DEPOSITION HANDBOOK *for* THE OPHTHALMOLOGIST

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Introduction

Since the majority of medical malpractice cases are disposed of prior to trial, the deposition can be of critical importance to the outcome of a claim. Although you may have given a deposition on behalf of others on prior occasions, it is a different experience when the deposition will be used in a case in which you are the defendant. You should approach this deposition with special care, remembering that your deposition is likely to play a very important role in the determination of the ultimate outcome of your case.

This handbook provides an overview of the deposition process to assist you in understanding what takes place at a deposition. It is *not* designed to take the place of your own personal legal counsel; its function is to provide you with general information about this important part of the litigation process, which increasingly affects the way physicians provide care within our medical system.

THE DEPOSITION PROCESS

A deposition is testimony given under oath before attorneys representing the parties to the lawsuit and the court reporter, much like testimony in court. The parties to the lawsuit are entitled to be present and observe, but they do not participate in the deposition.

Because the suit against you is a lawsuit claiming improper care of a patient by a physician, you are most likely the single most important witness in the case. Some juries accept as true every complaint that a patient makes in a malpractice lawsuit. However, a jury also will be most eager to hear what you, the doctor, has to say. Your deposition can be an excellent opportunity to practice for trial, should your case actually get that far.

Purpose of a Deposition

A deposition serves several general purposes:

1. It may enhance settlement and perhaps save trial time by permitting discovery of all facts prior to trial.

2. It allows the attorneys to determine how you present yourself as a witness.

3. It preserves testimony in the event a witness is unable to testify at trial.

Keep in mind that the primary purpose of the examining attorney is to extract testimony to use against you at trial. As the deponent, your primary purpose should be to answer each question truthfully and then stop talking. Restraint is enormously important when answering questions from a hostile attorney. The more you talk in your deposition, the more likely you are to make a mistake and say something that can be used against you at trial. The occasion of your deposition is manifestly not the time to tell your entire story. That day comes at trial.

Statements made in deposition that are helpful to your case generally cannot be used by your attorney at trial since you must testify "live." However, any deposition statement you make that is harmful to your case can and will be used by opposing counsel. You can expect few truly friendly questions from the opposing attorney at your deposition. The job of opposing counsel is not to help you look good; actually, it is just the opposite. Don't show your hand during the deposition. You want to be restrictive in how much you say and careful how you say it. Keep one thought foremost in your mind: **Stop talking!**

Preparing for Your Deposition

In light of the importance of your deposition, a significant amount of time with your attorney will be devoted to preparation. Each case usually presents unique issues requiring special attention. Make sure you understand the litigation and deposition strategies. Review your medical records and the documents, reports, and literature provided by the attorney assigned to assist you. Discuss candidly with your attorney the potential negative conclusions one could properly or improperly draw from reading the documents alone. The "damage" you see may not be very significant in terms of the issues of the case, and your embarrassment or discomfort from the documents should be put in perspective.

Your personal presentation and appearance are important. Remember to dress in a conservative and professional manner at the deposition.

The following are some of the subjects you may be asked about and should be prepared to answer at your deposition:

1. Your Education, Medical Training, and Experience
2. When You First Saw the Patient
3. The Patient's Medical History
4. Ophthalmic and Physical Examinations and Tests Performed
5. Findings and Diagnosis
6. Medical Treatment and/or Surgery
7. Consults and Subsequent Treatment
8. Patient's Last Visit/Exam
9. Future Surgery and/or Medical Therapy
10. Patient's Ophthalmic Limitations

General Instructions

Before your deposition begins, there undoubtedly will be a certain amount of friendly small talk. The other attorneys will be congenial and the conversation easy and relaxed. Remember though that it is the attorneys' job to win so you should not say anything about the case. If the opposing attorney discusses it, let your attorney make any necessary comments. Don't be impolite, but tell the other attorney as pleasantly as possible to talk to your attorney about the case.

The attorney who requested the deposition will ask questions about your knowledge of the facts. The other attorneys present have the right to object to any improper questions and will later have the opportunity to ask questions. Your answers will be recorded verbatim and presented to you in booklet form for correction and appraisal. If you make changes, the opposing attorney will be entitled to comment on that fact at trial.

During questioning, **maintain your dignity and do not allow yourself to become angry**. When angry, you may say things you don't really mean and later will regret at trial. No one who is under oath and whose every word is being recorded can afford angry outbursts. The examiner may become belligerent or sarcastic, but don't let that rattle you into making thoughtless remarks that distort the truth. Bear in mind that the examiner is testing you to find out how you will react in court. If you can be baited into losing your temper, the attorney will make good use of that knowledge later since angry witnesses also tend to be careless and to make poor impressions on judges and juries. Your attorney is there to protect you from being bullied or harassed. If questions are repeated or seem argumentative, let your attorney do the objecting. Keep calm and rely upon your attorney's judgment even when you believe there ought to be an objection. Often your attorney can learn more about a case from the questions asked than the examiner can learn from your answers.

Do not let your answer be affected by the form of the question or the examiner's tone:

Question: *Do you realize you are testifying under oath?*
Answer: *Yes.*

Question: *Is that really your sworn testimony?*
Answer: *Yes.*

Question: *Do you expect me to believe you?*
Answer: *Yes.*

You have a duty to **tell the truth**. If you meet that duty, the examiner's displeasure or doubt should not concern you.

The attorney is apt to open with general questions about where you live, work, and your background. You may start to relax and even enjoy being the center of attention. Do not be lulled into volunteering information. Once you let down your guard, the "friendly" attorney will slip in a zinger. If you fall into the trap and the line of questioning is harmful to your case, you can be certain the examiner will bring it up again, usually several times, at trial. **Do not relax.** Your deposition is of vital importance. Be on guard!

LISTEN CAREFULLY TO THE QUESTION AND MAKE ABSOLUTELY SURE YOU UNDERSTAND IT

It is easy to misunderstand a question or misinterpret unfamiliar words. If a question is posed too fast, ask the examiner to repeat it more slowly. If you don't understand exactly what the examiner is asking, request an explanation. Make sure you understand the sense in which words like "consent," "complication," and "consult" are used. If you have the least doubt, ask for a definition. If there is an unfamiliar word in the question, be candid and say you do not understand that particular word. Lawyers often use legal jargon. For example, lawyers use the words "prior" and "subsequently" instead of "before" and "after," and deponents are frequently confused by the terms. Lawyers say "inspect" when they mean "look at."

If you cannot decide exactly what the examiner means, ask for clarification and don't give your answer until you are sure of the question. An acceptable response to a question is that you don't understand. The examiner is required to pose questions that you fully understand.

Some examiners, when told a question is unclear, will attempt to make the deponent clarify:

"Why is the question unclear to you?"

"What don't you understand about the question?"

"What does 'acknowledgment' mean to you?"

You need not construct a proper question – that is the examiner's job. Use the "broken record" response to make the examiner pose a clear question. All you have to say is, "I don't understand." There are many ways to say you don't understand:

"I don't understand."

"Your question is not clear."

"I don't know what you mean."

"It's confusing."

"Please rephrase it."

"I'm not certain what you mean. "

"I have an idea, but I'd like to know what you mean in the context of your question."

If you persist, the examiner will give up and rephrase the question.

Every witness makes mistakes on a deposition. Do not become upset if you find you have made one. If you make a mistake during your deposition, correct it as soon as you realize it. Some time after the deposition, you will be given an opportunity to review the transcript of your deposition, which should be read and corrected as necessary. Mistakes you remember after the deposition is over may be corrected at the time you are to sign the transcript. You should keep in mind, however, that significant revision of your testimony may result in a further deposition or impeachment of your testimony should there not be a legitimate reason for change.

GIVE ONLY THE ANSWER THE QUESTION DEMANDS AND NOT ONE WORD MORE

Do not volunteer a thing; do not give clues; and stop talking. Accustomed to informal conversation, a typical deponent views a question as a cue to start talking on a subject and continue until someone interrupts. A deposition is not a chat. The less said, the better, and the sooner your deposition will be concluded.

If you can answer the question with a simple "yes" or "no," do so and stop. If the honest answer is "I don't recall" or "I don't remember" or "I don't know," say so and stop.

"Yes" or "no" answers should be obvious, but are they?

Question: *Do you know what your social security number is?*
Answer: *159-30-9454.*

Question: *Do you have an opinion as to a reasonable cost for the surgery?*
Answer: *$1,200.*

Question: *Do you recall the year that surgery was done?*
Answer: *1992.*

Question: *Did you note the time of arrival of the patient?*
Answer: *9:30 a.m.*

All of these questions could have been answered "yes" or "no." Almost any question that begins with "do" or "did" can be answered "yes" or "no." Granted, your answering "yes" might lead to follow-up questions:

Question: *Do you know your office telephone number?*
Answer: *Yes.*

Question: *Well, what is it?*
Answer: *629-4702.*

Make the examiner ask the right question for the following important reasons:

1. You are making the examiner work.
2. You are listening to the question.
3. You are not volunteering information.

If you cannot answer a question with a "yes" or "no," answer with "I don't recall" or "I don't know," if applicable. "I don't know" means just that – you have no knowledge.

Question: *Was Mrs. Smith notified of her missed appointment?*
Answer: *I don't recall. (Your office may have notified her; it may not have.)*

Question: *On what day of the week did she fail to show up?*
Answer: *I don't remember.*

Question: *Did you ever have a cataract operation on yourself?*
Answer: *No. (If you did, you would remember.)*

The examiner is entitled to ask you questions, but you are not required to know the answers. "I don't recall" is usually a safe answer, assuming it is true. The following questions usually can be answered "I don't recall":

"When…?" This asks, "On what specific date?"

Question: *When did you first become aware of the problem?*
Answer: *I don't recall.*

Don't say: "I don't recall the exact date." This answer will alert the examiner to ask, "What was the approximate date when you first became aware of the problem?"

"What specifically …?" This usually means "exactly."

Question: *What specifically did he say?*
Answer: *I don't recall.*

Don't say: "I don't recall specifically." This answer suggests, "I don't recall specifically, but ask me what he said generally and I can tell you."

If you cannot answer "yes," "no," "I don't recall," or "I don't know," then answer as briefly as possible and stop talking. Never think out loud! It will suggest additional areas of inquiry to the examiner!

Question: *When did you serve as president of the ophthalmology society?*
Answer: *Let's see, I was treasurer from 1950 to 1960, vice-president from 1960 to 1976, and president from 1976 until now.*

You have just invited questions regarding 1950 to 1976.

Question: *During his appointment on November 6, 1978, what was said by Mr. Jackson about his poor vision?*
Answer: *He didn't say anything during that appointment.*

You have suggested that the examiner ask questions about what Mr. Jackson said during other office visits.

Question: *Who was present?*
Answer: *Mr. Jackson and maybe his wife. She may have been. I'm certain she was at one of the appointments.*

You have just brought up other times when Mrs. Jackson was present.

Do not make gratuitous remarks:

Question: *Where were you on August 25, 1978?*
Answer: *I don't know. Sorry, but everyone who knows me will tell you I have a very poor memory for dates. I guess I do.*

You will be reminded of your poor memory at trial.

TELL THE TRUTH

Regardless of the possible effect on the lawsuit, answer truthfully. Don't be an advocate; don't stretch the truth. You need not explain, on deposition, an honest answer. Your attorney can elicit an explanation later in your deposition, or save it for trial. Let your attorney decide.

Question: *Did you penetrate Mr. White's eye with a needle?*
Answer: *Yes.*

Do not say: "Yes, but he was drunk and he sat up, pulled forward, and turned his eye into the needle." Save this anecdote for trial!

Do not let the examiner put words in your mouth. Give your version of the facts, not the version suggested by the examiner.

Question: *Did you have the patient read the informed consent before he signed it?*
Answer: *Yes.*

Later, the examiner will ask:

Question: *Now, as I understand your testimony, you say you had the patient study the informed consent before he signed it, true?*
Answer: *No.*

Question: *What is incorrect?*
Answer: *Your statement.*

Question: *What about it?*
Answer: *I didn't have him study the informed consent document.*

Be alert to questions beginning with:

"Is it a fair statement that …?"

"Do you agree that …?"

"If Mr. Jones testified …would you agree?"

"Do I understand you correctly that …?"

"Would you say that …?"

If you are in complete agreement, say so. If you are not in complete agreement, answer "No."

You should limit your testimony to what you have observed with your senses and not take as fact what you have learned secondhand. In daily conversation, where such shortcuts are common, you are not speaking under oath, which demands a higher standard of accuracy.

SPECIFIC POINTS

Objections

There are two types of objection. In the first type, your attorney objects and tells you not to answer the question:

Question: *What did you tell your attorney?*
Attorney: *Objection. The question calls for a privileged communication.*

Your attorney turns to you and adds, "Do not answer that question." You then say nothing. If opposing counsel persists with the question, you respond, "On the advice of counsel, I refuse to answer."

In the second type of objection, your attorney objects but tells you nothing:

Question: *How long would it have taken you to do that?*
Attorney: *Objection. The question calls for speculation.*

You may answer the question, but listen to your attorney's objection. By objecting to "speculation," your attorney is telling you the question calls for a guess on your part. If you agree, you can usually answer honestly, "I don't know." If the examiner persists with, "Give us your best estimate," you can answer, "I have none" or "I would be guessing."

"Objection; no personal knowledge," means your attorney thinks you don't know. If you don't know, say so. When testifying under oath, answer only on the basis of your personal knowledge, unless the examiner specifically asks you about secondhand information:

Question: *How many days was he off the job because of the eye injury?*
Answer: *I don't know.*

Don't say: "I have no firsthand knowledge about that." The examiner will then ask you about secondhand knowledge.

"Objection; compound question," refers to several questions in one. Usually the examiner will rephrase the question, or you will have to ask that the question be rephrased.

Question: *Didn't your office call Mr. Jones and then send him a registered letter?*
Attorney: *Objection, compound.*
Answer: *Please break that question down.*
Or
I don't understand the question.

"Objection; vague, ambiguous, too general," alerts you to a dangerous question. Always ask for the question to be repeated and listen to it very carefully. Do not answer the question unless you understand it perfectly. If you have any doubt about the question, say you don't understand it. Ask the examiner what vague or ambiguous words mean.

Question: What was wrong about the visual field record?
Attorney: Objection; vague and ambiguous.

Question: Please answer my question.
Answer: Please repeat the question.

Question: What was wrong with the visual field record?
Answer: I don't understand your question.
Or
What do you mean by "wrong with the visual field record?"

"Objection; calls for a conclusion," indicates the examiner wants you to draw a conclusion from facts you observed. You need not do so; ask for a definition instead.

Question: Did Mr. Jones give his consent?
Attorney: Objection; calls for a conclusion.
Answer: What do you mean by "give his consent"?

Question: Did Mr. Jones say, "Yes"?
Answer: No.

Motions to Strike

Occasionally, your attorney will move to strike part of your testimony as being "non-responsive":

Question: Did you review the surgery with the patient?
Answer: No, but my assistant did.
Attorney: I move to strike all after the word "No" as being non-responsive.

Such a motion usually is intended to remind you to limit your answers to the question and not to volunteer information.

Timing

Be certain to pause after each question before you voice your answer. For one thing, you want to give yourself as much time as you need to frame a careful and correct answer. More than that, however, you want to be certain your attorney has an opportunity to lodge any objections or even to instruct you not to answer the question. Always pause before each answer and if you hear your attorney speak, stop immediately.

Take your time answering the question. The examiner cannot pose the second question until you have answered the first. You control the tempo. Hasty answers are often poor answers and pauses don't show in the transcript. If you are being videotaped, a thoughtful, measured response works well. Remember at all times that you are dictating an important document. Taking your time will help insure that your answers are well reasoned and correct.

There Is No Such Thing as "Off the Record"

The examining attorney may instruct the reporter, "Off the record, please." The reporter will cease reporting the proceedings until instructed to resume. Being "off the record" is not off the hook and not the time to make gratuitous comments. If you do, and the examiner thinks your comment will help his client's case, he will go back on the record and then ask you, "While we were off the record, didn't you state …?"

Self-criticism

Plaintiff's attorneys increasingly are trying to paint physician defendants as resentful, prejudiced people who oppose injured patients having the right to come to court, if necessary, to address their grievances. Do not retort angrily when asked about such matters, and do not agree that you resent lawsuits or feel any degree of prejudice against people who bring them. Remember that you want to present yourself at all times during a deposition as a fair-minded, composed individual.

Question: *Don't you resent the fact that Mr. Jones is able to challenge your professional judgment and skill by bringing this lawsuit?*
Answer: *No. That is his right.*

Because the ultimate test in a case of supposed doctor negligence is whether the defendant doctor gave improper care, do not answer a question during a deposition that has the effect of criticizing yourself. This is the "back door" approach to negligence testimony. If the plaintiff's attorney cannot get you to testify directly that you were guilty of substandard care, he or she will try to get you to say the same thing in effect in a somewhat more indirect fashion. Never agree that you gave "bad care," "could have done something better," or that perhaps "it would have been preferable to do something different," or other answers to the same effect.

Question: *Isn't it true that you could have been more careful during the surgery?*
Answer: *No. I was as careful as possible.*

Remember, you are your own most important advocate. Don't criticize yourself.

Documents to Refresh Recollection

Question: *What else was said?*
Answer: *I don't recall.*
Question: *Is there any document that would refresh your recollection as to what else was said?*

The examiner often wants you to answer "No," which would make it necessary for you to explain at trial if you testified further on the point. The most accurate answer often is, "I don't know" or "There may be." Of course, if you know of a document that would refresh your recollection, you should answer, "Yes." Sometimes the examiner will show you a document and ask you if it refreshes your recollection on a point:

Question: *Does this letter dated December 18,1978, refresh your recollection about the appointment on December 18, 1978?*
Answer: *No.*

If the document doesn't truly spark your recollection, answer "No." Don't speculate as to what "probably" occurred.

If the examiner refers to any document in asking you a question, ask to see it before answering. Read the entire document before you answer any question about it. Note the date, author, addressee, and recipients of copies. Don't assume that facts recited in the document are true. If the examiner has a series of questions about the document, he or she should furnish you with a copy. If the examiner holds onto the only copy, ask to see it after each question.

Medical Records

When responding to questions for information that can be found in the medical records, do not guess or assume. Refer directly to the records before you give your answer, without asking the permission of the opposing attorney to do so. No one is expected to remember everything; it would appear suspicious if you did. You may testify from direct recollection, from recollection of information or events that have been triggered or refreshed in some fashion, or from written records themselves. This is one of the reasons you make records on a patient. Use them.

Medical Literature

Many states, either by statute or rule, will allow the opposing attorney to impeach your testimony using medical literature. That is, the opposing attorney can attempt to show that someone else in a medical text, journal, etc., has said something that contradicts what you are now testifying to yourself. Most often, however, the defendant doctor must help the opposing attorney lay the necessary predicate for this type of impeachment. This usually consists of the doctor agreeing that he or she is familiar with the particular literature in question, has read it and agrees that it is "authoritative," "the gold standard," or "controlling" on that particular question of medicine. If you are unfamiliar with the particular literature about which you are being questioned, that usually will end the line of questioning.

If, however, you are familiar with the literature, take great pains to point out in your answer that although the source in question may be a useful guide, helpful reference, or a source of some utility, it is not authoritative, standard or dispositive. Point out that you don't practice out of books, medical journals or surveys; to the contrary, you practice out of your substantial training and vast experience.

Here's an example:

Question: *Are you familiar with Dr. Smith's definitive study on this procedure?*
Answer: *Yes.*

Question: *Have you read Dr. Smith's treatise?*
Answer: *Yes.*

Question: *Isn't Dr. Smith's study the primary authority on how this procedure should be performed?*
Answer: *Dr. Smith's treatise is indeed a useful guide to this procedure; however, it is only a guide.*

The vice of impeaching a physician with medical literature is that first, there could be a substantial difference of opinion about the points being raised; second, medical science may change its mind as time goes on; and third (and most importantly), your particular patient is not in that book or article. The clinical presentation is always a very important part of any diagnosis or treatment. No medical source can govern the assessment or treatment of a specific patient who presents with his or her own unique clinical circumstances.

Hospital Review Committees

Since many states have strong statutory provisions protecting the work product or functioning of hospital review committees, it is prudent not to answer

questions concerning the functioning or findings of these committees. Discuss this matter with your attorney prior to the deposition, and once the deposition is under way, pause when confronted with any such questions to allow your attorney an opportunity to speak, if he or she wishes.

Attorney-Client Privilege

Conversations or communications between you and your attorney need not be disclosed. A similar privilege of confidentiality exists with respect to your spouse, physician, clergyman, or psychiatrist.

Questions eliciting such confidential communication are often obvious and your attorney will object. However, sometimes your attorney may be unaware that the question calls for a privileged communication and will fail to object:

Question: *Has anyone ever discussed with you whether you were wrong?*

Your former attorney did. You could answer, "Yes," and the examiner would then ask, "Who?" Before it gets that far, ask for a recess and tell your attorney.

Answer: *I would like to consult with my attorney.*

Videotaped Depositions

The practice of videotaping a defendant physician's deposition is getting more and more common. While other reasons are sometimes given, the genuine purpose for this in the mind of the plaintiff's lawyer is to record how you look and sound and to intimidate you with the video camera, if possible. When answering questions in a videotaped deposition, take care to sit up straight, avoid distracting mannerisms or gestures, and speak directly to the questioning attorney. Beyond that, ignore the camera completely. It will affect you only to the extent you allow it to.

Trick Questions

In addition to the discussion above, there are some specific trick questions opposing attorneys often use. Here are some of the more common ones. For one, the other lawyer may try to capitalize upon your eagerness to answer questions "yes" or "no" by asking you a question to which either answer will make you look bad. These are the proverbial "have you stopped beating your wife?" type questions. In truth, these are not actually yes or no questions. The vice of these questions is that they always assume a faulty premise (i.e., that you have ever beaten your wife). The proper way to respond to such questions is to directly point out the vice of the question (e.g., "I have never beaten my wife.").

Question: *Aren't you ever going to stop drinking cocktails in the O.R.?*
Answer: *I have never had a cocktail in the O.R.*

Opposing attorneys also will bait you by suggesting that some other physician involved in the case has criticized you:

Question: *Doctor, were you aware that Dr. Jones has said you caused the infection and he was simply trying to treat what you had created?*

Resist the temptation to respond angrily. Don't answer in a testy voice that Dr. Jones was himself the culprit or is incompetent. Instead, calmly respond that you are not aware that Dr. Jones has said such a thing.

Here's another popular trick question:

Question: *Doctor, if you could go back and do it all over again, what would you change?*

Obviously, this is not a fair question. It strongly suggests that you answer based upon hindsight and what you now know. No one, including the plaintiff's attorney, gets the benefit of hindsight. Assuming your attorney does not object to the question, you can handle it this way:

Answer: *If I were to go back in the same situation, nothing would be different, and I would do the same thing I did the first time.*

The only time a different answer is appropriate is if the patient or some third party was responsible for your not having necessary information which might have altered your conduct.

Perhaps one of the most common lawyer tricks during depositions is misrepresenting your prior testimony in the course of framing a later question. This is why you must always listen with exquisite care to every word of a question to be certain that the opposing lawyer has not shaded or actually misrepresented something you said previously. If you do not correct the misstatement but simply answer the question, you will not be in a position to quarrel with the erroneous misstatement in the question at a later time. Do not bless an improper question; rather, if a question in any way misrepresents your prior testimony, respond with "that was not my testimony."

Finally, your deposition can be a grueling experience. You are bound to be a little nervous as you prepare for it. However, keep in mind that you are in the best position to judge the efficacy of your care. If you believe your treatment of the patient complied with the standard of care, then you should expect to perform well during your deposition. The deposition can be used to reaffirm your professional skills.