

The Art of the Deposition

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Deposition - a word that strikes fear into the hearts of well-meaning chiropractors everywhere. I have heard many frightened doctors tell me they "don't do depositions" or worse, they don't do personal injury because they don't want to deal with depositions. No doubt it boils down to a fear of the unknown (But to be clear, a deposition subpoena is just that: a subpoena. If you do PI, you do depositions; you don't have a choice). Doctors who have been through one or two depositions in their career realize there is nothing to fear so long as you follow a few simple rules.

Preparation

"Preparation" is meant in two ways. Preparing for a deposition starts at the very first visit of every single PI case. Your records should be legible and complete. Your billing should be consistent and accurate. Your reporting should be succinct, but earnestly written. If you cut corners (e.g., copying and pasting the same paragraph into many PI reports or using the same billing codes in every trauma case), it will come out in deposition.

Remember also that deposition transcripts are public record, so you will want to make extra certain you don't get caught cutting corners, as it very well may get brought up at future depositions by enterprising defense attorneys who have reviewed your past depo transcripts. If you write so illegibly that no one can read your SOAP notes, you will be asked to decipher your scribbles and will likely feel foolish when you inevitably can't read your own handwriting.

(An interesting fact we will discuss below: Having your deposition taken can be lucrative; however, attorneys are permitted to take your deposition exclusively for the purpose of making you decipher your handwriting and *not* pay you as an expert).

When you receive a records subpoena, make sure you don't "split the chart" or only produce records from the most recent accident when you treated that patient previously for any reason. If the subpoena says "all records" or "all records within the last 10 years," then produce *all* the records you have. So long as you use good billing and reporting practices throughout your PI cases (and believe me, I know it is tempting to cut corners sometimes), your fear of being humiliated by a vicious defense attorney should be severely curtailed.

The other way you can be prepared for your deposition is by literally preparing yourself ahead of time. This means reading through every single note, every single report, every single form you made your patient fill out at your office, and every other document contained within your file for that patient prior to your deposition. It is not a memory test and you are not expected to have memorized the patient file; however, you do not want to be surprised by anything contained within your own file.

In addition, if you noted that you relied on a document within your report (e.g., an MRI report or a MD's report), make sure you have reviewed that document prior to the deposition as well. You do not want to be caught reviewing a document for the first time on the record - a document you claimed you relied on months or years earlier.

Location and Money

You have considerable power to affect the date, time and place of your deposition. Regardless of when or where the notice says the deposition is set, you can always contact your plaintiff's attorney and explain you are unavailable on that date and time, and insist the deposition be rescheduled to a date / time / place of your choosing. I always suggest doctors plan it during a lunch hour or hour when they would not otherwise be seeing patients, and insist that the deposition take place in their personal office (home-court advantage is a real thing!) or, in the post-COVID age, over Zoom.

You should also provide the noticing attorney with a copy of your fee schedule that notes depositions are between \$250-\$350 per hour (up to you) with a two-hour minimum, and that a check needs to be furnished at the time of deposition.

Consult With the Plaintiff's Attorney?

There are competing theories as to whether this is a good idea. Technically, the plaintiff's attorney does not represent you at the deposition and, thus, you do not enjoy any protections from the attorney-client privilege. This means anything you talk about with the plaintiff's attorney or anyone in their office (as well as all correspondence you have with the plaintiff's attorney's office) can be asked about by the defense attorney.

Regardless, I am of the opinion that there is more to be gained than lost by having a brief conversation with the plaintiff's attorney prior to a deposition. It is always better to learn the inside scoop about a case ahead of time, rather than be surprised on the record.

Follow the Rules

As a matter of housekeeping, the court reporter will require that you use only verbal responses (no "uh-huh" or "nuh-uh," shrugging shoulders, etc.) and that only one person speak at a time. You will also be required to give your best estimate without guessing (this means you can't say, "I don't know" to questions such as, "How many times did you see the patient?" or "How much face time did you spend with the patient on an average visit?")

Remember, this isn't a memory test. If you don't remember something, you are free to say you don't remember. If something happened a year ago, you are not expected to have specific recollection of it outside of what is written in your chart. Don't try and guess or speculate about things you don't know or can't remember.

Practical Takeaway

In the end, try and be calm and confident. You are the leading expert in the musculoskeletal condition of your patient and the treatment you rendered to them. You went to school for many years to gain an expertise in those subjects; and regardless of how well-prepared the attorney is, you know more than they do.

Attorneys are interested in your answers, but they are also trying to ascertain whether you would be a credible witness at trial. Doctors who are perceived as confident and credible witnesses / experts make the case less likely to go to trial and more likely to resolve for good value.

Chiropractors who are well-prepared (both in their workup of the case and for their deposition specifically); have set the terms of their deposition; have consulted with plaintiff's counsel; and follow the ground rules, can walk out of a deposition knowing they protected their reputation and aided in the litigation of their patient's PI case.

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