PREPARATION OF THE DEFENDANT FOR DEPOSITION: A PRACTICAL GUIDE

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General Introduction

Except for trial, the deposition of a defendant in a medical malpractice case is the most perilous part of the case. Very little good can come out of the deposition. If it were possible, defense counsel would like to avoid the deposition altogether. Unfortunately, that is not possible, unless the plaintiff has waived it, either voluntarily or involuntarily. The only affirmative use of a deposition on the defense side is in support of a motion for summary judgment, in lieu of an affidavit from the defendant.

The perils of the deposition are myriad. The defendant will (invariably) volunteer too much information, sometimes giving up a defense that the plaintiff has not anticipated. In thirty years of practice, I have had only two clients who did not volunteer a single piece of information. On the subjective side, the defendant may appear to be evasive, arrogant, dismissive of the case or express hostility or lack of sympathy toward the plaintiff. Substantively, the defendant may concede a critical fact or medical concept that undermines a significant aspect of the defense.

Preparation of the defendant requires a discussion of his or her background (education, training, professional credentials, prior administrative, disciplinary and litigation experience); review of the medical records (for accuracy and the possibility of alteration); review of conversations and communications with other health care providers, the plaintiff and the plaintiff's family; review of the medical principles applicable to his or her care; review of the standard of care and causation issues. Equally important is education of the defendant about the process, the purpose of the deposition, and the correct style of testifying. Finally, the deposition preparation should make the client be comfortable with, and less anxious about, the whole process.

Instructions For Client

It is best to being the preparation session with a discussion about the purpose of the deposition. Many, if not all, physicians approach the deposition as the first opportunity to defend his or her

actions. Psychologically, it is only natural for the physician to have this preconception. Often the physician will think he or she can convince the plaintiff to drop the case. It is critical that the physician completely abandon this approach. The differences in the approach to deposition and trial are poles apart. The physician should understand that the case cannot be won at deposition, only lost.

I find it useful to use a military analogy. The client should understand that the trial represents the final battle. The deposition is the equivalent of a reconnaissance mission. At a deposition, plaintiff's counsel is attempting to explore not only the weaknesses of the defense, but also its strengths. By volunteering information that might ultimately help the defense at trial, the defendant is actually assisting plaintiff's counsel prepare for trial. Just as a combatant would not disclose the location of his ammunition dump, the defendant should not disclose, unless directly asked, key aspects of his or her defense.

The essentials of a successful medical malpractice defense consist of the "4 C's":

1 Competence,
2 Carefulness,
3 Credibility
4 Compassion.

The groundwork to establish these characteristics begins with the deposition.

Once the defendant understands the true purpose of the deposition, it's time to move on to specific instructions.

<u>Location</u>

Never prepare the client in his or her own office. You want to take the client out of his or her comfort zone. You want to avoid distractions. You want to prepare the client in the same environment that the deposition will take place.

<u>Specific Instructions</u>

ANSWER VERBALLY

DO NOT VOUNTEER ANY INFORMATION
DO NOT EDUCATE THE PLAINTIFF
DO NOT EXPLAIN OR ELABORATE

- The plaintiff's attorney will attempt to extract as much information as possible
- The less the plaintiff's knows the better
- This is not your opportunity to defend yourself
- Nothing for us to gain
- You will not convince the plaintiff to drop the case
- Do not give any information not asked for, even if it is substantively helpful. This only helps the plaintiff
- If asked an closed-ended question that calls for a "yes," "no" or a specific fact, only give that answer
- If asked an open- ended question ("why," "please explain," "what is the significance of" or "what was the basis for") give as short an answer as possible. Think in terms of a check list.

DO NOT ANSWER UNTIL THE QUESTION IS COMPLETE

- The end of the question may change the meaning of the question
- This is the only way you can make sure you understand the question
- If I'm going to object or request a clarification, I have to wait until the question is complete

MAKE SURE YOU UNDERSTAND THE QUESTION

- If not, simply say, "I don't' understand the question."
- Do not explain why you don't understand the question.

DO NOT VOUNTEER ANY INFORMATION
DO NOT EDUCATE THE PLAINTIFF
DO NOT EXPLAIN OR ELABORATE

BE PATIENT…TAKE YOUR TIME

- There is no time limit for you to answer.
- Impatience and frustration are your biggest enemies

OPINIONS

- There is no objective right or wrong
- Be your own best friend in giving an opinion

ELEMENTS OF CASE

- Explain what the plaintiff has to prove in order to win at trial
- Departure from standard of care
- Proximately causing injury
- Extent of injury/damages

GENERAL VS. SPECIFIC

- General questions may be asked about a medical condition, signs or symptoms of a disease, diagnostic methods/techniques or standard of care.
- In answering, always keep in mind the specifics of your treatment of the patient

BE VERY CAREFUL WHEN ASKED ABOUT THE "STANDARD OF CARE"

The client should know that this is the whole ballgame.

NEVER ADMIT TO A DEPARTURE FROM THE STANDARD OF CARE

HYPOTHETICAL QUESTIONS

1. If the question assumes a fact with which the client disagrees, the answer should be prefaced by emphasizing that this is an assumed fact, with which the client disagrees
2. If the question assumes a medical concept that is incorrect, the client should state that he or she can't answer the question as posed.
3. If the question incorrectly paraphrases prior testimony, the client should simply state that the paraphrasing is incorrect
4. If the question assumes facts that occurred after the defendant's treatment, the client should simply say that he or she hasn't had the opportunity to review all the relevant information.

BE VERY CAREFUL WHEN ASKED CAUSATION QUESTIONS

- If you don't know, don't speculate.
- If causation is obvious and incontrovertible, then concede the point.
- If the question is beyond your expertise, then say so.

IF THERE IS OBJECTION TO QUESTION, ANSWER THE QUESTION UNLESS DIRECTED OTHERWISE, BUT LISTED CAREFULLY TO THE OBJECTION

WHENEVER THERE IS AN OBJECTION, REALIZE THE QUESTION IS IMPORTANT AND BE CAREFUL WITH YOUR ANSWER

MEMORY/RECOLLECTION

- When plaintiff's counsel asks, "Do you have an independent recollection of the patient or your treatment, independent of the record?" you are simply being asked do you remember anything about the case.
- Remember as much as possible
- It's easier for the plaintiff if you have no recollection. The only facts he has to contend with are those in the records.
- Custom and practice
- Particularly important with informed consent

DOCUMENTATION

- Significant positive findings
- It didn't happen if it wasn't written down
- Errors/corrections

DO NOT VOUNTEER ANY INFORMATION
DO NOT EDUCATE THE PLAINTIFF
DO NOT EXPLAIN OR ELABORATE

FAILURE TO DIAGNOSE

- Symptoms/findings/ lab results that are "consistent with" the disease. If yes, then answer, "along with many other conditions."
- In retrospect, did the patient have the disease at the time of client's treatment? Must be evaluated on case by case basis.
- What was your differential diagnosis? Should client include disease in question?
- In ruling out specific conditions or ranking the potential diagnoses, do you do so on the basis of seriousness of the disease? The answer should be No, it's done on the basis of probability.

- Performing a test because it is available vs. performing it because it is indicated

Recommendations for Attorney

KNOW YOUR CASE

- Thorough familiarity with the client's records
- Thorough familiarity with the medical issues.
- Don't rely exclusively on your client for medical information. You'll be able to gauge your client's competency and knowledge in short order.
- Do your own research
- Obtain expert review before the deposition

ONLY ALLOW CLIENT TO REVIEW HIS OR HER OWN RECORDS

- Anything beyond that is fair game.
- If shown material not reviewed, or asked hypothetical, try not to offer an opinion

CONCLUDE THE PREP SESSION WITH A "Q & A" ON THE MOST IMPORTANT ISSUES IN THE CASE

OBJECTIONS

- The only time a witness does not have to answer a question, is a question that calls for privileged information.
- Explain to client that unless directed otherwise, he or she must answer the question.
- Explain that this is to preserve the objection for the trial judge. If the judge agrees with the objection, then the answer cannot be used.
- Explain to the client that whenever there is an objection, realize the question is important and be careful with your answer
- Rather than object, ask for a clarification of the question

N.Y Ct. Rules § 221.1 – Objections at Depositions

> (a) Objections in general. No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules,

would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.

(b) Speaking objections restricted. Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

N.Y Ct. Rules § 221.2- Refusal to Answer When Objection is Made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

N.Y Ct. Rules § 221.3 – Communication With the Deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section **221**.**2** of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

CPLR Rule 3115 (b)

> **(b) Errors which might be obviated if made known promptly.** Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of persons, and errors of any kind which might be obviated or removed if objection were promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

TAKE A BREAK IF CLIENT IS GETTING FLUSTERED OR IS VOLUTEERING TOO MUCH INFORMATION.