

THE BASICS OF
PHYSICIAN DEPOSITIONS

Christopher E. Brown, J.D.

and

George F. Indest III, J.D., M.P.A., LL.M.
Board Certified by The Florida Bar in Health Law

THE HEALTH LAW FIRM
1101 Douglas Avenue
Altamonte Springs, Florida 32714
Telephone: (407) 331-6620
Telefax: (407) 331-3030

website: www.TheHealthLawFirm.com
e-mail: cbrown@TheHealthLawFirm.com

FLORIDA HOSPITAL
OSTEOPATHIC FAMILY MEDICINE RESIDENCY PROGRAM

FLORIDA HOSPITAL EAST ORLANDO
ORLANDO, FLORIDA

February 22, 2012

SCOPE OF SEMINAR

Unfortunately, a deposition is an event that many, if not most, physicians will experience at least once in their career. This seminar is intended to provide osteopathic residents and medical students with an introductory look into the typical deposition of a physician. We will highlight the basic format of a deposition, along with many of the tricks and tactics often used by deposing attorneys. In addition, we will leave you with ten points to remember should you ever be deposed.

OBJECTIVES OF SEMINAR

At the conclusion of this presentation, the participant will be able to:

- (1) Understand the purpose and format of a typical physician's deposition;
- (2) Recognize many of the tricks and tactics attorneys will use in an effort to trap the physician or extract testimony;
- (3) Understand how best to prepare for a pending deposition in order to provide the best possible defensive testimony; and
- (4) Leave with a better understanding of the overall deposition process.

A DEPOSITION DEFINED

A deposition is one of several devices used in the discovery phase of litigation. It is a proceeding where a lawyer representing a party to a lawsuit asks questions to or interviews a witness under oath, but out of court. The deposition is taken down by a court reporter and a typed transcript is produced for later use by the attorneys and the court. It may also be tape-recorded or video taped.

Depositions have several basic purposes.

- (1) They allow one side to find out what a witness or party knows about the case;
- (2) It fixes a witness's story so that he/she cannot amend his/her story at trial;
- (3) Under certain circumstances, it preserves the testimony for witnesses who may not be available to testify at trial; and
- (4) A deposition is frequently used at trial to impeach a witness who testifies differently than their deposition testimony at trial.

WHY AM I BEING DEPOSED?

As a physician, there are three common reasons why you will be compelled to testify and your deposition will be taken, each of which presents its own problems and pitfalls.

As a medical malpractice defendant. When a patient sues for malpractice, the patient's attorney will take the defendant physician's deposition. This is an adversarial process, in which the patient's attorney will attempt to demonstrate that the physician's negligence injured the patient. A physician being deposed as a defendant must prepare by meeting with his/her attorney and reviewing the issues likely to arise during the proceedings. If you are a defendant in a lawsuit, you must set aside adequate time to both review the patient's record and meet with your own counsel.

As a treating physician. Many physicians are deposed concerning the care they provided to a patient in lawsuits that implicate the patient's health (auto accident, work injury, disability suit), but not the physician's standard of care. These depositions focus on the substance of treatment, the patient's medical condition, and the patient's prognosis. While the physician is not

Prepared by: Christopher E. Brown, Esquire, and George F. Indest III, Esquire, Board Certified in Health Law, The Health Law Firm, 1101 Douglas Avenue, Altamonte Springs, Florida 32714, Telephone: (407) 331-6620; Telefax: (407) 331-3030; www.TheHealthLawFirm.com.

a party to the lawsuit and typically does not have an interest in how the lawsuit is resolved, it is important to still retain legal counsel as your records and treatment will be reviewed and scrutinized. A treating physician should also never give an opinion regarding another physician's medical care while being deposed. You are not there to be an expert witness and likely have not properly reviewed the subsequent physician's records. Offering such an opinion will leave you open to impeachment at trial.

As an expert witness. Finally, the rules of evidence allow people with specialized knowledge to testify as experts in fields normally beyond the average juror's experience. Because they have expert knowledge, experts are allowed to state opinions in their testimony, such as whether a physician's conduct complied with the applicable standards of care. An expert witness's deposition is almost always taken.

WHO ARE THE PARTICIPANTS?

A physician can expect that in addition to himself/herself, at a minimum, there will be an attorney for each party to the action and a court reporter in attendance. The court reporter's role is to administer an oath or affirmation and then transcribe verbatim every comment made in the room during the deposition.

Additionally, there may be other participants involved as well. The deposing attorney may invite assistants, including consulting physicians, nurses, or paralegals to help them in analyzing the testimony and framing questions. It is also not unusual for a defendant physician or a plaintiff in a personal injury action to be present as well.

OBJECTIONS BY YOUR ATTORNEY

During the deposition, your attorney may object to a question asked of you. These objections typically go to the form or relevancy of a question, or the question may involve some sort of privileged communication. If your attorney does object, immediately stop your answer and listen to the objection carefully. You may learn something about how the question could appropriately be answered from the objection. Your attorney may object simply for the record and then tell you to go ahead and answer the question; or he may object and instruct you not to answer. Follow his instructions and do not be intimidated by the examining attorney.

BREAKS

A deposition is not a sprint to the finish. Instead, it is more akin to a marathon, where the individual with the most stamina wins. An experienced attorney will continue a deposition for as long as possible, without interruption, in an effort to fatigue the witness. Take breaks when you need them or if your attorney suggests it. Trust your lawyer to monitor your stamina and coherence.

Also, during a break in the deposition, do not speak with anyone other than your own counsel. An opposing attorney may attempt to involve the physician in socializing so as to lull him/her into a false sense of security. Once the deposition resumes, the attorney may then play on this "friendship" in an attempt to extract additional testimony.

AFTER THE DEPOSITION

When the deposition is complete, you will be asked whether you would like to review the deposition transcript when it is completed or whether you are willing to waive that right. Always request to review the transcript! Every deposition has an errata sheet, on which you can correct any errors to your testimony.

TEN POINTS TO REMEMBER WHEN THE DEPOSITION HAS BEGUN

1. Tell the truth. In a lawsuit, as in all other matters, honesty is the best policy. And a lie can lose the case, or tarnish your credibility. Telling the truth, however, demands more than refraining from telling a deliberate falsehood. Telling the truth requires that witnesses testify accurately about what they know. Everything you say must be right, must be correct, and must be accurate.

2. Review the medical records. The medical record provides the framework for nearly every medical malpractice case. It is essential that you are familiar with every aspect of your documented treatment. Often the events you will be questioned on, occurred years earlier and may be difficult to recall. Thorough review of the records will allow you to articulately explain what was said and done and the rationale behind the treatment you provided. Being unfamiliar with your own care can irreparably damage your case.

3. Depositions are not conversations. Depositions are formal, legal proceedings. You are not there to make the other side understand your story. Be polite, but don't make small talk. If there is no question pending, don't say anything. Never volunteer information.

4. You cannot win your case at a deposition, but you can certainly lose it. Do not help the opposing attorney to understand your case or defense. Give him as little information as possible while still telling the truth. When possible, answer with (1) yes, (2) no, (3) I don't know, (4) I don't remember, or (5) I don't understand the question.

5. Pause before you answer. Take your time. Make sure you understand the question. Do not tell the attorney asking the question what you think he wants to know. Just answer the question he asks you. This pause also affords your attorney a chance to object.

6. Keep your answers short. There is a common misconception amongst physicians that if they explain things well, their intelligent responses will prove to the opposing attorney that the whole thing was a mistake and that their treatment was proper. This couldn't be further from the truth. When you give a lengthy answer, you're revealing more information and giving the opposing attorney ideas for more questions.

7. Never guess. You might be wrong. If you do not know the answer, say you don't know. If you do not understand the question, say so. The question can always be restated.

8. Do not get angry. Becoming angry sometimes will make you reveal too much information, and will send the message that you are ill prepared to be a witness and cannot control yourself. The attorneys for the other side will try to take advantage of that weakness in trial.

9. Make eye contact. Look at the attorney asking you questions. Stay calm.

10. Stop talking when your attorney makes an objection. When you hear your attorney make an objection, immediately stop talking and allow him/her to make the objection on the record. You will then be instructed to either proceed with answering the question or to not answer the question.

DISCLAIMER

This outline and the information it contains is for educational and informational purposes, to promote discussion and analysis. It is not legal advice. Every case and set of circumstances is different. You should always consult extensively with your own personal attorney and follow his or her advice. This outline and information cannot be used against its authors and clients.

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