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Depositions: You must prepare if you hope to survive

By **David L. Freedman, MD, JD, FAAEM,** Emergency Physician; Attorney, Miller, Canfield, Paddock & Stone PLC, Ann Arbor, MI

Depositions are serious business and may be decisive battles in the litigation war. For physicians and other health care providers, these are battles that are fought on foreign battlefields. For brevity, I have referred specifically to "physicians" throughout this article, although everything said is equally applicable to other health care providers. In a deposition, the physician is matched against an attorney whose profession it is to take depositions and to see to it that the words that end up on the transcript are as favorable as possible for his or her side in the litigation. As a physician, this is not your profession, and it is critical to keep this in mind at all times. Even if you testify as an expert witness with some regularity, you still will not have, in the vast majority of cases, the deposition experience of the attorney taking your deposition.

Plaintiffs' attorneys are generally extremely well-prepared for depositions, particularly when they are deposing a defendant physician. Some attorneys who represent malpractice plaintiffs limit their practice to cases involving a specific subspecialty of medicine (e.g., cardiac disease) and, therefore, can become knowledgeable about the standard of care in that particular subspecialty. As a result, the plaintiff's attorney may have more knowledge about the specific area of medicine (in a superficial way) than would ordinarily be possessed by a physician outside that subspecialty. For example, we recently defended a case that involved the placement of a ventriculostomy in a patient who had been admitted through the emergency department. A plaintiff's attorney might well know more about the differences between various ventriculostomy devices and their use in the management of closed head injury than the average emergency physician. If that were at issue in your case, it would be in your interest to become well-versed in ventriculostomies. Your expert consultants should be used to educate not just your attorney but yourself, as well. This is not to say that, at deposition, you should attempt to testify as an expert on ventriculostomy devices. Such testimony should be left to the neurosurgeons. You should, however, be an expert as

to when the standard of care requires an emergency physician to consult a neurosurgeon for the possible placement of such a device.

You should never take a deposition lightly and need to be at least as well prepared as your adversary, the plaintiff's attorney. Even if you are absolutely comfortable that the care you provided to the patient was well within the standard of care and the plaintiff "has no case," you should prepare diligently for your deposition. In some ways, these are exactly the cases with which you want to be especially careful, because you do not want to create a case for the plaintiff through your responses, when none existed before. Remember, there are few "slam dunks" in malpractice litigation.

Listen to Your Attorney

If, when faced with a deposition, you only remember one rule, remember this one: Listen to your attorney — ALWAYS. Whether you are giving a deposition as a defendant, fact witness, or expert witness, it is always critically important to listen to your attorney. A subrule contained within this general rule is: Do not stop listening to your attorney once the deposition has started. Your attorney may, on occasion (usually when a substantial problem is developing or already has developed) ask that a break be taken during the deposition, citing some pretextual excuse ("I'm sorry, I really overdid it with the coffee this morning. I need a short break") so that he or she may talk to you. More commonly, your attorney will talk to you during the deposition, in the form of "speaking objections" and the attendant banter with opposing counsel that sometimes ensues. When your attorney objects, you should take it as an alert that the question is dangerous and you should listen to your attorney for any clues as to what is particularly dangerous about the question. Your attorney should review his or her code words with you before the deposition. An obvious example, and common objection, is "asked and answered." Clearly, this is an alert to make sure you give the same answer you gave to this same question earlier in the deposition.

If you are a defendant, you obviously have the most to lose during a deposition, so listening to your attorney is most important in this circumstance. If you do not want your words to come back to haunt you, make sure that the words come out clearly and correctly the first time. If, for example, your case goes to trial, and your testimony at deposition was at all contrary to your trial testimony, you can be sure that the opposing attorney will question you mercilessly on the discrepancy to damage your credibility, at the very least. The attorney may ask the jury to not believe your trial testimony, based upon your previous contradictory testimony. The attorney also may ask the jury implicitly, if not explicitly, to discredit all of your testimony on the theory that one lie, or even a significant inconsistency, should taint all of your testimony. This also is important in cases that never make it to trial. Any inconsistencies in your testimony during the course of your deposition will be highlighted to the court and used to discredit your version of the facts as the various pretrial motions are argued.

One of the primary objectives of taking a witness' deposition, as was mentioned in the previous paragraph, is to "pin down" on the record the witness' testimony for the purpose of challenging the witness' credibility later at trial, should the witness stray from his or her previous testimony. Remember that attorneys live by the nuances of word meanings and at times can make previous testimony seem contradictory when, in fact, the witness thought he or she was saying the same thing both times. One technique of accomplishing this

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Vice President/Publisher: Brenda Mooney
Editorial Group Head: Valerie Loner
Managing Editor: Joy Daughtery Dickinson
Production Editor: Nancy McCreary

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is by taking previous statements out of context. The point is that you must always strive to have your best testimony, including your best choice of words, on the record with your first answer, and you should not stray from that answer. Never allow a plaintiff's attorney's quizzical look in response to your answer cause you to rephrase, elaborate upon, or modify your answer.

If you are testifying as a fact witness (e.g., you treated the patient before or after the defendant physician and are not named in the lawsuit), you must never drop your guard. In some cases, a fact witness is really just a "not-yet-named defendant." The plaintiff's attorney might be searching for a reason to include you in the case. The named defendants' attorneys also might be listening for an opportunity to deflect blame from their clients onto you and get you directly involved in the case. Remember that the only attorney who is your attorney and, therefore, is dedicated to protecting you, is your attorney. Never let another attorney tell you otherwise. While, when there are multiple defendants, the various attorneys for the defendants often will cooperate (sometimes through a formal mutual defense agreement and other times more informally), you must never lose sight of which attorney is your attorney. Always avoid saying anything in front of other attorneys, even if they represent the defendants in the case, without the approval of your attorney.

With respect to expert witnesses, the situation is different only with respect to the consequences of testifying poorly at a deposition. While as a hired expert, you might not have anything directly at stake in the case, at least as to the judgment, your reputation and future usefulness as an expert witness is at stake every time you testify. If you are careless in your answers and stray from the opinions you previous expressed to the attorney who hired you (including the strength of your opinions), you will not be hired again by the attorney. Do not expect an attorney to hire you again if, prior to the deposition, you were certain of your opinion and then, at deposition, you surprise him or her by equivocating. Attorneys hate surprises and will be unlikely to risk another surprise by retaining you in the future. Because attorneys often share information regarding expert witnesses, one bad performance can do considerable damage your marketability throughout the area.

Tell the Truth

When following Rule 1, "Listen to your attorney," you will hear your attorney advise you to always tell the truth. You are, after all, testifying under oath. Telling the truth, however, is not necessarily the same as telling everything you know related to a particular question. That is not to say that it is appropriate to mislead by providing an incomplete answer. We are all familiar now with the consequences of providing misleading answers (even if, arguably, not outright lies) during a deposition in a civil case. Listen to the question carefully and then provide a concise answer specifically responding to the question. It subsequently will be the plaintiff's attorney's responsibility to ask appropriate follow-up questions. Your attorney might want you to answer certain questions more elaborately. For example, your attorney might want you to demonstrate that you are a true expert on a particular topic and will impress a jury as such. This is an exception to the general rule, and you should be elaborate in your answers only on the advice of your attorney. Before the deposition, your attorney will review with you when your answers should be concise ("yes" or "no"), and when you should elaborate.

Be Frank with Your Attorney

While it is critical to listen to your attorney, it is equally important that you talk to your attorney and, in doing so, that you be absolutely frank. Your attorney will be severely handicapped in preparing you for deposition, and representing you in general, if you do not fully disclose everything to your attorney. No matter how embarrassing or insignificant you might think a particular fact is, if it could be related to the case in any way, you must disclose it to your attorney. You may think that you need not tell your attorney about something because the plaintiff's attorney will never find out about it (e.g., a late entry you made in a chart, a "minor" medical staff disciplinary matter in the remote past). Do not make this mistake. It is a source of constant amazement how these things so often seem to come to light, often at the most inopportune time. This is an excellent way to turn a perfectly defensible case into a sure loser. As a general rule, let your attorney decide what is relevant. Do not screen out details because you think they are not relevant.

It is natural to defend yourself when confronted with an accusation of malpractice and focus on why your care of the patient met the standard of care. It is, however, counterproductive and dangerous to focus blindly on the positive aspects of your case in your discussions with your attorney. Rather, it is crucial to

disclose all the possible weaknesses in your case, understanding that these weaknesses have been identified on your critical retrospective review of your care of the patient, and you might not believe them to be altogether fair criticisms of your care. By disclosing everything, with the benefit of hindsight, that might have been done for the patient, you will give your attorney an opportunity to prepare to respond to those criticisms when raised by the plaintiff. The experts that your attorney retains might miss some potential weakness in your case that the plaintiff has not missed. You can help by pointing out every possible weakness so that your experts will be able to appropriately defend your actions.

Particularly embarrassing or damaging facts should always be disclosed to your attorney. For example, if you argued with the patient or the patient's family before the patient was discharged, tell your attorney. Did the nurse suggest that an electrocardiogram be done, and that the patient, who died of an acute myocardial infarction in the car on the way home, not be discharged? If so, tell your attorney so that an appropriate response to this fact, should it come out, can be developed. If you forgot to check the allergies section of the chart before prescribing penicillin and discharging a penicillin-allergic patient, tell your attorney.

Educate Your Attorney

Preparation for your deposition is a two-way street. While it is important that you learn from your attorney, it is also important to educate your attorney. Like plaintiffs' attorneys, defense attorneys often will be quite knowledgeable about medicine, usually a particular subspecialty. In the case of emergency medicine, because of the breadth of the specialty, it is simply not possible for an attorney to be an expert in the entire field. There are, however, defense attorneys who have considerable knowledge with respect to a particular emergency medical condition, usually one of those that commonly leads to litigation (e.g., coronary artery disease or fractures). As a general rule, however, there is more subspecialization by plaintiffs' attorneys, some of whom are extremely selective in the types of cases they take.

Take on the responsibility of educating your attorney as to the medical issues that will likely be brought up by the plaintiff's attorney during the deposition. Education of your attorney is a joint responsibility of yours and the experts that your attorney retains in preparation of your defense. You should, however, take on the ultimate responsibility to ensure that your attorney is fully educated on all issues that might arise in the case, whether within your area of expertise or not.

Expert Witnesses

The opinions and deposition testimony of experts, both yours and the plaintiff's, will play a key role in your deposition. You will be asked questions in an attempt to elicit answers that will establish a level of care that did not meet the standard of care, as will be testified to by the plaintiff's experts. Your experts will help you and your attorney focus on the applicable standard of care. Subsequently, at deposition, you will attempt to provide answers that support your position that the care you provided fell squarely within the standard of care.

Your attorney will likely have a list of expert witnesses he or she has previously used and names of experts obtained from other defense attorneys. You should feel free to make suggestions as to who should be retained as an expert. In selecting an expert to review a case, it is advisable to initially have the case reviewed by someone who will be brutally objective (i.e., critical) in his or her review of the case. Even the best medical record will have its weaknesses, and it is important to identify those weaknesses early on. If your attorney has not already deposed the plaintiff's expert or experts prior to your deposition, your expert's critique of your care will help you and your attorney in anticipating the line of questioning that will likely be pursued by the plaintiff's attorney at deposition. In some cases, in particular those in which the case is relatively weak, you might have the case reviewed by several experts before your attorney finds one who will be sufficiently strong in defending the case. Once an expert has offered his or her preliminary opinion, you might assist your attorney in educating the expert as to any unique aspects of the case that would allow the expert to provide an opinion that more strongly supports your case.

Objections

During the deposition, your attorney will make objections to some of the questions that the plaintiff's attorney asks. With rare exceptions, you will be required to answer all questions, despite your

attorney's objections. Your attorney's objections are made for two reasons: 1) to preserve your attorney's right to object to the admission of the deposition testimony later at trial; and 2) to provide a warning to you to be particularly alert to the danger of the question. We discussed the importance of the "asked and answered" objection earlier. Other examples are: "lack of foundation" or "assumes facts not in evidence." Once again, your attorney will review with you beforehand how such objections should place you on guard and often will provide you with further instruction while making the objection (often to the consternation of opposing counsel). The "lack of foundation" and "assumes facts not in evidence" objections should alert you that, in framing the question, the plaintiff's attorney is assuming some set of facts that are not yet in the record, often "facts" that you contest. For example, the plaintiff's attorney might ask you: You didn't do an electrocardiogram when Mr. Jones complained of chest pain? This question assumes that: 1) Mr. Jones had chest pain; 2) you were aware that Mr. Jones had chest pain; and 3) you did not order an electrocardiogram (it is unlikely you would ever actually "do" an electrocardiogram). It may be a cornerstone of your defense that Mr. Jones only complained of abdominal pain and never had any chest pain, much less told anyone he had chest pain. Such a question now becomes, at most, hypothetical, and your answer should be prefaced with something like: 1) "This was not the case with Mr. Jones . . ."; or 2) "Mr. Jones never complained of chest pain, only abdominal pain and, therefore . . ."

Objections also might be thrown in merely to slow down your responses to the attorney's questions. You might be failing to properly consider the questions before answering, and your attorney is trying to give you that opportunity. Your attorney also might be trying to break up the cadence and pace of the questions and answers. It is dangerous to get into a sequence of quick questions and answers (usually "yes"). As you get comfortable and lose concentration, the attorney will slip a question in and, after you answer "yes," as you did the last 10 questions, you will wish you had said "no."

In some cases, your attorney actually might be attempting to provoke an argument with opposing counsel. This is particularly common when you have begun arguing with the opposing attorney, something that is rarely beneficial. Your attorney might be attempting to step between you and opposing counsel, much as a baseball manager steps between his star player and the umpire during an argument. Even this tactic is rarely sufficient when a deposition has gone drastically south. In such cases a break is mandatory. If your attorney knocks over his or her glass of water (often after kicking you repeatedly under the table without effect), he or she is probably not lacking in coordination. Rather, an immediate break for instructions is essential. Make sure some of the water gets on you and you have to leave the room to clean up.

I always instruct witnesses to pause before answering questions to give me an opportunity to object. This seems to be a difficult instruction for witnesses to remember once the deposition begins and the "adrenaline" is flowing. A constant mantra for witnesses of "slow down" or "take your time" is well advised.

Your attorney should discuss his or her use of objections and other cues during the deposition prior to the deposition. This should be kept simple because you obviously need to primarily concentrate on answering the questions. If your attorney is too obvious in "coaching" through the use of objections during the deposition, the opposing attorney will likely object to your attorney's "speaking objections" and insist that the objections be made without explanations. Your attorney will likely heed that admonition for no more than five minutes. As a result, the argument over "speaking objections" might become recurrent during a deposition. With proper preparation, however, it should not be necessary for your attorney to give you such specific instructions during the deposition. Taken to the extreme, these objections, which will be recorded in the transcript, may well give the appearance that the witness is being improperly coached.

Agreeing with Plaintiff's Attorney

Plaintiffs attorneys often will attempt to get you to agree to certain facts or conclusions. One plaintiff's attorney regularly ends her depositions with: "Doctor, let's see if we can agree on the following . . ." She then proceeds with a series of statements that she would like the witness to agree with. The tactic might be effective, particularly when the attorney starts with simple facts that are obviously true and gradually transitions to conclusions that do not accurately reflect the witness' previous testimony and, therefore, the witness should not agree to. Another tactic is to have the witness agree one by one with a series of statements

that are obviously true (often in the guise of restating your earlier testimony at the conclusion of the deposition) and then to nonchalantly slip in a statement that, if you agree, makes the plaintiff's case. Your attorney will be watching for this and object (e.g., "That's not what the doctor previously testified."). You need to do your part though to slow the pace and give your attorney the opportunity to object before "yes" exits your mouth. If you fall for this and agree to an incorrect statement, your attorney will have an opportunity to help you clarify your answer later in the deposition. This is, however, never as satisfactory as getting it right the first time.

Be extremely careful when agreeing to anything that the plaintiff's attorney says. Approach any questions that start with "Wouldn't you agree . . ." "Isn't it true . . ." etc., with extreme care. In many cases, you will not want to agree with the statement, at least not without some limitation or clarifying explanation. There are very few absolutes in medicine. You might, for example, be asked to agree that everyone age 60 or older with chest pain who presents to the emergency department should have an electrocardiogram. While it might be true that the vast majority of patients age 60 or older presenting to the emergency department with chest pain should have an electrocardiogram, there are exceptions and, more likely than not, the defense of your case depends on placing your patient within one of those exceptions.

Be alert for statements that are obviously true, and you therefore must agree with them, but they involve facts that differ somehow from the facts in your case (i.e., the question assumes facts not in evidence). In such cases, always qualify your agreement with a preface such as: "Those facts are, of course, not the facts in this case . . ." or "Under those facts, which have nothing to do with this case . . ."

Misquotes

The use of misquotes by plaintiff's attorneys really is a subset of the broader issue of agreeing with the plaintiff's attorney. When the plaintiff's attorney asks a question that includes a quotation from you, be extremely careful to make sure that you have been accurately quoted. The attorney might paraphrase your previous answer and, in doing so, change a word that significantly modifies the statement. As a result, if you agree with the paraphrase, you actually might be contradicting your previous testimony. Your attorney will be watching for this and should object to the question, often with a cue to you as to what your previous testimony was: "That isn't what Dr. X said. What she said was . . ." If the attorney persists that you had previously testified as he or she says, and you and your attorney continue to disagree, your attorney can insist that the record be consulted to indicate exactly what you did say previously.

The use of misquotes during a deposition is not confined to your previous testimony during the deposition. The attorney may misquote testimony from a previous deposition, for example, a seemingly critical comment made by an expert witness or another treating physician. It is always good practice to ask to see the document being quoted from and to read it yourself, including the material just prior to the quotation so as to make sure the statement is not being taken completely out of context in a way that distorts its original meaning.

Rehearsal

Your attorney should discuss the questions you will likely be asked during the deposition and will help you properly phrase your answers. It is not your attorney's place to tell you the answers per se; however, he or she should work with you to make your answers as clear and helpful to your case as possible. It is generally not a good idea to memorize pat answers to questions. There are, however, a few questions where an exception to this rule is in order and your attorney will suggest the proper answer to some basic and predictable questions. For example:

Question:	Did you prepare for this question with your attorney?
Answer:	My attorney assisted in helping me prepare for the deposition.
Question:	What did he or she tell you?
Answer:	To tell the truth.

A mock deposition can be quite useful, particularly if you have not been deposed previously. Mock deposition can vary from an informal session in which your attorney asks you the questions that are expected from the plaintiff's attorney, to more formal sessions in which your attorney will arrange for one of his or her partners to act as plaintiff's attorney to more realistically simulate the actual deposition. You should not be shy about asking your attorney for such preparation. It can be invaluable.

Facts Not in Evidence

Your attorney should object when the plaintiff's attorney asks a question that assumes facts that are not in evidence. An example was given earlier in the Objections section. This is an important and common issue deserving of further discussion. Another illustrative example is the following question: "So, let me get this straight. Despite Mr. Jones having tight chest pain that had been getting worse over the past three hours, you did not order an electrocardiogram?" This question assumes several facts that might not be in evidence and which you might vigorously contest. It may be your version of the facts that: 1) Mr. Jones never complained of chest pain; 2) if he did, he did not describe it as "tight"; 3) it did not increase in intensity; and 4) it did not last three hours. Your answer should reflect your version of the facts: e.g., "Mr. Jones never complained of tightness in his chest."

If the plaintiff's attorney insists on asking about the evaluation of a patient with chest tightness increasing for three hours, your attorney should insist the question be converted to a hypothetical, or at least the record is clear that the defendant considers it to be a hypothetical question. In answering such a question, you should preface your answer with: "This, of course, has nothing to do with this case since Mr. Jones never complained of tightness in his chest." Your attorney might want you to attempt to limit your response when answering the hypothetical, as evidence might later be introduced that Mr. Jones actually did complain of tightness in his chest: e.g., "My evaluation would be individually tailored to the specific circumstances of the case."

Authoritative Materials

You should never acknowledge that any textbook, article, practice guideline, or any other material is "authoritative." You might be setting yourself up for embarrassment at the least, and potential loss of credibility, if you agree that a particular journal or text is authoritative. More importantly, in some jurisdictions, your admission that a textbook is authoritative might allow the plaintiff to use it essentially as an expert against you. This is a tried and true trap that plaintiff's attorneys invariably try. Once you agree that a textbook or journal is authoritative, the plaintiff's attorney will find something in the textbook or journal that you will have to admit that you are unfamiliar with or, worse yet, that suggests that you should have acted differently in the care of the patient.

Your response should be vague and broad. You should answer that you read a wide variety of materials — journals that you subscribe to, journals that are sent to you at no charge, and a wide variety of textbooks, including various books you refer to in the department and hospital libraries. Add that you really could not possibly name all the journals and books that you have read that contain information potentially relevant to your care of the patient.

You might be asked if you conducted any research to prepare for the deposition or specifically related to the case. Your attorney should discuss the answer with you and will likely recommend some approximation of the following: "I read a wide variety of materials and routinely research various topics in the medical literature, including subject X. I have, I'm sure, read literature on subject X, but could not specifically recall what articles." In some cases, in which the literature unequivocally supports your case, your attorney might want you to be more specific in your answer.

Ambiguous Questions

If the question is at all ambiguous, or otherwise unclear to you, say so and ask that the question be clarified. Usually your attorney will do this for you in the form of an objection. Never answer a question that is not absolutely clear to you, and never make assumptions regarding the question. If, to answer the question, you have to make an assumption, the question likely is open to varying interpretations. Answering it without clarification will be dangerous, as your answer might be open to varying interpretations as well.

Do not make the mistake of clarifying the question because, in providing the clarification, you might be disclosing something that the plaintiff's attorney was not aware of and would not have asked about. You should let your attorney work out the clarification of the question with the plaintiff's attorney.

Compound Questions

Compound questions (questions that ask you two or more questions at once) have a high likelihood of being confusing or ambiguous, and you should never answer them. For example, you might be asked: Did you notice that he had a laceration on his arm, a bruise on his head, and did not seem to have been drinking? A simple "yes" or "no" answer to this question is

likely impossible, and your attorney will insist that the question be broken down into its individual components before you answer. Your attorney will be on the lookout for compound questions and ask that they be rephrased as individual questions.

Elaborations

Generally, your attorney will want you to keep your answers brief and to the point. Plaintiffs' attorneys use a variety of techniques in an attempt to get you to expand upon your answer. The attorney simply might ask repeated leading follow-up questions in an attempt to force you to expand upon your answer. The attorney also might ask the same question later in the deposition (sometimes several times). Particularly when the same question is repeated right after you have answered it, there is a natural tendency for the responder to "improve" upon his or her answer to satisfy the questioner. This is often a mistake. You generally should simply repeat your previous answer, perhaps with the introductory comment: "As I answered before . . ." Your attorney often will cue you in such circumstances with an objection that the question has already been "asked and answered."

Another tactic is for the plaintiff's attorney to simply pause after you have answered the question with a quizzical look on his or her face, with the hope that you will take the bait and elaborate upon your answer. Some attorneys are adept at contorting their faces into amazing masks of incredulousness after the witness answers a question. As an alternative to the expectant pause, or in conjunction with it, the plaintiff's attorney may express profound disbelief in your answer, together with facial expressions worthy of an Oscar. Examples of these types of follow-up questions include: "Do you mean to say . . . ? Are you sure about that?" When confronted with such a tactic, do not be intimidated and back down on your answer, or confuse your position with an unnecessary elaboration. If you were positive when you answered the first time, be positive in response to the follow-up question: "Yes, I am quite sure."

If a question can be answered with a simple "yes" or "no," you likely should do so. If the plaintiff's attorney does not follow up on your answer and your attorney would like further elaboration (unlikely), your attorney might ask you a follow-up question at the end of the deposition. As a general rule, you should never help the plaintiff's attorney with his or her questions. If the question is unclear, just say that it is unclear. Do not clarify the question for the attorney. In so doing, you might assist the attorney down a fruitful line of questioning that he or she had not planned on pursuing. Let any assistance to opposing counsel in the form of question clarification come from your attorney.

'I Don't Know'

If you do not know the answer to a question, say so. There is really no reasonable alternative. There are certain things you absolutely should know, and you should have reviewed them in your deposition preparation (e.g., dosages and side effects of medications given the patient, as well as possible alternative medications that you did not choose). While it would be embarrassing to admit you do not know the answer to a basic question, guessing and getting the answer wrong likely will be worse. Never guess or speculate. The potential for this problem should be minimized by careful predeposition preparation.

Remember, as was discussed earlier, the case may involve medical issues that are well outside your area of expertise. It would be inappropriate for you to attempt to testify as an expert on such issues. However, you should learn enough about those subjects to assist your defense and understand the issues involved. In many cases, the expertise you, as an emergency physician, will be expected to have with respect to subspecialty areas of medicine simply will be when to call in a subspecialist for a consultation.

Charm

Many plaintiffs' attorneys are quite charming. They might be extremely gracious when meeting you prior to the deposition and might attempt to engage you in friendly conversation. It is not advisable to enter into such conversations with opposing counsel, and your attorney will usually protect you from such situations, for example, by not bringing you into the deposition room until the deposition is set to begin. Even after the deposition begins, the plaintiff's attorney will often start out with easy, friendly questions in relatively rapid succession, the purpose being to lull you into complacently agreeing with question after question. Your defense to falling into such a trap is to be deliberate in your response, carefully listening to each question, and considering

your answer prior to saying anything.

Scope of Examination

The federal or relevant state rules of civil procedure limit the scope of questions that may be asked at trial. (Medical malpractice trials usually are in state court and subject to state rules of civil procedure.) For example, questions that would elicit answers that are not relevant or that would result in an answer that would be hearsay, not covered by an exception to the hearsay rule, are not allowed. The opposing attorney, of course, must timely object to the question at trial to preserve a right of appeal if the objection is overruled. The rules of procedure covering the scope of questioning during a deposition are much looser. At deposition, it is proper to allow questions even if the answer would not be admissible at trial (e.g., hearsay), so long as the question appears to be calculated to lead to admissible evidence. State rules are similar to the federal rule which provides that:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[1]

The rules, therefore, are quite liberal as to the questions that may be asked at deposition, or through other discovery methods for that matter. You will have to provide an answer (not necessarily a particularly informative answer) to all questions you are asked unless your attorney instructs you not to answer. In a malpractice case, the questions you will be instructed not to answer will primarily involve conversations with your attorney (attorney-client privilege) and information related to peer review proceedings protected under state law.

While the questions a plaintiff's attorney might ask a defendant physician at deposition are wide-ranging, a good plaintiff's attorney will be focused on using the deposition for four basic purposes:

- obtaining the physician's qualifications;
- eliciting information regarding the physician's treatment of the patient;
- establishing the physician's opinions;
- uncovering potential areas for cross-examination at trial.[2]

Treatment of the Patient

The plaintiff's attorney will likely first pin the defendant physician down as to what he or she did and did not do in treating the patient. Once the treatment provided has been established, questioning can be expected to move on to the alternatives or additional measures the witness will have now admitted he or she did not do. In some cases, the physician will have consciously selected one of several alternatives. In other cases, the physician simply would have forgotten to do something that, in retrospect, he or she wishes had been done. Having reviewed your treatment of the patient, and reviewed the opinions of your experts (plaintiff's experts as well), you should be able to anticipate the questions you will be asked and work with your attorney to effectively develop answers to them.

Your Opinions

The fact that you are the defendant in the case does not preclude you from also providing expert testimony and giving opinions about treatment that might have been provided or how various hypothetical situations might best be handled. Your attorney will instruct you as to how he or she will want you to respond to such questions and might warn you with an objection (e.g., "Assumes facts not in evidence.") or by interjecting a comment, seemingly to clarify the question for everyone, rather than to specifically warn the witness that the questions have strayed from the facts of the case to a hypothetical situation ("Now we're talking about a hypothetical case, right?"). In some cases, your attorney might want you to stick to an evasive answer (e.g., "Well, that's hard to answer without more facts and actually seeing the patient, since every clinical circumstance is unique is some way."). In other cases, your attorney might want you to answer with a clear, expert opinion. Obviously, you must never give an opinion that a particular level of care should have been provided when the care you actually provided fell below that standard.

Areas for Cross-Examination

Depositions can be used to obtain testimony that can be used later at trial. For example, if your testimony at trial varies from your previous deposition testimony, your deposition testimony will be used at trial to discredit your trial testimony (you will be "impeached"). Depositions also might be used to set you up for a "Perry Mason moment" at trial — the sudden, dramatic, clinching moment when the case is won. Modern discovery rules were designed to prevent "trial by ambush" by providing both sides an opportunity to understand all the facts and, to a considerable extent, the opposing party's theory of the case. As a result, "Perry Mason moments" are now quite rare, with each side knowing all the facts, expert opinions, and arguments that will be made prior to the beginning of the trial.

Most cases now never go to trial and are actually "tried" at deposition. As a result, attorneys are less interested in using depositions to set up trials. Rather, they will endeavor to obtain all possible testimony that will provide useful quotes in their various pretrial motion briefs (e.g., motion for summary disposition) and to best position their respective parties for a negotiated settlement. As such, your testimony at deposition might represent your only testimony in the case. That is, you will not have an opportunity to improve upon or correct your deposition testimony.

In addition, the physician witness' "cross-examination" will likely occur at the deposition. If, for example, you have previously been sued for malpractice or have any "skeletons in your closet" (e.g., medical staff membership rejections or involuntary terminations), you must tell your attorney before the deposition so that he or she can help you prepare to respond to such questions. Your attorney might have some recourse in limiting the scope of questioning (e.g., previous medical staff discipline procedures) but, as was discussed earlier, the allowable scope of questioning during a deposition is extremely broad, much broader than at trial. To give your attorney the best opportunity to help you, you must be absolutely candid with him or her before the deposition.

Policies and Procedures

You must review, prior to your deposition, all hospital policies and procedures that might be relevant to your case. The plaintiff's attorney already will have received and reviewed any such documents. Obviously, you must be fully prepared to respond to questions regarding any care that you provided that appears to have been contrary to any policy or procedure. The plaintiff's attorney also might ask about other practice guidelines, "best practices," clinical pathways, etc. (collectively, "Guidelines") that may have been published by various organizations (e.g., the American College of Emergency Physicians). As we all know, these Guidelines vary widely in quality and acceptance. In your deposition preparation, you should focus particular attention on those Guidelines that are most widely accepted. If your treatment deviated from a well-accepted Guideline, be prepared to explain why. Hopefully, if the questioning moves to Guidelines, you will be able to point to a prestigious Guideline that supports the treatment you provided.

Dangerous Rhythm

As mentioned earlier, attorneys often attempt to get into a set rhythm in asking their questions. Usually this will come in the form of "yes" and "no" questions that are short and rhythmic. The danger is that the witness might become too comfortable with the sequence of easy questions and lose concentration. As a result, the witness' guard will be down when the attorney slips in the dangerous question where a simple "yes" or "no" answer might be disastrous. Your attorney will be watching for this tactic and might attempt to break the rhythm by throwing in objections that might have little if any basis, or even by provoking an argument with the plaintiff's attorney over one of the objections. If your attorney gets into such an argument, consider the recent line of questioning, as your attorney may be warning you that you are in danger of getting yourself in trouble. If your attorney asks that a question be repeated, he or she is likely warning you that the question is of critical importance. Be particularly careful in answering.

'Honestly . . .'

Avoid using prefatory comments at the beginning of answers, such as: "Honestly . . ." or "To tell the truth . . ." When testifying at deposition you are under oath, and everything you say must be the truth. By inserting such prefatory comments prior to some of your statements, you leave yourself open to some wisecrack from counsel regarding the truthfulness

TABLE: Deposition Dos and Don'ts

1. Never take a deposition lightly. Budget sufficient time to more than adequately prepare.
2. Never practice deposition questions, or otherwise prepare for your deposition, with your spouse. The level of stress to a relationship resulting from a malpractice lawsuit need not be further escalated by actively involving the spouse.
3. Never underestimate the plaintiff's attorney and fail to diligently prepare for your deposition. Remember that, at a deposition you are facing a formidable enemy on a foreign battlefield.
4. Do not discuss your case with anyone other than your attorney. You might have discussed the medical aspects of the case with your department head or another physician or physician committee at the hospital with peer review responsibilities. Such discussions are generally privileged under state law. Do not, however, discuss procedural and tactical issues with anyone other than your attorney.
5. Beware of *all* attorneys other than your personal attorney. Granted, "your" attorney is really, in most cases, the insurance company's attorney. If you have concerns about this, discuss them with the attorney supplied to you and ask for an explanation of his or her obligations to you vs. the insurance company. In rare instances (e.g., a verdict in excess of your policy limits is likely), you will need to retain independent counsel.
6. Never consider your case to be a "slam-dunk" winner. It might be, but do not plan on it. "Slam dunks" are rare.
7. Listen to your attorney carefully, both before and during your deposition.
8. Tell your attorney everything. To have a chance of protecting you, your attorney must know all the facts, no matter how embarrassing they might be.
9. Always get your answer right the first time. Take your time and answer all questions correctly. Pauses before answering (unless extraordinary long and commented on by opposing counsel) are not reflected in the deposition transcript.
10. Always tell the truth. How much information must be disclosed to be "the truth" should be discussed with your attorney.
11. Use "yes" and "no" frequently as answers.
12. Always qualify your answers when "yes" or "no" would be overly broad.
13. Never get comfortable during a deposition. Comfort leads to carelessness, which leads to disaster.
14. Never ignore your attorney's objections. He or she often is talking to you.
15. Never assume.
16. Be extremely cautious if asked to agree with the plaintiff's attorney. It is seldom a good idea.
17. Never agree that a textbook or journal is "authoritative."
18. Never answer a question that is ambiguous or compound.
19. Do not be afraid to say "I don't know" when that is the truthful answer.
20. Keep your cool; don't argue with opposing counsel. Leave the arguing to your attorney.

of other statements you have made. The damage would likely be slight, but it is simply good practice to avoid these comments when testifying.

Conclusion

The purpose of this article was to provide some basic tips to prepare for and survive a deposition. **(See summary of dos and don'ts, left.)** Obviously, not every deposition pitfall could be discussed. It is important to start your deposition preparation early and practice enough such that during the deposition you will be able to concentrate on the questions, not on the rules. The basic rules (slow down, do not elaborate, etc.) must be ingrained sufficiently so that worrying about them will not distract you. Of course, you should always follow the specific directions of the your attorney.

Endnotes

1. FRCP 26(b)(1) (emphasis added).
2. Weiss ME. A prescription for deposing the doctor. *The Practical Litigator* 1994; 5(2):25.

CE/CME Questions

17. At deposition, the opposing attorney may attempt to confuse and mislead you through the use of:
    a. misquotes.
    b. compound questions.
    c. questions that assume facts not in evidence.
    d. all of the above

18. It is always a good idea to pause before answering a question to:
    a. allow your attorney an opportunity to object.
    b. seem professorial.
    c. think about your answer.
    d. both a and c

19. When your attorney objects to a question as "asked and answered," you are being instructed:
    a. to try to expand upon your answer so that plaintiff's counsel will be satisfied and stop asking the question over and over.
    b. that you answered it before and you should, therefore, make sure you give the same answer this time.
    c. to not answer the question this time.
    d. none of the above

20. Among the objectives of a plaintiff's attorney when taking a defendant physician's deposition is/are:
    a. probing the physician's qualifications.
    b. eliciting information regarding the physician's treatment of the patient.
    c. uncovering of potential areas for cross-examination at trial.
    d. all of the above

CE/CME Objectives

[For information on subscribing to the CE/CME program, contact customer service at (800) 688-2421 or e-mail customerservice@ahcpub.com.]

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In Future Issues:

Violent Patients