

# Deposition and Trial Testimony in “Med Mal” Litigation: A Survival Guide for Young Lawyers and Their 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. Physicians often feel out of their element and at a distinct disadvantage when named as defendants and dealing with opposing lawyers 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 followed by a real-life example of a trial cross-examination of a defendant and plaintiff’s expert.

## Deposition Testimony

### General Information Regarding Depositions

Giving one’s deposition is probably the most crucial part of a medical malpractice case. Indirectly, it may be even more important than one’s trial testimony. During the deposition, the plaintiff’s attorney is given great latitude to question witnesses 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. Deposition is often lengthy and may last many hours, even though when the witness actually testifies at trial, the cross-examination will be much more limited.

In a deposition, the opposing attorney lays the groundwork for his or her trial cross-examination. Once the witness has testified at deposition in response to a certain question, it will be very difficult to testify differently at trial, and opposing counsel will attempt to “impeach” the

witness’s testimony and damage his or her credibility with the jury. For instance, assume the testimony at deposition proceeds 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 ask:

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

A. Yes.

Q. And you testified under oath in that deposition?

A. Yes.

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 if it’s 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

**The witness should always make sure he or she understands the question before answering.** Attorneys will often ask confusing or convoluted questions. The witness may not have heard a question clearly because the attorney was speaking rapidly or softly or was distracted in some way. The witness should never answer a question unless he or she understands exactly what is being asked. To do so would risk giving an inaccurate answer, which may be harmful to the physician’s defense. The witness should not hesitate to ask the attorney to repeat the question or rephrase the question until the witness feels comfortable answering it.

**The witness should listen to the entire question before beginning to formulate a response.** The witness should not jump the gun and try to anticipate the question or guess the goal/intent of the question. This will only distract the witness and make him or her more prone to answering a question the witness did not fully hear and understand correctly.

**If a medical record is referred to, the witness should look at it in its entirety and then ask that the question be repeated.** The witness is under no obligation to memorize the record, and it

is crucial that he or she verifies that the record actually shows whatever it is that opposing counsel claims it shows.

**The witness should never guess or speculate.** Nothing good ever comes of this and, if the guess or speculation is contradicted by other evidence, it can be very damaging to the physician's case. There is nothing wrong with saying "I do not know" or "I do not remember."

**The witness should not give opinions outside his or her 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 the witness's credibility.

**The witness should not take opposing counsel's word for anything.** The witness is under oath; opposing counsel is not. They can distort or outright fabricate anything about the medical care, medical record, or medical literature to see if the witness will agree with it. If the witness concurs, opposing counsel no longer has to prove that statement. They can either use the witness's own words as an admission that the statement is true or introduce evidence that the statement was, in fact, not true and, therefore, the witness does not know what he or she is doing.

**Is the witness an expert in his or her field of practice?** The answer should be yes without any hesitation. This is no time to be modest. If the witness is a practicing physician in any particular field, then by definition, the witness is an expert. If the witness equivocates in response to that question, or worse yet, states that he or she does not know if the witness is considered an expert, opposing counsel will destroy the witness 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."

**The witness should beware of hypothetical questions and generalizations.** Plaintiff's counsel will often begin by asking broad, generalized questions that may seem innocuous and obvious. The witness must, however, keep in mind that every question asked in some way has to do with the witness's patient and the 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

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into 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 or 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 to combatting 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 the 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 . . ."

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

If the attorney refers to a specific abstract or article, the witness should ask to see it and take his or her time to read the entire thing. Then the witness should ask that the question be repeated. If counsel accurately reflects what is stated in the article, the witness still does not have to agree with it; the witness has a right to his or her own opinion. Also, most papers are only as valuable as the sources upon which they are based. One cannot really



comment on the accuracy of an article without also reviewing its sources.

**The witness should listen to his or her attorney's objections.** They offer clues as to whether there is something concerning about the question, and they often will hint at what the problem is. For instance, "objection, calls for speculation."

**The witness should be wary of opposing counsel summarizing the witness's testimony.** Often opposing counsel will tender questions like "So what you are telling me is . . .," "To make it clear, you believe . . .," "In summary you feel . . .," or some similar question. More likely, they will slightly misconstrue part of the witness's previous testimony to their advantage and hope that the witness responds to the question with a simple "yes." Unless the witness is 100 percent certain that every word the attorney has spoken is accurate, he or she should not agree with such a statement. In fact, the best way to respond to such questions is for the witness to restate his or her position. For instance, "What I am telling you is . . .," and then restate it in the witness's own words so that he or she knows it is correct.

**The witness should take as many breaks as needed.** The deposition is not an endurance test. The witness may take a break for any reason. In some states, the witness may speak with his or her attorney about the substance of the deposition during breaks. In others, however, the witness is prohibited from doing so. Be sure you know the rule applicable to your witness's deposition. Remember that during breaks, there is no such thing as "off the record." If during a break the opposing counsel asks the witness something "off the record," the first thing he or she will do once the deposition resumes is ask the witness about that conversation and what he or she said.

**The witness should not lose his or her cool.** Plaintiff attorneys are often

trying to gauge the witness's ability as a witness as well as question him or her. They will purposely try to push the witness's buttons to see what type of response they get. The witness should not fall for the bait, but should instead completely disregard the attorney's demeanor and focus only on the question itself.

**The witness always reserves the right to read and sign the transcript.** What this means is that in most jurisdictions, there are a certain number of days after the transcript is delivered to the witness for him or her to make sure there

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are no typographical errors or substantive corrections that need to be made. The witness should never waive the right to read and sign.

**The witness should not volunteer information.** The witness should answer only the question asked and do so in the most concise manner possible, making opposing counsel drag information out of him or her. For instance, if the witness is asked a hypothetical, he or she should answer "it depends." Make opposing counsel ask what it depends upon. The more information the witness volunteers, the longer the deposition will last and the more likely it is that the witness will provide useful information to the other

side that they may have otherwise never discovered. Never help the other attorney with his or her questions. If he or she is struggling to put together a coherent question, the witness should not volunteer "I think what you are trying to ask is . . ." The witness is not there to help the attorney. If the opposing attorney fails to ask about a crucial part of the case or the defense, the witness should not bring it up or feel that he or she must tell the entire side of the story in deposition. No matter how well the deposition goes, the witness will not win the case in deposition. The key is not to lose the case in deposition.

**If the witness is in the course of the deposition and feels the need to correct or add to an earlier answer, the witness should simply state the need to do so.** It is better to clarify or correct the deposition while it is still in progress than to have to try to do so afterwards.

### **Trial Testimony**

In a trial, the plaintiffs present their case first followed by the defense. More likely than not, the plaintiff's counsel will call the physician witness during their case for cross-examination. Indeed, the physician may be the first witness called. This is where the physician will be most vulnerable. Although the physician will likely be the first or one of the first witnesses called, defense counsel is normally not allowed to question the physician witness until after plaintiff's counsel is done. Therefore, the witness is mostly on his or her own during this initial cross. While it is most certainly stressful, it is also a great opportunity for the physician witness to score big points with the jury during the plaintiff's part of the case.

### **Trial Pointers**

**Know the deposition.** The witness must have his or her deposition testimony practically memorized. It is important

to avoid, to the extent possible, contradicting the deposition testimony. If contradicted, the witness had better be prepared to give a very good explanation as to why. Otherwise, the other side will attempt to impeach the witness, as referenced above.

**Know the medical record.** The witness needs to be extremely familiar with the medical record. The witness should work with his or her attorney to make sure this exhibit is in an order with which the witness is comfortable working. It does not look good to the jury if the witness is fumbling around with the records and does 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 is also able to convey that knowledge in an understandable fashion. The witness should not try to blow the jury away with his or her 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 at and listen to the witness and think to himself or herself, this is the kind of doctor I would like to have. I would

have confidence in him or her.

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

**Do not be flippant or sarcastic to opposing counsel.** While the witness should not hesitate to correct misstatements, he or she should not beat up on opposing counsel. Any medical malpractice suit is a serious matter, no matter how frivolous the claims. The plaintiff or his or her decedent may have been injured, sometimes significantly and traumatically. Typically, it is best to be understanding and sympathetic toward 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 the witness's 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.** The witness should

not lose his or her cool or become argumentative with opposing counsel. If opposing counsel becomes argumentative, not only will the witness's counsel object, but it may also turn off the jury.

## Conclusion

Giving effective deposition and trial testimony takes a great amount of patience, time, and dedication to the process. While all physicians 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 cannot be overemphasized. While some physicians may believe 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 clearly demonstrate that one cannot tell the truth unless he or she knows exactly what the question is. By following the above guidelines, a physician and his or her attorney will be in the best possible position to understand the question and its implications, allowing the physician to answer the question truthfully. ■

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