

Deposition dos and don'ts: How to answer 8 tricky questions

You must tell the truth,
but you can answer honestly
without hurting your case

During your deposition in a malpractice suit, would you know how to answer if the plaintiff's counsel asked you: "Doctor, are you saying it was impossible to foresee Mr. Jones' suicide?"

Ninety percent of malpractice cases are settled before trial, and the deposition often is the turning point.¹⁻³ Your answer to tricky questions such as this could favorably affect a critical stage of litigation—or spur the plaintiff's attorney to pursue the case more vigorously. Even if a case is settled in the plaintiff's favor before trial, the deposition's effectiveness may determine whether the settlement is \$300,000 or \$1 million.

Don't go to a deposition unprepared. This article offers guidelines to help you anticipate many different scenarios and includes examples of honest, skillful answers to 8 difficult questions (*Box 1, page 26*).³⁻⁷

Digging for pay dirt

Discovery begins after a formal complaint alleges malpractice. The parties to a lawsuit gather information through written interrogatories, requests for documents, and witness depositions—out-of-court testimony to be used later in court or for discovery purposes.⁸ Discovery's rationale is to reduce surprises at trial and encourage pretrial settlement. The witness being deposed is the "deponent," and testimony is given under oath.⁹

A discovery deposition is designed to gather information, with almost all questions asked by opposing counsel. If you are sued for malpractice, this is the type of deposition you probably will encounter.



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continued



Depositions

Table 1

5 goals of the plaintiff's attorney at a deposition

Lock down testimony for trial
Scrutinize defendant's qualifications
Size up defendant's effectiveness as a witness
Probe defendant for bias, arrogance, or hostility
Learn as much as possible ('fishing')

Rules of engagement. The plaintiff's attorney initiates the discovery deposition. Ground rules vary by jurisdiction, but in general the Rules of Civil Procedure give deposing counsel substantial latitude in the questions that can be asked.¹⁰ The deponent and defending counsel, opposing counsel, and transcriptionist typically attend the deposition. To help you prepare appropriately, confirm with your defense

counsel if other attorneys or the plaintiff will be present.

Not-so-hidden agendas. The plaintiff's attorney's primary goal is to gather as much information as possible about your side's case⁴ (Table 1). No matter how accurate the medical records may be, they require interpretation and follow-up questioning of key players to get the full story. Opposing counsel also wants to:

- "lock down" your testimony for use at trial (testimony captured at a deposition can be used to impeach a witness who gives inconsistent testimony at trial)⁹
- "size up" your potential impact on a jury by assessing your strengths and weaknesses as a witness.¹¹

The impression you make may influence the opposing attorney's decision about how far to pursue the case. Plaintiffs' attorney Bruce Fagel once told an interviewer that defense attorneys, too, may consider settling a case "if their client shows such arrogance in our deposition that they're afraid to let him appear in front of a jury."¹²

Clinical Point

Avoid the temptation to schedule the deposition in your office, even though that might seem convenient for you

Honest, skillful answers to 8 tricky deposition questions

1 The Impossible Dream



In law, there is a distinction between *possibility* and *probability*. The law considers anything 'possible,' but something

is not probable unless it is more likely than not (expressed mathematically, its chances are $\geq 51\%$).

...

Q. Doctor, are you saying it was impossible to foresee Mr. Jones' suicide?

A. I don't know of any way the suicide could have been foreseen. It was a terrible, tragic loss that was not possible to foresee.

2 The Hypothetical



When confronted with questions containing a hypothetical, identify the hidden assumption before answering.

...

Q. Doctor, with a psychotic suicidal patient, would you agree that the standard of care requires you to...?

- A.** I can't agree with you that in this case we are talking about a psychotic suicidal patient. Do you still want me to answer the question? **Or**
- A.** I can't answer that based on the few facts you've given me. I'd need to see that patient and examine her first.

3 Invitation to Speculate



Refrain from speculating, especially when you're presented with an incomplete clinical picture.

...

Q. Doctor, is it fair to say that a patient with those symptoms should be referred to a neurologist?

A. I really can't speculate based on that limited information. I'd just be guessing.

4 Did I Say That?



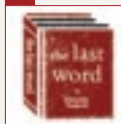
Opposing counsel may mischaracterize or distort your testimony by attempting to 'paraphrase' what you've said.

...

Q. Now doctor, as I understand it, what you're really saying is that the patient...?

- A. No. Or**
- A.** No, that's not an accurate summary of what I just said.

5 The Authoritative Treatise



Opposing counsel wants you to acknowledge a specific piece of literature as 'authoritative' in psychiatry, so that

counsel can then impeach you at trial with points from the literature that contradict your testimony. Although you may be made to look foolish if

Choosing a site. Most depositions take place in a conference room in one of the attorney’s law offices or at a neutral site. Avoid the temptation to schedule the deposition in your office, even though meeting there might seem more expedient and comfortable for you.⁹ Scheduling the deposition at your site:

- might make you feel it is “just another day at the office” and dissuade you from preparing sufficiently or taking the deposition seriously
- allows opposing counsel to scrutinize diplomas, books, journals, and other materials in your office.

Questioning you about these materials during the deposition is not off limits for the plaintiff’s attorney. You might find it difficult to explain why a book on your bookshelf is not “authoritative.”

Prepare, prepare, prepare

Your emotional stress will probably wax and wane during the lengthy litigation process.^{13,14} Knowing what to expect and

being well-prepared for the deposition may relieve some anxiety.

Review the case. At least twice, carefully review the entire database—including medical records and other fact witness discovery depositions. Perform 1 of these reviews just before the deposition.³ Having the details fresh in mind will help you if opposing counsel mischaracterizes information when questioning you.

Meet with your attorney. Insist on at least 2 predeposition conferences with defense counsel.

At the first conference, volunteer all pertinent information about the case as well as any noteworthy medical inconsistencies.² Find out what documents to bring to the deposition, who will be present, and the expected duration. You might wish to prepare mentally by inquiring about the style and personality of opposing counsel.

Defense counsel does not control how long a deposition lasts but might be able to give a rough estimate. Plan accordingly,

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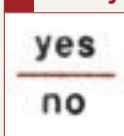
A mock deposition with your attorney can improve your effectiveness as a witness and reduce your anxiety

you refuse to acknowledge anything as authoritative, this usually is the safest course.

Q. Doctor, do you accept Kaplan & Sadock’s Comprehensive Textbook of Psychiatry as an authoritative reference in your field?

- A. It is certainly well-respected, but the entire text can’t be considered authoritative. **Or**
- A. Significant portions may be authoritative, but I would need to see the portion in question to be able to answer your question.

6 The Tyranny of Yes or No



In an effort to control you, opposing counsel may demand only yes or no answers. Listen closely to each question, and determine if you can convey the whole truth with ‘yes’ or ‘no.’ Asking to further

explain to avoid giving a misleading answer will make opposing counsel appear defensive if he does not agree.

Q. Doctor, please answer the question; it requires only a simple yes or no.

- A. I cannot answer that question with only a yes or no. Would you like me to explain? **Or**
- A. A mere yes or no answer to that question would be misleading. May I explain?

7 Convoluted Compounds



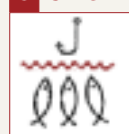
When opposing counsel asks you a double- or triple-jointed question, ask him or her to reframe or breakdown the inquiry into simpler questions.

A. Doctor, would you agree that a patient with a family history of

diabetes who is on olanzapine should be tested for...at least once a month, and that if there is evidence of...then the standard of care requires you to...?

- A. Please ask me those questions again, one at a time.

8 Give Me More



Opposing counsel may try to ‘fish’ for more information. You are under no obligation to make his or her job easier. Answers that contain a qualifier are useful.

Q. Doctor, to your knowledge, have you told me everything you consider important about your patient’s death by suicide?

- A. I have told you all the information I can remember at this time.

Source: References 3-7



Depositions

Clinical Point

Remain composed when answering questions, and resist the urge to counterattack; strive for humility and dignified confidence

Table 2

Malpractice: How to prepare for your deposition

Thoroughly review case records
Master the case (memorize key names, dates, facts)
Meet with defense counsel at least twice to: <ul style="list-style-type: none"> • find out deposition's location, who will be present, and expected duration • learn what documents to bring • understand opposing counsel's style and personality • prepare for difficult questions • consider having a mock deposition
Double-check your curriculum vitae for accuracy and updating
Come to the deposition well-rested

and allow for sufficient scheduling flexibility. Depositions typically last half a day, but they can last more than 1 day.

At a later predeposition conference, defense counsel might walk you through a mock deposition that involves difficult or anticipated questions. This is a good opportunity to master your anxiety and improve your effectiveness as a witness.

You also may wish to go over your curriculum vitae with defense counsel and check it for mistakes or other content that might raise problematic questions during the deposition (Table 2). Make sure your c.v. is up-to-date, and refresh your memory if it lists lectures given or articles written—no matter how long ago—on topics related to the litigation.

On deposition day

Don't open Pandora's box. Keep your answers to deposition questions brief and clear. Opposing counsel may ask broad questions, hoping to encourage rambling answers that reveal new facts. Answering questions briefly provides the least information to opposing counsel and is best under most circumstances.

One exception may involve scenarios in which the defense attorney instructs you, for various reasons, to provide information beyond the question asked. For exam-

ple, when a case is close to settling, your attorney might instruct you to lay out all evidence that supports your professional judgment and clinical decisions in the case. Do not use this approach, however, unless your attorney specifically instructs you to do so.

You are under no obligation to make opposing counsel's job easier. In a discovery deposition, volunteering information may:

- open up new areas for questioning
- equip the deposing attorney with more ammunition
- eliminate opportunities for your attorney to use surprise as a strategy, should the case go to trial.

Consider, for example, a scenario in which you and a hospital are sued in regard to an inpatient suicide case. At deposition, you might be asked whether you can identify written evidence anywhere in the patient's chart that the decedent was checked every 15 minutes.

The correct answer would be "no," even though you know 15-minute checks are documented in a log kept at the nursing station in this hospital. You might be tempted to reveal this information, but leave the timing of its disclosure to the defense attorney. Your attorney's strategy may be to reveal this critical piece of information at trial, when the plaintiff's attorney has less opportunity to strategize ways to discredit the evidence.

Keep your cool. Attorneys have different styles of questioning, depending on their personalities. Some may be excessively polite or friendly to get you to let down your guard—only to set you up for a devastating blow at the deposition's end (or save this for trial). Other attorneys might employ a "bullying" style that seeks to intimidate. In responding to questions, always remain composed and resist the urge to counterattack.

In all circumstances, strive for humility and dignified confidence. Opposing counsel gains the advantage when defendants lose composure or become angry, defensive, or arrogant. Indeed, experienced plaintiff's attorneys may be testing for precisely this reaction in the hope that

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Depositions

Clinical Point

To avoid guessing about something you've forgotten, qualify your answer with a statement such as 'to the best of my recollection'

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a defendant will "demonstrate his arrogance" during the deposition or later on the witness stand.¹²

In working as expert witnesses in malpractice cases, we have observed many instances in which a defendant psychiatrist's arrogant or hostile remarks at deposition played a key role in causing the case to be prematurely settled in the plaintiff's favor.

Avoid making jokes or sarcastic comments. Even a well-timed, self-deprecating joke may backfire should opposing counsel take the opportunity to point out that the case is a "serious matter."

Listen carefully to each question during the deposition. Pause for a moment to consider the question and allow time for other attorneys to object.⁵ Your attorney's objection may suggest the best way for you to respond to the question. Refrain from answering any questions when defense counsel advises you to do so (*Table 3*).

Don't answer questions you don't understand. Rather, ask for clarification. Avoid using adjectives and superlatives such as "never" and "always," which may be used to distort or mischaracterize your testimony at trial.

Don't guess. No rule prevents opposing counsel from asking a witness to speculate, but generally avoid doing so. You are required to tell the truth—not to speculate or volunteer guesses. The best way to cause a jury to disbelieve your testimony is to make inaccurate or unfounded statements, which opposing counsel will surely point out at trial.

Don't be tempted to "plumb the depths" of your memory for a forgotten piece of information, however. If asked, for example, if a patient displayed a specific symptom during an appointment 4 years ago, the true answer is likely to be "not that I recall," rather than "no." Qualify similar answers with statements such as "to the best of my recollection," or "not that I recall at this time."

If opposing counsel asks questions based on a particular document, request to see the document. Review it carefully for:

Table 3

Deposition dos and don'ts

Always tell the truth
Actively listen to questions, and pause before answering
Keep your cool ; never lose composure
Answer only the question asked
Stop speaking and listen carefully if your attorney makes an objection
Avoid long narratives , and don't volunteer information
Don't speculate or guess
Avoid absolutes such as 'never' or 'always'
Avoid jokes , sarcasm, and edgy comments
Ask for breaks if needed to keep from becoming inattentive
Carefully examine documents, reports, etc. before answering opposing counsel's questions about them
Ask for clarification of confusing questions
Remember that nothing is 'off the record'
Don't waive your right to read and sign the deposition transcript

- who signed and/or authored it
- when it was prepared and dated
- whether it is a draft copy
- whether it contains confidential information relating to patients other than the plaintiff
- whether it is attorney-client privileged
- and—most importantly—whether opposing counsel has quoted portions of the document out of context.

Procedural pitfalls. Throughout the deposition, the attorneys may periodically tell the court reporter they wish to have a discussion "off the record." Nothing is off the record for you, however. If you make a statement when the court reporter has been told to stop, opposing counsel can summarize on the record everything you said during that time.

At the beginning or end of the deposition, one of the attorneys may ask if you

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wish to retain or waive the right to read and sign the deposition transcript. Seek your counsel's advice, but defendants usually choose to retain this right. Typically, you will have 30 days to read the transcript and correct any errors. Keep in mind, though, that substantive changes that go beyond typos are likely to be the subject of intense cross-examination should the case go to trial.⁹

Depositions are sometimes videotaped, usually because a witness will not be available at the time of trial. Because the jury will hear and see you, approach a videotaped deposition as if it were an actual trial. Dress appropriately, speak clearly, and look directly into the camera. Don't feel embarrassed about making sure you are videotaped with the best possible lighting, camera angle, and background.

Keep your guard up

Don't allow yourself to be distracted if opposing counsel jumps from open-ended questions to clarification questions to "pinning down" questions. Using an erratic approach could be part of opposing counsel's strategy. Answer only the question asked, and give the shortest correct answer to each question.

Opposing counsel may ask a question in a way that suggests substantial confusion or misunderstanding. If this confusion does not affect your testimony, you don't need to clear up matters for opposing counsel. If, for example, opposing counsel asserts that one of your statements was contradictory, an appropriate response may be simply, "No, it wasn't." It is opposing counsel's job to explicate further details.¹¹

Bottom Line

Before a deposition, master the records and facts of the case and have a clear understanding of opposing counsel's goals and strategies. Prepare thoroughly, alone and with your attorney, because opposing counsel will be sizing you up as a witness. Approach the deposition with humility, confidence, and a good understanding of how to answer difficult questions honestly and skillfully.

Box 2

Persona adopted by plaintiffs' attorneys to obtain information at deposition

'Mr./Ms. Friendly.' Some attorneys look for an opportunity before the deposition begins to show that they are 'friendly' and not to be feared. Remember that discussions with opposing counsel without defense counsel present are not appropriate.

'Eager Student.' Opposing counsel may play the 'eager student' to massage your ego and pave the way for long narratives and volunteered information.

'Counselor Clueless.' Opposing counsel may appear so ignorant of certain facts that you can scarcely resist jumping in to educate him or her.

Silent treatment. After you give a brief, honest answer, opposing counsel may sit silently as if expecting a more substantive response. Resist the temptation to fill the silence.

Opposing counsel may approach the deposition with a particular demeanor—such as friendly or eager to learn—in an attempt to get you to let down your guard and speak more freely (*Box 2*).

Particularly in a full-day deposition, the greatest likelihood of making mistakes begins around 4 PM. Indeed, some attorneys may reserve especially important questions for this time period, hoping that the witness will be less guarded. Be sure to start the day well rested, and ask for breaks if fatigue begins to affect your concentration.

Clinical Point

Witnesses are most likely to make mistakes after 4 PM, so ask for a break if fatigue starts to affect your concentration



Depositions

Related Resources

- Professional Risk Management Services, Inc. The Psychiatrists' Program. www.psychprogram.com.
- Simon R, Sadoff R. *Psychiatric malpractice: cases and comments for clinicians*. Washington DC: American Psychiatric Press, Inc; 1992.

Drug Brand Name

Olanzapine • Zyprexa

Disclosure

The authors report no financial relationship with any company whose products are mentioned in this article or with manufacturers of competing products.

Be alert to a pattern of questioning designed to elicit only “yes” answers. This technique—commonly used by salespersons—makes it difficult to say “no” in response to an ambiguous question.

Point out errors if opposing counsel misquotes earlier testimony or states facts incorrectly. These mistakes may be innocent or a deliberate attempt to distort your testimony.

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