

[IMAGE]

Dynamic Chiropractic – July 1, 1994, Vol. 12, Issue 14

Legal Pitfalls and Counterstrategies

Depositions

By Arthur Croft, DC, MS, MPH, FACO

1. After a long and arduous session in deposition, clinicians are usually eager to bring the thing to a conclusion. This is a time, however, when you must be attentive for subtle tricks which might later prove disastrous. Attorneys usually jump back and forth in their questioning -- partly because of lack of organization inherent to all real-world business situations, and partly in a deliberate attempt to confuse you and keep you off balance. By breaking up your rhythm, your responses to questions are liable to be choppy, incomplete, and formulated without a great deal of forethought. This might be particularly useful to that attorney in instances in which excerpts of your deposition are later used in lieu of your actual courtroom appearance. The technique is also a reliable way of allowing the attorney to ask clinicians the same question a number of different times. The words may change but the essence of the question will be the same. If the attorney is lucky, you will have a slightly different response the second time around.

By the end of the deposition, you'll be uncertain of what topics were covered during the deposition and just how thoroughly they were discussed. This is usually the time the attorney says something like this:

"Well, I guess I'm just about finished doctor. Before we relieve the court reporter of her duties, do you have any other opinion in this case?"

It's tempting to take the bait and answer, "No," and be done with the mental fencing. However, clinicians should be advised that the purpose of the question is to limit future testimony and, most importantly, opinions, to the subjects discussed during the deposition. Suppose, for example, you had expressed many opinions about causation, severity of injuries, and a number of related subjects but had not been asked to opine on the issue of prognosis. If, later in court and during direct examination, you are asked for an opinion about prognosis, the wily villain from the other bench is liable to object to such a discourse on the grounds that you failed to provide that opinion at deposition, even after being given the chance to discuss "any other opinions in this case." In some circumstances, the court may sustain the objection and disallow your further

testimony on this most important topic.

Although there is no easy solution to this common tactic, the best defense, when asked if there are any other opinions in this case, is to explain that you have expressed a number of opinions today, but that if the questions were formed specifically you probably would have other or further opinions. The attorney representing your patient should also voice an objection for the record that the question is vague and ambiguous. This should solve the problem in most cases.

Courtroom

1. A common tactic employed during cross-examination is to ask you whether you are certain about something "within a reasonable degree of medical certainty." Usually some degree of emphasis is added to encourage you to back down and answer that there is always a degree of uncertainty in matters of medicine and chiropractic. The attorney relies on your scientific training as the source for such conservatism. Later (and it may be days later), during his closing arguments, the crafty attorney will remind the jury that even the plaintiff's own doctor admitted that he wasn't sure about such and such. That should effectively plant some doubt in the minds of the jurors who, by now, have forgotten the clinician's testimony for the most part.

The counterstrategy for this trick is to answer in such a way to leave little doubt as to how much "medical certainty" really exists. For example, the clinician might respond, "Nothing is absolutely certain in medicine and chiropractic, but the chances of (the thing being the opposite way, etc.) are one in a thousand (or whatever the odds are)." This will be more memorable to the jury and they will be less likely to be fooled later.

2. The latest tactic in the arsenal of defense attorneys is to "voir dire" you in court. This is a way of asking questions of you regarding your familiarity with certain conditions or training in a certain area. If the attorney can convince the judge that you do not possess sufficient training or knowledge in that particular area, the judge may agree to limit your testimony. The popular application of this technique now is to attempt to disallow chiropractors from testifying on issues of biomechanics. If successful, the attorney can prevent you from any and all discussions about the forces involved in whiplash trauma. In fact, objections will be raised over discourses even remotely related to the subject, effectively gagging the treating doctor or expert.

There is no easy solution to this problem -- at least none that are guaranteed. You should be ready to discuss your chiropractic training as it relates to biomechanics. Also discuss any undergraduate work in the area. If you've taken postgraduate training in CAD trauma, you can use that to establish your advanced training and understanding of the subject. My course specifically delved into accident reconstruction and this should also be helpful. It wouldn't hurt to take an accident reconstruction course, and many are offered through local police departments. Finally, like all professionals, you rely on textbooks and journals to stay abreast of new developments in your field. And don't fail to mention your own self-study in the area. You may not have a PhD in biomechanical engineering, but you may be thoroughly familiar with the salient issues related to the biomechanics of whiplash and how these injuries affect the patient.

Arthur C. Croft, DC, MS, FACO
Coronado, California

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