will not be available at the time of trial. Because the jury will hear and see you, approach a videotaped deposition as if it were an actual trial. Dress appropriately, speak clearly, and look directly into the camera. Don't feel embarrassed about making sure that you are taped with the best possible lighting, camera angle, and background.

Keep your guard up!

Don't allow yourself to be distracted if opposing counsel jumps from open-ended questions to clarification questions to "pinning-down" questions. An erratic approach could be part of opposing counsel's strategy. Answer only the question asked, and give the shortest correct answer possible to each question.

Opposing counsel may ask a question in a way that suggests substantial confusion or misunderstanding. If this confusion does not affect your testimony, you don't need to clear up matters for opposing counsel. If, for example, opposing counsel asserts that one of your statements is contradictory, an appropriate response may be simply, "No, it wasn't." It is opposing counsel's job to explicate further details.¹¹

Opposing counsel may approach the deposition with a particular demeanor—friendly, eager to learn—in an attempt to get you to let down your guard and speak more freely (see "Personae sometimes adopted by plaintiffs' attorneys to obtain information at deposition," above).

During a full-day deposition, particularly, the greatest likelihood of making a mistake begins around 4 p.m. Some attorneys may reserve especially important questions for this time, hoping that the witness will be less guarded. Start the day well-rested and ask for breaks if fatigue begins to affect your concentration.

Be alert to questioning designed to elicit only "Yes" answers. This technique—often used by salespersons—makes it difficult to say "No" in response to an ambiguous question. Last, point out errors if opposing counsel misquotes earlier testimony or states facts incorrectly. These mistakes may be innocent, or an attempt to distort your testimony.

CASE RESOLVED

Direct question at deposition

You reply to plaintiff's attorney: "I don't know how the rupturing of membranes in this case could have been foreseen." ■

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