Giving depositions as a defendant or an expert

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Depositions of defendant health care providers and retained experts are extremely important in health care liability claims. Whereas in other types of claims, depositions are used primarily as a tool to discover and clarify the facts, in health care liability claims depositions also serve to discover and evaluate the thought process and rationale behind the evaluation and treatment of the patient's condition, the underlying basis of opinions about the propriety of the care rendered, and the causes of the patient's subsequent complications, problems, impairment, or death. The underlying facts in these cases are critical, but they are often documented long before litigation.

Counsel for both the plaintiffs and the defendants also use these depositions to evaluate how a witness will present at trial and how a jury will respond to the witness and his or her testimony. While recollections of facts and expert opinions are an important part of health care liability claims, the real key is whether or not beneficial or supportive recollections and opinions can be presented to the jury in a reasonable, understandable, and credible way. Depositions of the defendant physician(s) and expert witnesses provide counsel with some of the best information on which to evaluate these factors and the case itself. For this reason, depositions need to be taken seriously by physicians, whether they are testifying on their own behalf or as an expert for one of the parties.

If you are a defendant in a health care liability claim, the best thing that you can do to assist in your defense is to devote the utmost attention and effort to your deposition. This is the only part of the process (other than the decision on whether or not to consent to settlement) over which you have any control. Generally, if you prepare thoroughly and follow counsel's instructions, you will do as well in the deposition as the underlying facts allow. Frequently, your deposition reflects the overall strength or weakness of the case. While you cannot change the underlying facts, your deposition is a key factor in counsel's evaluation of whether or not to take the case to trial or whether or not your case can be settled on more favorable terms than the facts alone might otherwise allow.

If you are acting as an expert witness for one of the parties, your time and effort will go for naught, as will the resources spent for your services, if you are not your best in deposition. A poor expert deposition may force the party that retained you to settle a claim that might otherwise go to trial, or to settle the claim on less favorable terms than originally anticipated. Being an expert is a big responsibility, and much rides on your deposition.

This article briefly reviews some points to keep in mind to maximize the effect of your deposition testimony. Understand that different attorneys may have different recommendations in these matters. Since your counsel is the one presenting the case at trial, follow his or her instructions. In addition, keep in mind that these recommendations apply only to depositions that are taken by your opponent in a "discovery" context. These rules do not apply when you are being deposed by your counsel, or counsel for the party that retained you, in lieu of testifying live at trial. Different rules apply to those situations.

PURPOSE OF THE DEPOSITION

You are being deposed solely to provide opposing counsel the opportunity to ask you questions about what you know and think about the case. These depositions are not the stage for you to tell your side of the story (unless asked) or make sure that you explain the entire case to the opposing lawyer (again, unless asked). You are there to simply answer opposing counsel's questions. If the attorney representing you and/or presenting you for deposition feels that something not covered by opposing counsel needs to be brought out, he or she will do so at the appropriate time. In addition, keep in mind that counsel present are watching your mannerisms and how you deal with the process during your deposition. As such, your appearance and the manner in which you convey your opinions and impressions are just as important as what you have to say.

PREPARATION FOR THE DEPOSITION

The importance of devoting time to preparing for a deposition cannot be overstated. While your predeposition meeting with counsel is an important and necessary part of preparation, it is by no means sufficient. The most important way to prepare for your deposition is to devote the time necessary to unearth

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and understand the underlying facts of the case, the apparent issues, and the potential issues and to know how to deal with the strengths and weaknesses of the case.

The somewhat trite phase "the devil is in the details" often rings true in these matters. In order to have an adequate understanding and basis from which to work, you need to spend sufficient time reviewing the medical records, the depositions, and any expert reports. In addition, you need to think through your impressions and opinions about the case, the bases for your impressions and opinions, how your impressions and opinions could be attacked, and how to respond to any attacks.

Never assume that the opposing attorney is simply going to show up and ask you to state the background facts, your opinions and impressions, and the bases for your opinions and impressions. While this may happen occasionally, it is best to be overprepared rather than underprepared. Anticipate that opposing counsel will have reviewed the medical records and depositions in great detail and will have reviewed the medical literature on the relevant subjects. Expect that opposing counsel will "test" you on your opinions and not simply accept your testimony as fact. This means that you need to expect that counsel will question you extensively about the reasons for each of your conclusions; will question you about how you resolve any inconsistencies that may arise from the patient history, laboratory results, or study results; and will query you about how you excluded other possible opinions or explanations.

For example, if the appropriateness of a diagnosis is an issue, you need to know more than the reasons on which your diagnosis of the patient rests (or the basis on which you agree or disagree with the defendant's diagnosis). In this scenario, you must also consider other possible diagnoses based on the patient's history and clinical condition and be prepared to explain why these other possible diagnoses were not reasonable and should be excluded under the circumstances. Likewise, if your opinion is that the patient's adverse outcome is not the result of the care at issue, you not only need to be prepared to explain the reasons why the adverse outcome occurred, but you need to be prepared to have evidence to explain and support why this outcome was not the result of improper care or the result of the care provided. In order to have credible, effective explanations, it is important to know the underlying facts, good and bad, and be able to cite facts or information in the records or depositions themselves, as opposed to merely stating that you do not think your opponent's position is reasonable or medically credible. If you are not aware of the "good" facts, you will miss an opportunity to show opposing counsel that your opinions and thought processes are well based. If you are not aware of the "bad" facts, you can get caught flat-footed and miss an opportunity to explain away these facts when given the opportunity, and you are likely to be left agreeing with your opponent that these facts may be of significance.

PRESENTATION AT THE DEPOSITION

As mentioned earlier, the manner in which you present your opinions and impressions is as important as the opinions and impressions themselves. Keep in mind that your opponent will be presenting the other side of the case through experts also. As such, the fact that you may be a knowledgeable and qualified physician is not enough. The key is for you to be able to convince a jury that your position is the most reasonable explanation of the situation before them. Being medically "right" or having the best curriculum vitae or the most experience is often not enough. Litigation is not reality, it is persuasion. Your impressions and opinions are being presented to and need to be accepted by laymen, not your peers or other medical professionals. Thus, you cannot assume that you will prevail because you know what you are talking about and/or are medically correct. You need to be able to clearly and concisely explain your position and have supporting facts from the case itself to effectively support your conclusions.

One key factor here is your demeanor. You need to be direct, patient, and matter-of-fact in your presentation. Arrogance and wisecracks are not called for and are not effective ways of presenting your position. These actions turn juries off and adversely impact the effect of your testimony. Let the attorneys act disrespectfully if they must. Do not rise to that bait. Further, accept that attorneys may ask what you consider ill-informed or even stupid questions, but realize that they may not seem so ill-informed or stupid to a lay juror. Understand that conducting yourself in a professional and respectful manner and holding your tongue and keeping your frustration in check at such questions for a few hours during your deposition may pay off greatly down the road. These actions show opposing counsel that he or she will be facing at trial a formidable witness who will have credibility and probably the respect of the jury.

For the deposition itself, come neatly dressed and groomed. Be attentive, patient, and confident, not arrogant or cocky. Directly answer the question asked. If your answer needs to be qualified, keep the qualification short and to the point. Do not lecture or pontificate. In short, put yourself in the place of a lay juror listening to your testimony. Certainly, there is nothing more frustrating than to be forced to sit and listen to someone who avoids direct questions and says only what he or she wants to say. Imagine being forced to listen to hours of a political debate where numerous direct questions are asked but direct and concise answers are never given. That would not only be frustrating but would also likely result in your not believing what the speaker has to say. If you act in this same manner, jurors will probably have similar thoughts about your testimony.

In order to directly answer the question, you must listen carefully to the question itself. A key point here is to understand that lawyers' questions can be long and rambling and may not end up where they appear to be going when they start. If you do not listen to the question carefully, you will not be able to answer it directly and truthfully. In addition, if you legitimately do not understand the question, ask for it to be reworded. If you do not know what is being asked, there is no way that you can provide an honest answer.

The case will have weak parts, and opposing counsel will most certainly ask about these matters. Address these facts honestly and directly. For example, it is common for actions

considered and/or taken to not be reflected in the case documentation. The absence of documentation will be readily apparent to everyone looking at the case materials. Do not lose your credibility by avoiding a direct question seeking to establish that supporting documentation does not exist. Another matter that frequently arises is that a statement in the medical records, taken alone and out of context, appears damaging. Frequently, opposing counsel will simply focus on that one statement and ask if that statement is contained in the records. If it is, then it is. Do not argue about the "meaning" of the statement or the true context of the statement if that is not the question being asked.

In these situations, you need to accept and acknowledge these facts. Do not be defensive about them. Arguing about these matters does nothing other than to risk creating "a mountain out of a molehill" over something that you will have to eventually admit is true. If you avoid a direct response to this type of question, the jury may come to believe that the opponent's position is correct and that the matter is a legitimate problem with the case.

Tell the truth and do not try to outthink the lawyer. Oftentimes, a witness will try to answer a question based on what he or she thinks the lawyer is going to do with the answer. Do not do this. Answer the question truthfully and accurately. Lawyers will make every effort to twist and turn the facts to their benefit, regardless of what they are told. Answers that are not truthful and accurate are a recipe for disaster. Keep in mind that the attorney working on your side of the case understands that answers may be twisted and taken out of context and should be prepared to deal with those occurrences accordingly. You are the witness. Do your job and answer the questions asked. Let the counsel presenting you be the lawyer.

In addition, never guess or pretend to know something that you do not know. Expect that the opposing lawyer will know the facts as well as you do or better and will have a good grasp of the medical issues. As such, a guess that is incorrect will come back to haunt you. Also, never think that you can "put something over" on the opposing lawyer. For some reason, some experts are so arrogant that they think they can throw out an unsupported medical opinion that the opposing lawyer will not know is invalid and will simply accept. Never take this chance. There is nothing worse for your credibility than to have the opposing lawyer show in front of a jury that you tried to put something over on him (and them) and were caught.

Lastly, pay close attention during the entire deposition. Everything that you say is being written down by the court reporter. Further, most depositions are videotaped, so all of your actions, facial expressions, and mannerisms are being captured. Hours of great testimony can be undone in the final minutes of your deposition if you let your guard down. Keep focused and behave throughout the deposition. The last thing you say is every bit as important as the first.

Depositions of physicians in health care liability claims are difficult and complex. They are very important parts of the litigation process. If you are going to be deposed in a health care liability claim, you need to accept the importance of this situation and act accordingly. This means putting in the effort needed to adequately prepare for the deposition and making the utmost effort to act appropriately during the deposition itself.