

Medicolegal Forum: The Expert Deposition: Part 2: The Day Of....

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Depositions are a key aspect of the Discovery process, which simply refers to all of the pretrial activities in a civil lawsuit. In the last Medicolegal Forum we discussed the importance of preparation for a deposition. This column will focus on the actual deposition – what to expect and how to behave.

Where and When is the deposition held?

You will receive a subpoena listing the date, time, and location of the deposition. They are not held at the court, but at a location determined by the lawyers involved in the case. It may be at a law office, a court reporter's office, or at the hospital. You do have some input with scheduling and should schedule the deposition with adequate time to prepare.

Who will be at the deposition?

There may be a number of people present at the deposition. The plaintiff's lawyer will be there and in many Obstetric and Neonatal malpractice cases there are multiple defendants, each with their own lawyers. The plaintiff (often the baby's parents) who have filed the lawsuit may attend as well. Additionally there will be a Court reporter and a videographer if the deposition is videotaped, which is often the case. It is not unusual to have some lawyers present and others participate via telephone or video conferencing.

Is there a 'dress code' and a "behavior code"?

While you may or may not be videotaped and you are not meeting the Queen, appropriate dress and behavior is important. Conservative dress is recommended, as is professional behavior at all times. Similar to a job interview you are being evaluated at all times for your potential impact on a jury, so annoying habits like chewing gum or checking your phone every five seconds will be noted by opposing counsel. Your attorney can make suggestions regarding any of your distracting mannerisms which can be interpreted as nervousness to the jury. Image is extremely important. Focus directly on the attorney asking the questions. Electronic equipment (cell phones, pagers) should be turned off. Speak directly into the microphone. Do not appear impatient and be aware of your non verbal behavior.

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What should I do at the Deposition?

1. TELL THE TRUTH – remember you are under oath just as if you were in a courtroom. The attorney questioning you is not under oath and can make untrue statements. Think of your testimony as if you were meeting a person for the first time. Simple yes or no answers are often the preferred way of answering questions. Truthfulness and humble answers are uniformly best.

2. ANSWER WHAT YOU KNOW – “I don't know” or “I don't remember” are perfectly acceptable answers and preferable to guessing. The more the expert witness tries to avoid sim-

ply saying, I don't know, is unreasonable since there are many questions that can be asked and not answered simply. Avoid using “hedge words”. These include, it's possible or I think so. It is better to use the word “probability” rather than “possibility”. Seasoned attorneys will often ask a compound question and stipulate a “yes” or “no” answer. If the question is compound you do not want to agree or disagree with the entire question. Your attorney should be able to object if necessary.

3. LISTEN CAREFULLY TO THE QUESTION – How you answer the question matters. If you don't understand the question, ask for clarification. If you don't remember the question, ask for it to be repeated. Pay particular attention to hypothetical questions and compound questions. Opposing counsel may repeat the same question over and over again with different syntax or grammar. This can be annoying to the expert witness who oftentimes becomes impatient and upset. If the opposing attorney notes that you are becoming frustrated the questions may become even more hostile. If you remain calm and speak effectively the attorney may look like a “bully” to the jury. Sometimes some of the questions and your answers can be embarrassing:

Question: Isn't it true that you earned over \$800,000 last year in expert fees?

Answer: I am not sure.

Question: Isn't it true that you did not pass your certification examination until the third attempt?

Answer: Yes

These simple questions are embarrassing but under law they are permissible.

4. ANSWER ONLY WHAT IS ASKED – Lawyers rarely ask questions at a deposition that they don't already know the an-



swer. But the attorney has a narrow understanding of the science, and the expert has more “expertise”. It is usually incorrect to volunteer information for it can later lead to a new line of questioning. However, you can bring out the limitations of the attorneys knowledge by careful responses.

Question: You know that baby Thompson was suffering from the neonatal abstinence syndrome and should have been transferred from your community hospital to an academic center where the care would have been more complete. Isn't that true?

Answer: No

Question: What do you mean “no”? Care is uniformly better at an academic center. Isn't that true? Answer: That is a broad statement and not always correct.

Question: Let's go back to your first answer about not transferring the infant from your community hospital to an academic center for treatment of the neonatal abstinence syndrome.

Answer: Sir, with all due respect, studies have shown that there are no significant differences in infants managed in a community hospital compared with academic centers. The use of standardized protocols has erased any potential difference.

5. LISTEN CAREFULLY TO YOUR ATTORNEY'S OBJECTION – Your attorney is not allowed to speak with you privately after a question has been asked, so an objection may be directed at you as well as opposing counsel. For this reason you should pause briefly before answering the question to give your attorney a chance to object. This pause is critical for if there is an objection, stop testifying and let the attorneys bicker and leave you out. Often the expert will have extra time because of the objection process to formulate a better answer.

6. GOING “OFF THE RECORD” – Off the record simply means that the court reporter is no longer recording what is being said. It doesn't mean that if you offer statements off the record that they cannot be used against you.

7. KEEP YOURSELF COMFORTABLE – If you don't feel com-

fortable you won't look comfortable! You are welcome to ask for breaks anytime as long as there is not a question pending. Take water and bathroom breaks as needed, generally at least once an hour for a few minutes. If the deposition is long, stop for lunch or a snack to keep your energy up.

8. BE PLEASANT, CONFIDENT & COOPERATIVE – portions of a videotaped deposition may be played for the jury at trial in an effort to discredit your testimony. How you say it is as important as what you say. Do not demonstrate exasperation at the question or appear bored. Opposing counsel is always interested in the manner of your response to questions; often your response is more important than the answer itself. Confidence is paramount but arrogance is not. Remember that the expert witness is offering an opinion based-upon expertise in the subject matter. The expert witness is not an advocate.

9. SHOW UP PREPARED – Depositions are generally not pleasant. Preparation with your attorney will help decrease anxiety and give you an idea of what to expect. It is best to over prepare rather than to appear complacent.

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