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## **DEPOSITION AND TRIAL TESTIMONY: A SURVIVAL GUIDE FOR YOUR CLIENTS**

**By: James V. Painter**

The practice of medicine and the practice of law are typically two separate and distinct endeavors. An obvious and significant area of overlap, however, is where physicians are brought into court and accused of committing professional negligence leading to patient harm and, at times, death. Commonly referred to as "medical malpractice litigation", physicians often feel out of their element and at a distinct disadvantage when dealing with opposing lawyers when named as defendants in these suits. For most physicians, the most difficult and stressful part of the process is being cross-examined, both in deposition and later at trial. The following are general tips regarding deposition and trial testimony.

### **DEPOSITION TESTIMONY**

Giving your deposition is probably the most crucial part of your case. Indirectly, it may be even more important than your trial testimony. During the deposition, the plaintiff's attorney is given great latitude to question you about broad and varying issues, as long as the questions, arguably, are "reasonably calculated to lead to the discovery of admissible evidence." This is commonly referred to as "cross-examination." Often, your deposition will be lengthy and may last many hours, even though when you actually testify at trial, the cross-examination will be much more limited.

In a deposition, the opposing attorney is laying the groundwork for his/her trial cross-examination. Once you have testified in deposition in response to a certain question, it will be very difficult to testify differently at trial. If you do, opposing counsel will attempt to "impeach" your testimony and damage your credibility with the jury. For instance, assume you testify at deposition as follows:

Q. Doctor, did you personally check the cast that day after it had been split and covered with fiberglass?  
A. I don't recall.

Q. Did you chart anywhere that you did?  
A. No.

At trial, Plaintiff's counsel would likely ask:

Q. Doctor, you did not personally check the cast that day after it had been split and covered with fiberglass?  
A. That is not true, although I do not recall doing it, I normally would.

Plaintiff's counsel would next follow with:

Q. Doctor, do you remember giving your deposition in this case?  
A. Yes.

Q. And you testified under oath in that deposition?  
A. Yes.

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Q. Please look at the highlighted portion I have handed you, I asked you... "Doctor, did you personally check the cast that day after it had been split and covered with fiberglass?"  
A. Yes.

Q. What was your answer?  
A. I said "I don't recall."

Q. You did not mention anything about your custom or habit then did you?  
A. No.

Q. It is only now, before this jury, that you assert for the first time that you checked it because it was your so-called habit, correct?

To avoid this exchange at trial, the deposition response to the question should have initially been, "Yes, I did personally check the cast that day after it had been split and covered with fiberglass" If the attorney follows up with, "How do you know that, it is not charted?", the response should be, "Because it is my custom and habit to always do so and I know I would have done it then."

## DEPOSITION POINTERS

☞ *Always make sure you understand the question before answering.* Attorneys will often ask confusing or convoluted questions. Also, you may not have heard a question clearly because the attorney was speaking rapidly or softly, or you were distracted in some way. NEVER answer a question unless you understand exactly what is being asked. If you do so you risk giving an inaccurate answer which might be harmful to your defense. Do not hesitate to ask the attorney to repeat the question or rephrase the question until you get to the point where you feel comfortable answering it.

☞ *Listen to the entire question before beginning to formulate your response.* Do not jump the gun and try to anticipate the question or guess the goal/intent of the question. This will only distract you and make you more prone to answering a question you did not fully hear and understand correctly.

☞ *If a medical record is referred to, look at it in its entirety, and then ask that the question be repeated.* You have no obligation to memorize the record and it is crucial that you verify that the record actually shows whatever it is that opposing counsel claims it shows.

☞ *Never guess or speculate.* Nothing good ever comes of this and, if your guess or speculation is contradicted by other evidence, it can be very damaging to your case. There is nothing wrong with saying "I do not know" or "I do not remember".

☞ *Do not give opinions outside your area of expertise.* To do so risks contradiction by specialists in that particular field. Even if it is on a minor matter, it can damage your credibility.

☞ *Do not take opposing counsel's word for anything.* You are under oath, he or she is not. They can distort or outright fabricate anything about the medical care, medical record or medical literature to see if you will agree with it. If you concur, they no longer have to prove that statement. They can either use your own words as an

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admission that the statement is true, or introduce evidence that the statement was, in fact, not true and therefore you do not know what you are doing.

☞ ***Are you an expert in your field of practice?*** YES, with no hesitation. This is no time to be modest. If you are a practicing physician in any particular field, by definition you are an expert. If you equivocate in response to that question, or worse yet, state that you do not know if you would consider yourself an expert, opposing counsel will destroy you with this at trial. "Ladies and gentlemen, Dr. Smith has told you that he did nothing wrong during the operation on Ms. Smith, yet he agreed that he is not even an expert in performing this type of surgery."

☞ ***Beware of hypothetical questions and generalizations.*** Plaintiff's counsel will often start out by asking broad, generalized questions which may seem innocuous and obvious. You must, however, keep in mind that every question asked in some way has to do with your patient and your case. Even if the attorney prefaces the questions by stating, "In general, and I am not talking about Ms. Smith here...", you can be certain that counsel's intent is to tie the question and answer back to Ms. Smith. This method is utilized to get the defendant physician to agree to broad, generalized questions, then somewhat more specific questions, and so on, until, when the attorney finally specifically mentions the facts and circumstances involving the patient at issue, he/she will have cornered the defendant into either agreeing that something was done wrong or caused harm, or trying to distinguish why the prior agreements to generalized statements do not apply to Ms. Smith.

There are two methods of combating this approach, and they are not mutually exclusive. The first method is to answer almost every question of this type with "it depends." In truth, almost every generalized medical question "depends" frequently on a number of different factors and, therefore, cannot be answered as a general statement. The other approach is to specifically bring the question and your response into the context of the patient at issue. For instance, "While that may be true with many patients, it was not true with Ms. Smith because..."

☞ ***Do not be intimidated by literature or supposed statements of renowned experts.*** As a practicing physician, you are your own expert entitled to your own expert opinion. You, therefore, have every right to disagree with statements in even the best known medical texts/literature. First and foremost, no literature is "authoritative". "Authoritative" in the medical legal arena means that you agree that every word in the text is true. If you agree something is authoritative, opposing counsel can bring the entire text or any issue of the publication and use it to impeach you with statements contained therein. In truth, there is no "authoritative" literature out there. While you may agree with parts of a text or other publications, it is likely you disagree with others. We all know that of the tens of thousands of articles, studies, and other publications out there, many of them are not worth the paper upon which they are printed.

If the attorney refers to a specific abstract or article, ask to see it and take your time to read the entire thing. Then, ask that the question be repeated. If counsel accurately reflects what is stated in the article, you still do not have to agree with it. You have a right to your own opinion. Also, most papers are only as valuable as the sources upon

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which they are based. One cannot really comment on the accuracy of one particular article without also reviewing its sources.

- ☞ ***Listen to your attorney's objections.*** They are always a clue that there is something concerning about the question, and often will hint at what the problem is. For instance, "objection, calls for speculation."
- ☞ ***Be wary of opposing counsel summarizing your testimony.*** Often opposing counsel with tender questions like "So what you are telling me is . . .," "To make it clear, you believe . . .," "In summary you feel . . .," or some similar question. Most likely, they will slightly misconstrue part of your previous testimony to their advantage and hope that your response to the question is a simple "yes." Unless you are 100% positive that every word the attorney has spoken is accurate, you should not agree with such a statement. In fact the best way to respond to such a question is to restate your position yourself. For instance "What I am telling you is..." and then restate it in your own words so that you know it is correct.
- ☞ ***Take as many breaks as needed.*** It is not an endurance test. You may take a break for any reason. In Georgia you may speak with your attorney about the substance of the deposition during breaks. In South Carolina, however, you are prohibited from doing so. Be sure you know the rule applicable to your deposition. Remember during breaks, there is no such thing as "off the record." If during a break the opposing counsel asks you something "off the record," the first thing he/she will do once the deposition resumes is ask you about the conversation and what you said. If your attorney asks you if you need a break the answer should always be "yes." It is likely that he/she either wants to speak with you about something or just feels you need a break.
- ☞ ***Do not lose your cool.*** Plaintiff attorneys are often trying to gauge your ability as a witness as well as question you. They will purposely try to push your buttons to see what type response they get. Do not fall for the bait. Completely disregard the attorney's demeanor and focus only on the question itself - that is all that matters.
- ☞ ***Always reserve your right to read and sign the transcript.*** What this means is that in most jurisdictions you have a certain number of days after the transcript is delivered to you to make sure there are no typographical errors or substantive corrections you feel need to be made. NEVER waive your right to read and sign.
- ☞ ***Do not volunteer information.*** Answer only the question and do so in the most concise manner possible. Make opposing counsel drag information out of you. For instance, if you are asked a hypothetical, answer "it depends." Make he/she ask what it depends upon. The more information you volunteer, the longer the deposition will last and the more likely it is that you will provide useful information to the other side they may have otherwise never discovered. Never help the other attorney with his/her questions. If they are struggling to put together a coherent question, do not volunteer "I think what you are trying to ask is..." You are not there to help them. If the opposing attorney fails to ask about a crucial part of the care or your defense, do not bring it up. Do not feel that you must tell your entire side of the story in deposition. No matter how well the deposition goes, you will not win the case in deposition. The key is not to lose the case in deposition!

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☞ *If you are in the course of the deposition and feel the need to correct or add to an earlier answer, just state the need to do so.* It is better to clarify/correct the deposition while it is still in progress than having to try to do so afterwards.

## **T**RIAL TESTIMONY

In a trial, the plaintiffs put up their case first, followed by the defense. More likely than not, the Plaintiffs counsel will call you during their case for cross examination. Indeed you may be the first witness called. This is where you will be most vulnerable. You will likely be the first, or one of the first witnesses called, but your counsel is normally not allowed to question you after plaintiff's counsel is done. Your counsel may not question you until the defense is putting up its case. Therefore, you are mostly on your own during this initial cross. While it is most certainly stressful, it is also a great opportunity to score big points with the jury during plaintiff's part of the case. The following are some pointers for surviving cross examination at trial:

☞ *Always make sure you understand the question before answering.* Attorneys will often ask confusing or convoluted questions. Also, you may not have heard a question clearly because the attorney was speaking rapidly or softly, or you were distracted in some way. NEVER answer a question unless you understand exactly what is being asked. If you do so you risk giving an inaccurate answer which might be harmful to your defense. Do not hesitate to ask the attorney to repeat the question or rephrase the question until you get to the point where you feel comfortable answering it.

☞ *Know your deposition.* You must have your deposition testimony practically memorized. It is important to avoid, to the extent possible, contradicting your deposition testimony. If you do, you had better be prepared to give a very good explanation as to why. Otherwise, the other side will attempt to impeach you, as referenced above.

☞ *Know the medical record.* You need to be extremely familiar with the medical record. Work with your attorney to make sure this exhibit is in an order with which you are comfortable working. It does not look good to the jury if you are fumbling around with the records and do not seem familiar with them.

☞ *Speak to the jury, not the lawyers.* The most effective witnesses speak directly to the jury in a professorial manner. Think of your favorite professor; someone who is knowledgeable but also able to convey that knowledge in an understandable fashion. Do not try to blow the jury away with your brilliance. Jurors do not like condescending or arrogant witnesses. They also do not particularly warm to nervous, jittery witnesses who lack self-confidence. Ideally, a juror will look and listen to you and think to themselves, this is the kind of doctor I would like to have. I would have confidence in him/her.

☞ *Unlike in your deposition, at trial you do not need to keep your answers short.* Plaintiff's questions will most likely be geared to solicit yes or no answers. To the extent that you can elaborate and get your defense points across, you can actually strengthen your defense during Plaintiff's cross-examination of you. This, however, will take much pre-trial preparation with your attorney.

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☞ **Do not be flippant or sarcastic to opposing counsel.** While you should not hesitate to correct misstatements, do not beat up on the opposing counsel. Any medical malpractice suit is a serious matter, no matter how frivolous the claims. The plaintiff or their decedent may have been injured, sometimes significantly and traumatically. Typically it is best to be understanding and sympathetic towards the plaintiff, while firmly maintaining that the claimed harm was not the result of medical negligence. There may be limited exceptions to this approach, which will be addressed by your attorney. Refrain from the use of technical terms or common medical slang that could be perceived as insensitive, such as whether a patient was "salvageable" or "circling the drain."

☞ **Remain calm.** Do not lose your cool or become argumentative with opposing counsel. If he/she becomes argumentative with you, not only will your counsel object, but it typically turns off the jury.

Giving effective deposition and trial testimony takes a great amount of patience, time and dedication to the process. While every physician would undoubtedly rather be spending their time performing their chosen profession of caring for their patients, the importance of dedicating the necessary time and attention to the litigation process can not be overemphasized. While some physicians may be tempted to think that the number one rule when testifying, ALWAYS TELL THE TRUTH, is all they need to know to get through testimony, the above rules and examples should clearly demonstrate that one can not tell the truth unless he/she knows exactly what the question is. By following the above guidelines, a physician should be in the best possible position to understand the question and the implications thereof and then answer the question truthfully.

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