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Malpractice: How to Prepare for Deposition

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Remember the first time you rode a roller coaster? You probably had little forewarning and approached it with considerable anticipation. Shortly after taking your seat, you experience the unforgettable. Most roller coasters begin with a slow climb to the top of a hill that quickly crest and cascade downward through unknown valleys and turns, thrusting you hither and yon, leaving you short on oxygen and physically exhausted.

The roller coaster experience is not unlike your first deposition at the hands of a skilled lawyer. Unlike the roller coaster ride, where the best preparation leaves you unprepared for the unforgettable, you can prepare for your deposition. Proper preparation gives the deponent a measure of control to steer and brake through the corners, crests, and valleys of their first unforgettable ride.

What Is a Deposition?

A deposition is simply a question and answer session in which the lawyers of both parties are present and involved in the examination and cross-examination of witnesses. Each party may examine the other party or any person who may possibly be a witness. The testimony taken under oath is recorded by a court reporter and is admissible at trial. The atmosphere at a deposition is often informal. Do not be fooled by this informality. What you say and how you say it may win or lose your case.

Customarily, depositions are not taken until after a lawsuit has been filed. You will be notified by your lawyer that the plaintiff's lawyer wishes to take your deposition. Usually, depositions are held in the office of the deponent's lawyer.

The purpose of a deposition is to discover facts and obtain evidence. Lawyers refer to the procedure as discovery. It is an opportunity to obtain admissions from the opposing party to: learn the identity of other possible witnesses; solidify the testimony of a witness; determine the opinion and theories of the expert

witness of the opponent; focus on the facts and issues, and assist lawyers in evaluating their case for settlement or trial.

If you are a party to the suit, you might have a right to attend all depositions. If you have the time, your attendance at depositions can be invaluable to your lawyer. Doctors with busy schedules often consider this an inconvenience and waste of time. Discuss your attendance with your lawyer before assuming your presence is unwanted or an unnecessary waste of time.

Deposition vs. Trial Testimony

Giving a deposition is very different than testifying on the stand at trial. The procedural rules at trial limit the lawyers to direct examination, cross-examination, and redirect examination. At deposition, the plaintiff's lawyer will begin the questioning and will be allowed to cross-examine you and ask leading questions.

Your lawyer will decide when to object and whether you should answer a particular question. When a plaintiff's lawyer has completed questioning you, your lawyer may or may not ask you questions. Do not be surprised if your lawyer does not ask you questions. He or she knows what your testimony will be at the time of trial and may wish to preserve that testimony as a defense.

Preparation for a deposition cannot be overemphasized. If your defense lawyer neglects preparation, you are back on the roller coaster for the first time. It is your lawyer's responsibility to prepare you, and you have a right to expect proper preparation. In defending doctors of chiropractic on behalf of NCMIC, I would usually spend five hours to a full day preparing my client for a deposition. If your lawyer fails to take time to work with you, don't be shy. Tell the lawyer you are uncomfortable, that you don't feel ready, and that you are willing to schedule time to prepare.

Know Your Facts

Fortunately, there are some things you can do in advance to ease your anxiety and make you a better witness. Remember, what you say during your deposition is under oath. Your testimony can be used to impeach you at the time of trial. First, know the facts of the case and the subject matter on which you may be examined. You should devote considerable time to the following.

- 1) Reviewing your file. Organize your chart so that your records are in chronological order. If your notes are hand-written, transcribe them for your lawyer. This transcription is a work product and not obtainable by the

opponent's lawyer. Review the patient intake form. Recall the treatment plan you had in mind when you first saw the patient. Explain this to your lawyer.

Review your method of treatment. Be prepared to explain why you administered one treatment as opposed to another. Make sure you are familiar with the history given at presentation by your patient. Explain to your lawyer how the history relates to the treatment plan. You must understand the treatment procedure, the alternatives and the risks. Your chart, it is hoped, will reflect that the procedure, alternatives, and risks were explained to the patient, and that you obtained the necessary consent.

If necessary, review literature or articles by authorities that support your treatment plan. Remember, you may be asked if a particular article or text is authoritative. It is no sin if you are unfamiliar with the article or text, considering the amount of literature available. Do not hesitate to admit that you are unfamiliar with a particular article. On the other hand, if there is an authority who supports your defense, make sure you have explained it to your lawyer so it may be used in your defense. Make sure you have reviewed all x-rays, diagnostic tests, and laboratory data so that you can refer to the material quickly and knowledgeably.

Review your own curriculum vitae prior to deposition. You have spent a significant portion of your life obtaining an education and postgraduate training. If given the opportunity, you should explain in great detail your educational background and experience. If the plaintiff's lawyer fails to ask about your credentials, your own lawyer will have ample opportunity to have you discuss them at trial.

2) During questioning, listen closely to each question. Make sure you understand the question before you answer. Take as much time as you need before giving a thoughtful answer. Answer only the question.

3) Do not volunteer information. Remember, this is not a friendly conversation. You will have an opportunity to explain your position during direct testimony at trial with the guidance of your lawyer.

4) The silent pause. It may feel uncomfortable to sit still with your mouth shut while the opponent's lawyer shuffles through papers. Nine times out of 10, the lawyer has lost his or her train of thought or is waiting for you to say something. Don't. It's the opponent's lawyer's job to ask the questions. You are not obliged to assist.

5) Be aware of leading and repetitive questions. They are designed to put you on the defensive. Take a deep breath and politely say, "I think I have already answered that question."

6) Do not lose your composure. Damaging admissions are made in haste or when you're flustered.

Remember, the purpose of your preparation is to help you think for yourself. Don't let the lawyer put words in your mouth with questions such as, "Isn't it true ..." or "Don't you agree, doctor..." You are not required to answer this type of question with a simple "Yes" or "No." You may explain your answer.

7) Take a short pause before giving any answer. This allows your lawyer the opportunity to interpose an objection. If your lawyer objects, don't answer until you're told.

8) If you don't know the answer to a question say, "I don't know." You will not be required to speculate.

9) If you are fatigued, ask for a break. In most jurisdictions, you are allowed to talk with you lawyer out of the presence of the opponent and his lawyer. You may be required, however, to answer a question before you talk with your lawyer. This procedure will be explained during your preparation.

10) Be alert for the hypothetical question. These are questions that ask you to assume certain facts and given an opinion based on those facts. You might become an expert witness for the opponent. Before answering, be certain the "assumed" facts are accurate and that your opinion is consistent with your defense.

11) If you are asked, "Doctor, this result would not have occurred if you would have used reasonable care, correct?" Think carefully before you answer that question. If you state, "That's right, this result ordinarily does not occur," you have just testified as an expert against yourself. What you have said is that the result does not occur except when the doctor is negligent or his care has fallen below the standard.

If you answer the question truthfully say, "Although the result may not ordinarily occur, when it does, it most frequently is due to the inherent risk in the procedure."

12) Speak clearly, be calm, and above all, be honest.

13) Your appearance should reflect your professional status. Your behavior at all times should be courteous, without emotional outbursts. Never engage in an argument or idle chatter with your opponent. Remember, they are the enemy. They have sued you.

Your first roller coaster ride may be exciting and memorable, but with a little care and preparation with your defense counsel, you may be able to slow the pace and feel that you are in control.

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