

DEPOSITIONS: *Defending Your Care*

If you're sued for malpractice, follow these safe deposition tips and you may not have to go to court.

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Professional competency, clear communication and complete documentation build a bulwark against claims of malpractice. Despite these fortifications, a window of vulnerability remains open to accusations of inferior or improper care. Closing this window proves difficult, especially when unrealistic expectations combine with dramatic and irreversible patient injury. Such incidents and the malpractice accusations they prompt are common in family medicine. In the 1998 AAFP *Professional Liability Survey Report*, 45 percent of respondents reported having had a malpractice claim filed against them.

Most claims fizzle or settle well before a public trial, but many do proceed to a deposition. Other than a jury trial, a deposition is probably the most stressful litigation event

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physicians will experience. It may also be the most important, because the deposition offers physicians a formal opportunity to rebut erroneous claims while demonstrating the merits of their care. In emotional terms, a well-conducted deposition provides the accused an opportunity to convert vilification into vindication.

Deposition defined

A deposition occurs during the discovery phase of litigation. It follows a question-and-answer format, is given under oath and is recorded by a stenographer. Though most

depositions are not videotaped, many states allow for this. Being taped can be unnerving, and attorneys may resort to this tactic to “turn up the heat.”

The plaintiff’s attorney (patient’s attorney) usually serves as the interrogator, though any co-defendants have the right to ask the physician questions, which they may do when attempting to distance themselves from the care provided by the physician being deposed. The patient may also be present for the physician’s deposition but only as an observer. Conversely, the physician may attend the patient’s deposition.

The patient’s attorney holds two essential purposes in mind when taking the physician’s deposition. The first is to commit the physician to a set of facts. The second is to assess the strengths and weaknesses of the physician as a witness. Unexplained changes in testimony permit trial attorneys to impeach a defendant in front of a jury.

KEY POINTS

- In the latest AAFP *Professional Liability Survey Report*, 45 percent of respondents reported having had a malpractice claim filed against them.
- At a deposition, the goals of the patient’s attorney are to commit the physician to a set of facts and to assess the strengths and weaknesses of the physician as a witness.
- Properly preparing for a deposition may allow physicians to defend the quality of their care and possibly avoid a jury trial.

Consistent testimony deters impeachment. Consistent professionalism enhances the physician's potential appeal to a jury.

Effective strategies

By preparing and practicing with your defense attorney, you can maximize your chance of presenting the facts of your case in the most beneficial manner and promote the impression that you are a competent and confident witness. You should dedicate and schedule adequate professional time for this purpose. Here are some strategies for giving effective depositions:

Choose a neutral location. Ideally, the deposition should take place in your attorney's office, rather than in your own. This precludes interruptions and allows you to focus on the disputed case. Additionally, any patient handouts you display in your reception area or medical texts you have in your office could attract the patient's attorney's attention and later be used against you. Conducting the deposition at your attorney's office also hinders the patient's attorney from requesting additional records or documents from you during the deposition.

Hold a mock deposition. Some attorneys suggest conducting a mock deposition with a partner assuming the role of the

patient's attorney. Facing tough questions before the deposition can be quite helpful when it really counts. A full critique should follow in order to guide you toward effective and persuasive ways to accurately answer questions. This type of dress rehearsal is protected by attorney-client privilege.

Review the medical records. The medical record provides the framework for nearly every malpractice case. Therefore, it is essential that you are fully familiar with every aspect of your documented treatment. Often the events discussed occurred years earlier

Remaining calm under the stress of cross-examination is a daunting challenge.

and resist recall. Thorough review of the records augments your ability to explain what was said and done and the rationale behind the treatment you provided. Being unfamiliar with your own care can irreparably damage your case. This underscores the necessity of always maintaining adequate records. (To find out how to defend care that wasn't documented, see "If it wasn't written, it didn't happen.")

Remember your role. You must remember your limited role in litigation (i.e., you are the defendant, not the expert witness). Your testimony must be factual and provide a solid foundation for the expert witness to defend the care provided. While appearing

current, competent and experienced in the issues of the case, you should not feel compelled to argue in your own defense. That is left for the attorney and the expert.

Think about your answers. Your responses should be clear, concise and directed only to the specific question asked. If a question is unclear, vague or couched in language that lacks a sound medical basis, do not try to answer it. Instead, ask the attorney to rephrase the question. If a question requires some thought, it should be done mentally, not verbally. Thinking out loud opens doors to new and unexpected areas of probing. Admit when you are unsure of an answer

'IF IT WASN'T WRITTEN, IT DIDN'T HAPPEN'

Misguided defendants believe, or even proclaim, that "if it wasn't written, it didn't happen." Like much dogma, this assertion lacks grounding in reality. Physicians don't have time to document every aspect of a visit, and no current technology captures all the nuances of patient-physician interactions. Committing to this erroneous concept ensnares your testimony with in sometimes sparse chart notes, preventing a full defense of your case.

Events, advice or treatments that were not specifically documented in the medical record can be particularly troublesome for the defense during a deposition. However, you may plausibly rely and expound upon your "custom and habit" of care to explain an apparent deficiency. For example, you can credibly testify that, though you do not specifically recall a discussion of the risk of a medication, you are reasonably certain that the discussion occurred because it is your custom and habit to discuss such issues when prescribing the medication to any patient.

Of course, the best malpractice prevention is competent care and complete documentation. [See the list of recent *FPM* articles about malpractice on page 36].

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A deposition is probably the most stressful litigation event a physician will experience other than a jury trial.



During a deposition, the patient's attorney and any co-defendants can ask the physician questions.



The patient's attorney wants to establish a set of facts and assess the physician's strengths as a witness.



The deposition should take place in a neutral location, such as the physician's attorney's office.



Prepare yourself by conducting a mock deposition and carefully reviewing your medical records.



Put careful thought into each of your answers, and keep them concise and specific to the question asked.



Becoming argumentative, defensive, combative or evasive during a deposition signals a lack of professionalism.



Completing a successful deposition may help you avoid a jury trial and may even cause the patient to drop the malpractice claim.

RECENT FPM ARTICLES ON MALPRACTICE

"Coping With the Stress of Being Sued." Brazeau CMLR. May 2001:41-44.

"Documenting High-Risk Cases to Avoid Malpractice Liability." Davenport J. October 2000:33-36.

"Documentation Tips for Reducing Malpractice Risk." Teichman PG. March 2000:29-33.

rather than giving one that is inadequately grounded in the facts of the case. Speculating or guessing at an answer flaws the defense. "I don't know," or, "I don't recall," are not necessarily poor responses.

Explain the circumstances. Since virtually every malpractice case involves a poor medical outcome, you must prepare to offer an explanation as to why the patient did not fare well. The sincerity and reasonableness of your explanation are key to defending the case. The outcome may have been affected by patient noncompliance or an unavoidable risk associated with a drug or surgery. Whatever the explanation, it should be consistent with the overall defense strategy and testimony of the expert witness. You should fully discuss this topic with your attorney prior to the deposition.

Keep your cool. Most depositions last less than two hours. However, remaining calm under the stress of cross-examination is a daunting challenge. Becoming argumentative, defensive, combative or evasive signals a lack of professionalism. These traits could be exploited by the patient's attorney in front of a jury. If the patient's attorney senses that you can be easily provoked and that you might convey an adverse impression to the jury as a result, the patient's attorney will more likely proceed to trial. (See "Holding your own" for more about maintaining your composure during a deposition.)

The benefits of preparation

While successfully completing a deposition neither ensures a favorable outcome nor eliminates stress and inconvenience, it may avert the array of professional and personal woes precipitated by a jury trial. By properly preparing for a deposition, you may be able to reduce the intimidation involved in defending your professional competence; avoid the uncertainty, expense and time of a jury trial; and even encourage the patient's attorney to abandon all further pursuit of a malpractice claim. **F M**

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HOLDING YOUR OWN

There is a widespread belief that a good lawyer can coax virtually any answer he or she wants from an opposing witness. While most lawyers engaged in medical malpractice cases are skilled and experienced litigators, a prepared and professional physician can project his or her own confidence and competence.

In preparing for a deposition, you should work with your attorney to identify your areas of vulnerability and be prepared to explain what you did, why you did it and how the patient's claimed injury was not the result of your actions. The following tips will help you to disarm even the most potent interrogator:

- Be prepared:** Know the patient, the chart and the medicine. This requires advance preparation that is well worth the time and effort.
- Be confident:** If your care was appropriate, you should be able to withstand the challenges of cross-examination.
- Be patient:** Let the fight come to you. There's no need to be aggressive. In a medical claim, you are the "home team."
- Be alert:** Do not allow a faulty premise in a question (medical or factual) to lay a foundation for an equally faulty response.
- Be considerate:** Convey empathy and sympathy for the patient's poor outcome while maintaining your belief in the quality of the care provided.
- Be professional:** From your appearance, demeanor and verbal responses, let it be clear you are a true professional. You can disagree without being argumentative or disrespectful. If the patient's attorney respects you, he or she will realize that a jury will respect you too.