General Guidelines for the Physician's Deposition in a Medical Malpractice Case

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INTRODUCTION

Perhaps the most crucial aspect in the defense of a medical malpractice lawsuit is the deposition of the physician-defendant. Since the majority of malpractice actions are concluded prior to trial, the deposition is often the best opportunity to directly influence the ultimate outcome of the case. For this reason, it is essential that the physician involved is familiar with the deposition process and fully prepared to testify. Most people, irrespective of their background or level of education, who have never given a deposition feel a natural sense of anxiety and uncertainty in an unfamiliar environment. Such factors can influence the testimony or create issues that detract from the presentation of a successful defense. Fortunately, the physician defendant, in working closely with defense counsel, can transform the deposition from a threatening situation into an affirmative contribution to his or her defense. To achieve this result, it is important that the physician work closely with his or her attorney to prepare thoroughly for the deposition. The following discussion offers information that hopefully will assist in understanding the deposition process, as well as some guidelines as to how to prepare for a deposition and provide deposition testimony.

THE DEPOSITION PROCESS

A deposition is sworn testimony of a party or witness taken before a court reporter. During a deposition, all parties and their attorneys have the right to be present and to question the deponent. Normally, the majority of the questioning will be done by the attorney representing the plaintiff, although other counsel may also ask questions. As indicated, testimony is given under oath with a written transcript produced of all of the questions and responses by the witness. Depositions may also be videotaped, which is increasing in frequency with lower cost and better technology.

The primary purpose of a deposition, in pre-trial proceedings, is to obtain information from the witness and determine what he or she knows or remembers about the facts of the case. The attorneys also want to evaluate the ability and credibility of the physician as a witness. Accordingly, your demeanor and presentation can have a significant impact, just as surely as in a situation where a witness acknowledges professional negligence during his or her testimony.

Testimony provided during a discovery deposition may be used at trial to impeach any witness’s trial testimony, if the latter is inconsistent with what was said at the time of the deposition. In addition, all or portions of a defendant-physician's testimony can be read into evidence at trial. Thus, it is important that the testimony given at a deposition be completely accurate and well presented in all respects.
PREPARATION AND MEETING WITH COUNSEL

Prior to the deposition, your attorney will request a meeting to prepare for your testimony. Some attorneys schedule this meeting several hours before the time of the deposition, while others will want to meet several times and days in advance of the deposition. Either approach is appropriate, so long as adequate time is allotted for thorough preparation.

During the preparatory meeting, defense counsel will describe the deposition process in detail and also discuss both general areas of questions the witness will be asked and specific questions pertinent to the particular case at issue. Counsel will also advise you of the goals to be attained in providing deposition testimony and the specific defense strategies and themes associated with the defense. At the conclusion of this preliminary session, the physician should feel comfortable with the deposition process; hopefully, a rapport will have been developed with defense counsel, and most importantly, the witness will be completely familiar with the treatment rendered to the patient and prepared to respond to anticipated questions.

One key element in preparing yourself to testify will be to review the relevant medical records. A physician can anticipate being questioned about his or her treatment, any prior and subsequent treatment of the patient by other health care providers, as well as the medical standards applicable to the treatment decisions. Prior to a deposition, a witness should review every aspect of his or her treatment records from the outset of the physician-patient relationship until its termination. You should be able to testify regarding all aspects of the care and treatment rendered, particularly information disclosed to the patient-plaintiff and reasons for each treatment decision. During the deposition itself, the medical records are always available for reference, and the witness should feel free to refresh his or her memory by referral to the records, as necessary. Nonetheless, familiarity with important aspects of the patient's condition and the care rendered will establish a favorable impression of the witness as a knowledgeable and caring physician.

Many physician-defendants, upon learning that they will be required to testify, tend to examine the medical literature to assure that their treatment decisions were appropriate. Normally, such research should be avoided until after the deposition has been completed. If the witness conducts a review of the literature, the plaintiff's attorney then will be able to question you regarding general matters that may or may not be relevant to the particular case. At the same time, the opposing attorney will have the benefit of a free education and the identification of resources that may be used against a physician in an attempt to define standards of care. By becoming involved in a discussion of medical terminology and general issues, the witness provides assistance to the opposing attorney that is not necessary, and often can be harmful. It is preferable to reserve demonstration of your medical expertise until trial.

SPECIFIC AREAS OF INQUIRY

There are two broad categories of inquiry at a deposition: (1) personal and professional background; and (2) the care and treatment of the patient-plaintiff. During the preparatory meeting with counsel, each area of inquiry should be discussed in detail so that the witness is fully prepared to respond to all anticipated questions, and defense counsel is aware of any potential problems created by the expected testimony of the physician.

Background questions will include some or all of the following:
Examination of a physician-defendant can proceed in as many ways as there are different attorneys. Frequently, the questioning will follow the chronological order of events, but this is not always the case. That is why it is vital that the physician be familiar with all aspects of the medical records from the outset so that confusion can be avoided. During the course of a deposition, the physician will likely be questioned in detail concerning the treatment rendered and all individuals involved in the patient-plaintiff's care. Accordingly, you should anticipate that you will be asked to identify all individuals present during or having knowledge of the patient's treatment, including the name, current whereabouts, and how each person was involved in the treatment. You may also be asked to identify, interpret and/or translate entries in the medical records. You should be prepared to interpret your own handwriting, as well as all sections of the treatment record which would have been relevant to the patient's care at the time of your involvement. The inability to read a relevant consultation report or nursing notes at a deposition might suggest that you were unaware of important facts which could have influenced treatment decisions.

You will likely be questioned concerning initiation of the relationship with the patient-plaintiff, including the date, time, place, circumstances, and initial communication with the patient. You will likely be asked about all information that was available to you prior to seeing the patient for the first time. Additional questions may focus on each contact between you and the patient thereafter, including the date, time and place of each visit. You should be fully prepared to discuss the nature and scope of the history, examination, diagnostic tests, treatment decisions and communications with the patient made during each such encounter. You should also be prepared to discuss termination of the physician-patient relationship, including when and under what circumstances as well as the reasons for the termination of care.

With regard to your own care of the patient, you should be prepared to describe, in detail, the following: The patient's medical history, including all facts learned, additional information that is documented, and the sources of all information available to you, examinations conducted and treatment rendered, including the specific elements of each examination, all findings, any differential diagnoses, the prognosis on each occasion, any consultations or referrals, all recommendations for treatment, including diagnostic or clinical procedures and hospitalization, in addition to any and all conversations with the patient about such matters.

If you recommended or undertook clinical or diagnostic procedures, such as surgery, you should be prepared to explain the nature and purpose of the surgery, prior familiarity with performance of the procedure, including prior outcomes, and
any unusual circumstances or factors which affected the patient's case. You should be able to describe how a procedure is done and, in particular, as to surgery, the technical aspects of the operation. Often, it may not be possible to remember every detail, especially with the passage of time; however, it is important that the witness be able at least to describe the procedures that were done by way of general routine.

Additionally, you should be prepared to discuss the risks and potential complications associated with the procedure and available alternatives for treatment, the information disclosed to the patient and/or family members concerning such risks and alternatives, identifying the persons who were present, the person or persons who communicated such matters, and verification of the patient's consent to treatment. It is always helpful to be able to rely on the medical records in this regard, and the importance of adequate documentation cannot be over-emphasized.

THE DEPOSITION ITSELF AND ANSWERING QUESTIONS

In Pennsylvania, depositions are administered before a court officer or other individual authorized to administer oaths and transcribe testimony. At the outset of the deposition, the court reporter will administer an oath to you, pursuant to which you will swear to provide truthful testimony.

Once the oath has been administered and any stipulations have been noted, you will be questioned by the plaintiff's attorney. The rules governing information that is discoverable during such depositions are quite broad. The plaintiff's attorney will have wide latitude in areas of inquiry. In fact, the opposing attorney may even ask leading or accusatory questions. Nonetheless, the questioning is not without limits, and defense counsel may interpose objections to inappropriate questions. When this occurs, your attorney will either advise you to answer the question or instruct you not to answer, as may be appropriate. In the latter circumstance, obviously, you should not answer the question asked.

Occasionally, a physician will want to answer a question or to provide an explanation despite his/her attorney's instruction to the contrary, because the physician believes that the response will assist in clarification of the treatment rendered. You should recognize that your medical expertise does not cover making legal determinations in the context of a deposition and you should always abide by your counsel's advice. Additionally, providing a response in such a situation may demonstrate to the opposing attorney some measure of divisiveness between you and your counsel, which plaintiff's attorney will see to exploit throughout the deposition.

APPEARANCE AND DEMEANOR

During the deposition, the plaintiff's attorney will be evaluating you to determine whether a jury would be favorably or unfavorably impressed by your appearance and testimony. It is essential, therefore, that you make every effort to create a favorable impression. You should be prepared, confident and assured, rather than hesitant, arrogant or disorganized. In this setting, you should dress neatly and conservatively, but in accordance with your normal style. A professional attitude should be maintained. Emotional responses, including arguing with the attorney or angry outbursts as a result of frustration or other factors, will undermine the force of your testimony.

Although questioning may be extensive, and there are many demands on your time, you should strive throughout the deposition to avoid demonstrations of boredom, fatigue, impatience or exasperation. Responses should be voiced forcefully and confidently, and should reflect your professionalism. Patronizing, arrogant or smug answers will prompt the
opposing attorney to seek similar responses at trial, thus discrediting you before the jury. By projecting professional confidence, competence and compassion, you enhance the positive impact of your testimony.

AN APPROACH TO ANSWERING QUESTIONS

The role of the questioning attorney at a deposition is to elicit as much information from you as possible. The witness's role is to answer the questions that are posed and to provide truthful and concise responses to the best of his or her knowledge. The following are some general points to keep in mind in answering any questions:

- **UNDERSTAND THE QUESTION** – If a question is unclear, you cannot be expected to provide a concise response. You may ask the examining attorney to repeat or rephrase an unclear inquiry, or you may ask the court reporter to read back the question from the notes of testimony. To avoid confusion, the witness should be certain that the examining counsel has completed a question before beginning his or her response. You must never answer a question you do not completely comprehend.

- **ALWAYS ANSWER TRUTHFULLY** – While this admonition may seem obvious, particularly when providing sworn testimony, sometimes a witness may be reluctant to disclose facts perceived as potentially damaging. Be sure that you have made a full disclosure of all such matters to your attorney. Failure to disclose information to defense counsel will certainly impede counsel's ability to prepare an adequate defense. Lack of forthrightness in responding to deposition questions, moreover, affords the opposing attorney an opportunity to impeach your credibility as a witness, not merely as to the disingenuous testimony, but regarding all of the testimony given.

- **DO NOT VOLUNTEER INFORMATION** – A witness is obligated only to answer the specific questions that are posed. A belief that lengthy explanations to simple questions will expedite the process or persuade the opposing attorney that the case is unfounded is sadly mistaken. The result will only be to open up the examination to further questions, and perhaps raise an issue the plaintiff's attorney had not thought of. A deposition is not the place where all aspects of the defense will be asserted. There will be ample opportunity to do this at trial.

- **DO NOT GUESS OR SPECULATE** – A witness should provide factual information only to the extent that he or she has first-hand knowledge of the facts. You should not offer information that comes from other sources, unless specifically asked for such information.

Similarly, you are not expected to know the answer to every question. If you are not sure of the answer, you should not guess nor assume the facts. If the matter is beyond your memory or personal knowledge, "I don't know" or "I do not remember" are perfectly appropriate responses to any question at a deposition.

- **MAINTAIN YOUR COMPOSE** – Opposing counsel may attempt to deliberately provoke you into making an emotional, rather than a rational response. You should rely on your attorney to assure that the proper atmosphere is maintained. Defense counsel will protect you from harassment, and any necessary arguments should be left to counsel. Even though it may be difficult at times when the questions become accusatory or seem foolish, you should maintain a professional attitude and demeanor throughout the deposition.

During the deposition, certain kinds of questions may arise that pose difficulty, not because the factual information to be revealed would be particularly damaging to the defense, but because the form of the inquiry is intentionally or inherently misleading. While most questions are not designed to mislead you or be confusing, that may be the result. The following
are some typical forms of questioning that can present problems:

- **QUESTIONS REGARDING RECORDS** – As indicated above, the medical records are an essential source of information. The physician defendant’s own records concerning a particular patient often cover substantial time periods and contain much information that may be unrelated to the care that prompted the malpractice action. Nevertheless, you may be subject to questioning about all care and treatment rendered to the patient. You should focus, in particular, on the facts relevant to your involvement in the treatment under scrutiny in the litigation. Documentation, of course, is vital, but inevitably every detail you will be asked about will not be recorded. The fact that something is not documented is not always a negative factor, so long as the documentation follows your usual custom and habit. When it occurs, lack of documentation should be acknowledged, but that does not mean that the fact did not happen. A physician defendant should not feel uncomfortable about the absence of documentation, as long as positive testimony on the subject can be offered.

- **QUESTIONS CONCERNING COMMUNICATIONS WITH THE PATIENT** – Differences between your recollection of conversations with the patient and the plaintiff's recollection of such conversations often constitute the central dispute in a malpractice case. To the extent possible, you should carefully reconstruct information conveyed to the patient, particularly if informed consent to particular treatment is at issue. If specific recollections of conversations with the patient cannot be reconstructed, you should be prepared to testify regarding routine practice in situations similar to the patient's case.

- **QUESTIONS CONCERNING OTHER HEALTHCARE PROVIDERS** – It is likely that the patient will have received treatment from healthcare practitioners other than you. If you have not reviewed the records of such other practitioners prior to the deposition, inquiries may be deflected based upon lack of knowledge. In certain situations, you will be familiar with other treatment information, particularly if your involvement with the patient was during a hospitalization when many physicians participated in the patient's care. Obviously, you will be expected to know about the treatment and evaluations, to the extent that such matters were relevant to your own treatment decisions. However, you will not typically be required to respond to questions concerning care and treatment rendered by other practitioners.

- **TIME ESTIMATIONS** – The length of time between certain events, how long a particular event took and other time estimations, are common areas of inquiry at a deposition. Accurate estimates of time, however, are often difficult, primarily because of imprecise language. Whenever a time estimation is requested, you should reflect on the subject and carefully choose the most precise words possible to describe the matter.

- **HYPOTHETICAL QUESTIONS** – The opposing attorney may ask you to assume certain facts or inquire conditionally if certain facts had been known, and then pose a particular question based upon those assumptions. Inquiries of this nature which assume facts not within your personal knowledge constitute hypothetical questions. In the deposition process, you are usually obligated only to answer factual questions, not hypothetical matters. The physician-defendant normally will not testify as an expert in his or her own defense because a jury is likely to discredit such testimony due to the physician's objective involvement in the lawsuit. Accordingly, when a hypothetical question is posed, your counsel will likely object to same and you will be instructed not to respond. This is also true in the instance where you are asked to comment about the facts retrospectively or to state your opinion about a subject at the current time. The proper line of questioning will relate only to your knowledge and thinking at the time of the treatment at issue.
Finally, there is frequently an attempt to compromise or misconstrue your responses to questions based upon opposing counsel’s choice of words or definition of terms. Similarly, a question that is posed may mischaracterize your prior testimony. You do not have to accept or agree with a statement made by the plaintiff’s attorney just because of the way a question is phrased. If a fact is misstated or a previous response mischaracterized, you should feel free to say so.

**CONCLUSION**

Apprehension about the deposition process constitutes the greatest threat to successful testimony. Familiarity with the procedure coupled with thorough preparation for anticipated questions and viable responses will allow you to allay such fears and aid your defense. The foregoing discussion is not intended to be complete, nor to replace the specific advice and instructions of defense counsel retained to represent you in any particular matter. We hope this overview and commentary will assist you in preparation for giving a deposition so that, with the assistance of defense counsel, anxiety and uncertainty can be transformed into confidence.

*This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation and legal questions.*