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Physician CONNECTION

Oh, No! I've Been Sued!

The Difference between a Deposition and Trial Testimony

By Julie Ramson, J.D., B.S.N.

The goal of *Physician Connection* is to feature articles by leaders in the medical, legal and risk management professions, and we believe you'll enjoy the in-depth perspectives shared by our authors. We realize the practice of medicine can involve both science and art. A patient's medical history and treatment plan should be based on the patient's condition, appropriate guidelines and procedures, and the physician's clinical opinion. Therefore, the views and opinions expressed are those of the authors and do not reflect the policy or position of PSIC.

It's happened. You've been sued! Now the plaintiff's attorney wants your deposition, and your attorney tells you this is a statement under oath about what happened.

Your attorney has told you that in a deposition you must answer only what you are asked and keep your answers short—no educating the plaintiff's attorney and no volunteering information.

But, but, but ...you know in your heart of hearts that if you could just explain to the plaintiff's attorney why you did what you did, what you were thinking, and what happened, he would see that you were thoughtful in your care and that what happened to this patient was not your fault. If you could just explain ... he would dismiss this lawsuit against you.

Wrong. In over 30 years of practice, I can count on the fingers of one hand the times I have seen a case dismissed **after** a deposition.

You need to be prepared for this deposition, so know your medical records. The plaintiff's attorney may approach you in a pleasant, rational and businesslike way. Or, he or she may be a condescending jerk. Some will try to be your buddy because, after all, this isn't personal. The patient just wants your *insurance* money, not *your* money! No hard feelings, right?

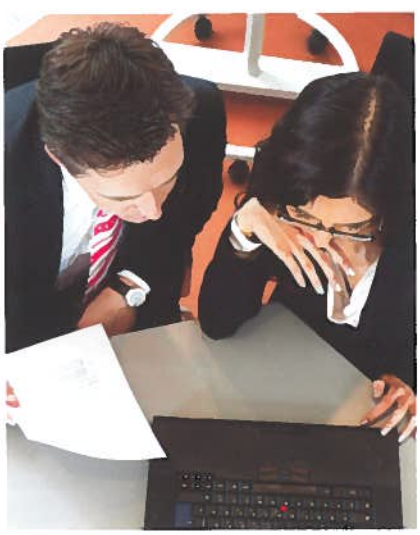
Wrong. Don't be taken in by the ruse. The plaintiff's attorney wants every cent he or she can get from you. The plaintiff's attorney is not your friend.

Lions and Elephants

Yes, deposition and trial testimony are similar—kind of like lions and elephants. Both are animals, both are mammals, both are big. But that's where the similarities end. Lions prowl at night while elephants are day creatures. Lions eat meat. Elephants munch on plants and leaves. Lions will stalk their prey, preferring to sneak up on them, pouncing for the sudden kill while elephants are loud and noisy as they stomp their victims. Don't be fooled though. Both can kill.

Deposition testimony and trial testimony are both statements of what happened to the patient in this lawsuit, both are given under oath and both will reflect your perception of why your treatment was proper. The purpose of the deposition testimony is very different from the purpose of testimony at trial, however, and it's important to know when to talk and when to be quiet.

At deposition, the plaintiff's attorney doesn't want your explanation of what happened. He only wants to set up questions that will elicit answers that, taken out of context, will make you look bad before the jury. At deposition, the plaintiff's attorney may be a lion, asking questions that set the traps for you to make damaging admissions he can pounce on to destroy your defenses and then use against you later at trial.



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Once on trial, though, in front of the judge and jury, he will be like an elephant—more calm and outwardly more polite—but no less deadly. He will use the answers you gave at your deposition to show the jury you were negligent. Rather than a lion's sudden pounce, he will hammer away, piece by piece to stomp your defenses into the ground.

There are ways to prevail against both the lion and the elephant. Follow your attorney's advice and you can win at the deposition and, more importantly, at the trial.

If I Could Only Explain Why

The plaintiff's attorney isn't taking your deposition to find out if the patient *should* have sued you—he *knows* the patient should have. The plaintiff's attorney has an expert telling him that he should sue you and that your care was negligent. The goal in this deposition is to get you to say too much, to incriminate yourself with statements so that they can win. They are not there for the truth. They are there to win.

Sounds harsh? It is, slightly, but it's also true. The plaintiff's attorney is an advocate for his client just as your attorney is there to be an advocate for you.

The plaintiff's attorney needs only to show that your care was improper, that it did not meet the "standard of care," which is the care that any reasonably well-qualified doctor would give under the same or similar circumstances. If they prove that, they win. Ironically, the standard of care is not written down anywhere, nor is it defined in any book. It is—like beauty—in the eye of the beholder. In lawsuits, it's in the eye of the testifying expert. The plaintiff's expert will say you "deviated" from the standard of care, and your expert will say you complied with the standard of care. They are both talking about the exact same care!

Don't try to educate the plaintiff's attorney. First, his expert has already done that, and there's nothing that would convince him that his expert was wrong and your care was proper. He is a believer who wants the jury to award the client money. Period.

Deposition Testimony—The Approach

Be prepared by knowing your deposition testimony and medical records inside and out. Your deposition testimony will be your blueprint for your trial testimony.

Yes, I know you are hoping the case never goes to trial. Your attorney is hoping that, too. But we attorneys are a pessimistic group. We plan for the worst. In fact, our entire work up of the case will have two goals, the first being to get the case dismissed, and the second being to prepare the case for trial.

A Few Practical Tips

1. **Always tell the truth. You are under oath, and lying would be perjury.** Work with your attorney before the deposition to discuss areas of the case or your care that concern you and decide together how to answer the anticipated difficult questions.
2. **Listen carefully to what you are being asked and answer only what you are being asked.** Example: Do you know what time it is? If you answered "10 a.m.," you lose. Your answer should be: "Yes, I know what time it is." Wait until you are asked what time it is before you give this answer.
3. **Pause and count to three before you answer in case your attorney wants to object.** If this occurs, listen to the objection. Your attorney will give you the reason for the objection, such as confusing, multi-part, vague or asked and answered.
4. **If you don't know the answer to a question, say so.** Don't guess at what the answer might be or should be. For example, "Didn't your neurology consultant, Dr. Z., believe the patient had a cardiac problem?" Unless there is a specific note in the chart, you don't know what Dr. Z. believed. That's speculation. This is different from "The patient's hematocrit was elevated on June 9, 2010, right?" That's a fact, and there should be a lab result to confirm the higher hematocrit. You can agree to facts.
5. **Nothing—no textbook, no article, no journal and no online site—is authoritative**. You use your background, training, education and experience along with the articles or textbooks to determine how to treat a patient or patient's condition. You don't *rely* on them; You simply find some parts useful.
6. **With very rare exceptions don't criticize the care given by others**—unless they have been dismissed from the case or the statute of limitations has run. Your attorney will know if that is the case. Know that if you criticize another doctor's or nurse's care, they and their experts will come right back at you. Suddenly, you will be fighting with a co-defendant, as well as the plaintiff's attorney. This will not help your case.
7. **It is perfectly acceptable not to remember something**. If you are asked about a fact, or a conversation with someone such as the patient, his family or another doctor or nurse, and you don't recall that discussion, say so. Don't try to pretend to remember when you don't. Never assume that you remember the conversation.

8. **Don't get defensive.** Be polite and calm at all times and don't let the plaintiff's attorney annoy you. When annoyed, people often say things they regret.
9. **You always have the right to talk to your attorney.** The plaintiff will object if a question is pending but take your attorney's lead and either answer or leave the room to have a discussion with your lawyer.

So Now …Trial

The case didn't get dismissed, and it didn't settle. You are on trial. Now—finally—you can tell your story to the jury. Now—finally—you can do one of the things that you do best, which is teach. Most doctors excel at this. You are trained to do it, and your attorney will give you the opportunity to do so.

Trial Testimony

Trial testimony is different than deposition testimony because now you can answer the questions more fully. It's also more civilized because the judge won't let the plaintiff's attorney be rude or nasty. In fact, the plaintiff's attorney won't want to look that way in front of the jury either. So, while the attorney will still be tough, he will also have to be polite.

> Jurors will ask themselves:
> Would I go to this doctor?
> Did the doctor care about the patient?

The plaintiff's attorney will call you to testify as an "adverse witness." This means he can ask you questions before your attorney does and those questions will be "leading." These are questions that will require only a 'yes' or 'no' answer. You must not worry if he cuts you off and doesn't let you give a complete answer. Your attorney will go back to those questions and give you the opportunity to finish your answer.

Now is the time that your attorney will let you tell the jury what you believe happened. He will allow you to give your thought process, your reasons for doing what you did and, most importantly, show the jury through your testimony and demeanor, that you are a thoughtful and caring doctor for your patients. This will be your opportunity to shine.

Depending on the type of medical issue involved, he will also have the medical record entries, a model of the organ in question, if applicable, or posters depicting the surgery or other issues in the case. Your attorney will call you down from the witness stand and let you teach the jury directly what happened or what the plaintiff's condition was that required treatment.

Juries

Juries are interesting. Most often, people don't want to serve, but once selected for jury duty, the vast majority of jurors really try to be fair to both sides. They enter the case without any prejudice to either side, not liking one more than the other. This is the main reason you need to look pleasant and reasonable.

Typically, the one issue that will overshadow every other one for a juror is this: Would I go to this doctor? Would I send my wife, husband, child or parents to this doctor? Did the doctor care about the patient? Did he or she really try to give the patient good medical care?

Juries can forgive a mistake, and they understand that there will be unfortunate results in a case. However, they need to know that you tried, that you did all that you could to save the patient or get a good result. I have seen doctors who had misdiagnosed a patient, or caused an injury to a patient's organ

or artery in surgery and who have still been found "not guilty of medical negligence" because the jury thought the doctor cared and did his best.

Remember, every nuance of your manner, your facial expression, your courtesy and even your clothes will be carefully scrutinized by the jurors. It is essential that, regardless of what the plaintiff's attorney asks or how he asks it, you remain calm and pleasant. You cannot show any feelings of hostility or anger you might feel toward the plaintiff's attorney, the case or even possibly the patient. Be polite, be nice.

Tips for Trial Testimony

1. **Make eye contact with the jury.** It makes you look as though you are sincere and have nothing to hide from them.
2. **Remain calm** no matter how the plaintiff's attorney tries to rattle you or insult you. If you remain calm it makes the attorney look worse. Juries hate to see anyone treated rudely, so they will hold it against attorneys who do this.
3. **Stick to your story** and don't let the plaintiff's attorney change it for you. Practice with your attorney before the trial to find the best way to make a statement. I once defended a cardiologist in a cardiac ablation case where the patient had several abnormal electrical pathways that caused an abnormal electrical conduction in the atria. The medical jargon for stopping that abnormal electrical pathway is "burning" it. This

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is accurate. The electro physiologists do, in fact, burn a very tiny piece of cardiac tissue. But we had to find another word besides "burning" the heart tissue—what a horrible mental image! We used the term "interrupting" the aberrant pathway instead. Articulate your theory of what happened and stick with it.

4. **Trust your attorney.** If the plaintiff's attorney does get you to slip up or make an unfortunate remark, your attorney can help fix that. Your attorney will "rehabilitate" your testimony but you have to trust him. Don't get alarmed or panic if you say something incorrect. Your attorney will allow you to correct it.
5. **Dress conservatively** in a dark suit or dress. Wear little jewelry, have neatly combed hair and wear understated makeup. You need to look professional and competent.

One Last Point

In any trial, I pick three things we can teach a jury. Just three. Most jurors are not medically trained, and if we try to teach them all the medicine surrounding the condition, the injury or the surgery, we will lose them. Pick your three points and stick with them. I once told a doctor that if we tried to answer all the little nasty things the plaintiff's attorney put out there against the doctor, we would be like a dog chasing a bunch of gophers. If you chase them all, you won't get any. Pick your gopher (your theory of the case) and go for it.

In conclusion, deposition testimony and trial testimony are similar, but they have different functions in a case. Work with your attorney and make those differences work to your favor rather than against you.

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Julie Ramson, J.D., B.S.N., *is a partner with the law firm McKenna Storer where she specializes in defending medical professionals in cases alleging malpractice. She was born in Cedar Rapids, Iowa, and received her Bachelor of Science in Nursing from the University of Wisconsin. She practiced for several years as an ED nurse, head nurse of a medical intensive care unit and as director of nursing in a surgical hospital. She earned her law degree from the Loyola University of Chicago School of Law in 1982, and since then has had extensive experience in representing physicians, nurses and professional corporations in all areas of medicine. She has tried numerous multi-million dollar cases involving both single and multiple defendants with good results. Ms. Ramson has also spoken to numerous professional groups on the topic of professional liability, documentation and how to avoid the need for a defense attorney.*

Clarification

The last issue of *Physician Connection* contained a reference to Dr. William Edwards. This should have listed the doctor's full name, Dr. William Edwards Deming. We apologize for any confusion.

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