



Has a deposition gone wrong?

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10 strategies for the hot seat: Giving a successful deposition

📌 You aren't powerless even though you've been put under a microscope. A defense attorney offers strategies to remain calm, bolster your position, and thwart the manipulative tactics of opposing counsel.

Andrew K. Worek, Esq

The unthinkable has happened: You've been sued.

You've spent the past several months explaining your care and treatment of the patient to your defense attorney. Now the plaintiff attorney wants to take your deposition.

Although a deposition is a routine part of a case (the defendant physician in a medical malpractice lawsuit is nearly always called on to give one), you're anticipating the undertaking with understandable trepidation—maybe even fear.

There are significant differences between testifying in a deposition and testifying in a courtroom at trial. In this article, I offer 10 strategies for giving deposition testimony that strengthens your defense—or, at least, does not weaken it. In the next (March) issue of OBG MANAGEMENT, I will review tactics for giving testimony at trial.

Out of the courtroom, still in the fire

A deposition is generally conducted in the conference room of the firm of one of the lawyers (defense or plaintiff attorney). It is an opportunity for the plaintiff lawyer to pose questions to the defendant physician. It is also an opportunity for the lawyer to challenge the physician's answers, test his or her resolve, and collect sound bites that are unfavorable to the doctor's defense. These sound bites can be read to the jury at trial.

On average, a physician deposition takes 3 or 4 hours to complete, although a duration of 6 to 8 hours is not uncommon. A deposition may begin in a relatively congenial atmosphere but devolve, at some point, to a highly contentious exchange.

Rather than leave the outcome of the deposition to chance, it is better to take a few considered preparatory steps and proceed judiciously during the deposition. Here are 10 strategies to help you come out on top.

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Mr. Worek reports no financial relationships relevant to this article.

1 Tell the truth

As a defendant, your credibility is the foundation upon which all of your past actions and forthcoming testimony—at deposition and at trial—will be judged. If you manage to protect and preserve that credibility, it will be a

ON THE WEB

▶ **Mr. Worek offers tips on avoiding deposition pitfalls, at obgmanagement.com**

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fortress of strength. If your credibility is compromised or breached, however, you will open yourself to attacks based on your decisions as a medical practitioner, and also upon your basic character as a human being.

Tell the truth, even when the truth may appear to cast you in an unfavorable light. On many occasions, I have seen a seemingly unfavorable issue become defensible as the evidence and case develop. The discovery of additional facts during the litigation may help strengthen the defense. Therefore, tell the truth, even if it appears to be unfavorable.

Many years ago, a mentor told me: “Honesty isn’t the best policy—it’s the *only* policy.”

As former Senator Alan Simpson once said: “If you have integrity, nothing else matters. If you don’t have integrity, nothing else matters.”

2 Prepare thoroughly with your defense attorney

Defending a lawsuit is a team effort. It requires cooperation between the physician, who brings medical knowledge and expertise to the table, and the defense attorney, who brings legal expertise. The more time you spend educating your attorney about the medicine, the better the result will be. And the more time the attorney spends raking you over the coals in preparation for the deposition, the better the outcome. If you view the education of your attorney and the overall defense of your case as a chore or inconvenience, you do yourself a great disservice.

Tell your defense attorney about any weaknesses that you perceive or suspect regarding the medical care rendered. It is better to develop a strategy to address a weakness rather than be surprised by or unprepared to answer a question on the issue during your deposition.

Provide your defense attorney with peer-reviewed literature and other reliable information about the medical care. Such information will help educate your attorney, may aid in defining the “standard of care,” and may be a source of potential differing

views on the care rendered. Reliable literature will also alert you and your defense attorney to the potential alternative treatment theories that the plaintiff attorney is likely to raise during your deposition.

Make sure you clearly understand the meaning of “the standard of care” within the jurisdiction where your case is pending. Most jurisdictions permit a physician to be asked, point blank, “Doctor, did you meet the standard of care?” Responding that you don’t know what the definition of “standard of care” is or that you’re uncertain whether you met the standard of care would certainly be damaging to your defense.

Thorough preparation normally requires two or three meetings, each lasting 2 to 4 hours. Every potential question needs to be anticipated and evaluated. Keep in mind that every word of your testimony will be recorded by the court reporter, so concise and careful speech is a must. The ideal preparation is for your attorney to focus on your thought process and challenge your initial answers in role-playing sessions to expose any potential problems.

After the deposition, the best compliment you can pay your lawyer is to tell him or her that **1)** there wasn’t a single question that surprised you and **2)** the preparation was more grueling than the deposition.

As in other settings, half the battle is *what* you say, and the other half is *how* you say it. Both content and delivery are key.

3 Maintain your composure

A deposition is not the time to “get something off your chest.” Nor is it a license to tell the other guy “a thing or two.” A lawsuit can be emotionally devastating and exhausting—but if you need encouragement or feel an urge to vent frustrations, do it with your lawyer in private. The deposition room is not a place where weakness is rewarded.

There is no judge or jury at a deposition. Even if you give stellar and inspiring testimony, nobody is going to pronounce you the winner in the lawsuit. However, you *can* do serious damage to your case by making



Half the battle is *what* you say; the other half is *how* you say it



statements against your interest or becoming emotionally unwound.

The plaintiff attorney will probe your thinking, medical judgments, competence, and treatment decisions and performance. A good lawyer will spot any sign of inconsistency or weakness and dig deeper and deeper until you are caught between the horns of two seemingly inconsistent positions.

Composure is especially critical when a deposition is recorded on videotape. The Internet contains videos of a number of emotional deposition eruptions that, when replayed to a jury, undoubtedly produced catastrophic results.

Your dress and demeanor must remain professional whether or not the deposition is videotaped. A suit or sport coat and tie for men and similar professional attire for women are a must. Wearing a lab coat over a suit is generally only credible if the deposition is taking place in your clinical office or in a hospital.

4 Listen to the question

Each question is critical; listen closely. This may seem like a simple rule, but it is one that is frequently broken.

Listen to the question, and then take a breath before you answer. This pause will give your brain time to analyze the question and prepare a reasonable answer. It will also give your lawyer time to make a verbal objection, if one is warranted.

Make sure the question is intelligible before you begin to answer it. If you don't understand it, say so and ask that it be rephrased.

If the question is medically inaccurate, point out the inaccuracy. For example, if the lawyer posits that preeclampsia is contagious, correct that statement and ask for the question to be rephrased. In cases involving birth trauma, the phrases "fetal stress" and "fetal distress" are often intermingled.

In the heat of a deposition, you will feel pressured. Don't let that pressure cause you to blurt out an inaccurate or inappropriate answer to a poorly phrased question.

Listening to each question and taking a

breath before responding will also keep you from becoming involved in a rapid-fire question-and-answer flurry with the opposing attorney. Such flurries rarely end favorably for the physician.

Listen to the question. Take it one question and one answer at a time.

5 Stop, look, listen

If your attorney makes an objection, stop talking. Don't answer the question until your attorney gives you the go-ahead.

Sometimes a question is so inappropriate, you can rightfully refuse to answer. For example, an aggressive attorney might ask, "Doctor, am I correct that in medical school they taught you not to leave sponges in the patient's belly?" Or, perhaps, "Doctor, did you think it might be a good idea to identify the ureter before you went slicing away at my poor client?" Such questions are, at times, merely designed to anger and impair the doctor's focus.

In most instances, any objection from your lawyer will concern the technical phrasing of the question, and you will be instructed to answer.

Look at your attorney. Listen to the objection. The nature of the objection may give you valuable insight as to whether the phrasing of the question poses risks that are not readily apparent.

6 Answer only the question that is asked

This is another simple rule that is often broken. Many times, a physician will answer the question that is posed and then offer additional information that lies beyond the scope of the question. This approach creates three potential problems:

- It may lead the plaintiff attorney to ask about information that he or she hadn't previously considered.
- It creates apparent inconsistency because the answer doesn't match the question.
- It makes the deposition longer.

FAST TRACK

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I once represented an anesthesiologist who was asked whether he evaluated the patient's airway before intubation. He responded: "Yes, she was a red flag."

From that point, the deposition became a downward spiral. Nobody had asked about "red flags"—or any other color of flag, for that matter—but that simple phrase changed the face of the litigation.

You can't be penalized for not answering a question that was not asked. For example, if an attorney questions you for 4 hours but never touches on the patient's history of a prior macrosomic delivery, you generally can't be criticized at trial for failing to reveal the information in your deposition.

7 Don't volunteer information

This is similar to strategy #6. As a general rule, you should refrain from volunteering information beyond the scope of the question.

The deposition is an adversarial process. Any information you volunteer has the potential to lead the opposing attorney into areas he or she hadn't previously considered. When you volunteer information beyond the scope of the question, it may signal to opposing counsel that you are subliminally uncomfortable about some area of the case, and scores of additional questions may follow.

Opposing counsel is generally only able to obtain information from you via written questions ("interrogatories") or directly during a deposition. If you engage in any informal pleasantries or discussions with opposing counsel in the deposition room, you could inadvertently provide information about yourself and your beliefs that the attorney would otherwise not be entitled to obtain. Therefore, anything beyond a simple handshake and "good afternoon" may be ill-advised.

This general rule of thumb isn't hard and fast, however. Discuss this strategy with your attorney in advance of the deposition. In some instances, there may be information that should be volunteered during the process.

8 Know the medical chart

You will be questioned about your actions. If the answer is contained in the medical chart, it may be wise to refer to it to confirm the answer before you respond. If your handwriting or that of other parties is difficult to decipher, you must interpret the hieroglyphics before your deposition. It looks terrible when a physician stumbles and bumbles through his or her own handwriting or that of a trusted colleague. It's even worse when the physician has to admit that he or she simply cannot decipher some or all of a critically important treatment note or order.

Similarly, if you are presented with a document, read it before you answer questions about it. Make sure that you receive all the pages and that the document is actually what the attorney represents it to be.

9 Resist the urge to educate

Physicians are highly intelligent people who, in addition to practicing medicine, educate their patients. A deposition room is not the place to be an educator, however. The opposing attorney may be unprepared, and by educating him or her, you may unwittingly assist them, ultimately leading to questions that produce unfavorable responses.

The opposing counsel in a medical malpractice action has very likely already consulted with an expert witness—quite possibly, with several. Those experts will have assisted the attorney in drafting questions to be put



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to you. Those questions will be intelligently designed to exploit potential weaknesses and conflicts in the defense.

Treat with great caution any statement by a lawyer to the effect of, “I’m just a lawyer. I don’t understand all this medical jargon.”

When a lawyer feigns ignorance, beware.

10 Take a break

A deposition can make you feel as though you are in a pressure cooker. If you need to take a break, ask your attorney to request one.

Also discuss with your attorney, ahead of time, how long the deposition is likely to take and whether scheduled or impromptu breaks are more appropriate.

Many attorneys can move from a

congenial interrogation to heated questioning at the flip of a switch. You must be ready to answer questions under all conditions and stress levels. If you become emotional or combative, it may signal a weakness in your position or simply encourage opposing counsel to engage in similar tactics at the trial.

If you feel that you are losing your composure, it’s time to take a break.

You can make it through!

Although every situation and case are different, these 10 strategies should help you understand the deposition process and endure it. These strategies are guideposts that should be reviewed with your attorney. With careful preparation, you can both survive the process and bolster the defense of your case. 🚫

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