



@Risk: The Last Place I Want to Be...

Managing Deposition Anxiety

By Kristin B. Pettey, Esq.

This article is an enduring activity approved for AMA PRA Category 1 Credit(s)[™] and category 1 credit in Risk Management Study.

We work in a litigious climate.

The unfortunate truth is you will likely be sued at some point in your career. Feelings, including shock, guilt, self-doubt, defensiveness, anger and fear of the unknown, can be overwhelming. It is important to understand the effect these feelings may have on your ability to navigate through the foreign territory of a lawsuit and give clear and convincing testimony during your deposition.

Except for actually appearing as a witness during the trial, providing effective deposition testimony is the most significant contribution you can make in a malpractice lawsuit. Further, in what may seem illogical, those attributes that make you a "good" doctor can make you a poor witness. The reality is, if you take the time to understand the process, you can succeed and even excel.

So, it is important that you take the necessary steps to do it well. Your deposition testimony can, and will, have a profound impact on the outcome of your case.

What is a Deposition? A deposition is an oral "question and answer" examination of a defendant or witness under oath in the presence of a court reporter, who prepares a transcript of your testimony. It is a critical part of the fact finding process, and yes - if a deposition is requested, you must appear and give your sworn testimony. At the deposition, you are the "star." Your attorney cannot tell you what to say during the deposition but will take as much time as is needed to prepare you ahead of time.

The questioning attorney has significant latitude about what can be asked, including the possibility of asking quite personal questions. The attorney representing you will play a limited role, but can object to questioning where it becomes repetitive, belligerent or beyond the scope of proper discovery. Because a Judge is not present, attorneys may argue about inappropriate questioning, however, it is important to maintain your own decorum and professionalism. You will be required to answer every question unless instructed not to by your attorney. Your attorney usually does not question you. However, on occasion, to avoid having to participate in a second deposition, your attorney may try to correct a serious substantive error by asking you limited questions.

When you receive your deposition transcript you have 30 days under Court rules to correct errors such as significant misspellings, inaccurate transcriptions by the stenographer or substantive mistakes made by you before it is finalized. Your attorney will review these changes with you. However, if you make substantive changes to the deposition you may need to testify about why the changes were made.

A deposition is a time for you to present your defense through pointed answers made in a concise manner. While it is an opportunity for opposing counsel to learn your "side of the story," you must understand that they also view this as an opportunity to "lock you into" certain positions for later use at trial. Careful preparation and forthright, accurate delivery of the facts is of utmost importance. If the plaintiff's attorney can show you are not truthful on a single point, he or she will argue that none of your testimony should be believed.

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Lifespan



What a Deposition IS NOT. A deposition is not where you will “win” your case, how you will “prove” your innocence, or how the parties search for the scientific “truth.” Your deposition is a time for the attorney to understand your role in the event, and unless asked to do so, it is not the proper time for you to expound on complex medical issues tangentially related to the case in an effort to educate opposing counsel.

Depositions Cause Anxiety. Why? Because depositions are unlike any other type of personal interaction a provider has typically engaged in. Fear of the unknown; feelings of helplessness; limited understanding of the process; anger over being personally attacked; uncertainty about the outcome; stress over the impact of the deposition and the lawsuit on you, your family, your reputation and career; and, fear of saying the wrong thing, all contribute to stress and increase this anxiety. It is important to acknowledge that these feelings can occur and learn how to manage them ahead of time. An anxious witness is often not a good witness. But, with proper preparation, you can channel your normal anxiety into a positive experience.

Manage Deposition Anxiety with Good Preparation. Thoughtful and thorough preparation puts a witness in the best position of achieving the primary goal of a deposition, which is to make positive contributions to the successful defense of your case. A “bad” deposition is often preventable through collaborative preparation between the witness and his/her legal team. Poorly delivered testimony at your deposition may create a serious tactical error, which may be difficult for your legal team to overcome. In fact, the entire outcome of a lawsuit, good or bad, may depend on a defendant’s deposition.

How Can I Succeed at Deposition? Prepare and prepare again. Preparation is more than just reviewing medical records; it will involve discussions about general strategies and guidance on how to manage your conduct, your appearance and your testimony at the deposition. This preparation will take more than one session and may begin weeks before your deposition occurs. Even if you consider yourself an accomplished witness, your testifying skills will be much improved with proper preparation. Remember that just as doctors have different approaches, your attorney may approach depositions differently than you experienced previously.

In Summary. With your attorney, identify your deposition goals, sharpen your listening skills and enhance your ability to communicate effectively. Appreciate that your answers can control the flow of the deposition. Practice listening to questions, thinking about, and stating your answers succinctly. Learn about the deposition process and understand if, when, and how you can exercise or maintain control. It is essential that you know how to tell your story effectively, confidently and with credibility. Practice, preparation and familiarity will help to decrease anxiety and ease tension surrounding the process.

To earn CME credit for reading this article, please go to <https://www.surveymonkey.com/r/FSJ9Y3M>

Suggested links for additional guidance on this topic:

1. Getting Sued: A Resident’s Perspective, <http://www.acep.org/>
2. So You’ve Been Sued, <http://www.acep.org/>
3. Surviving the Deposition, <http://epmonthly.com/>
4. Surviving and Preventing Malpractice Litigation, <http://www.audio-digest.org/>
5. What to Do if You are Named in a Malpractice Suit, <https://www2.aap.org/>
6. The Power of Prep: Effective Preparation of Your Client for a Deposition, *Section of Litigation*, <http://apps.americanbar.org/>
7. The Graduating Emergency Medicine Resident’s Guide to Medical Malpractice, <http://www.ohacep.org/>

Interested in attending a mock deposition with attorneys and a physician involving an actual case?

@ Risk Live Lecture Series: Mock Deposition

November 4th and 20th — George Auditorium — 12 Noon

See page 3 for the corresponding summary of case facts

**Case Facts: "Alleged Failure to Obtain Informed Consent"
See "Dr. Bovi" deposed *LIVE!*
@ Risk Live Lecture Series: *Mock Deposition*
November 4th and 20th—George Auditorium—12 Noon**

- Dr. Bovi, orthopedic surgeon, determined that Mr. Aiken had moderate to severe right carpal tunnel syndrome and surgical decompression was appropriate.
- In accordance with his routine practice, Dr. Bovi would have discussed the risks and benefits of the procedure with Mr. Aiken and his wife in his office prior to surgery.
- Mr. Aiken consented to the surgery.
- Both Dr. Bovi and Mr. Aiken electronically executed consent documentation regarding the procedure.
- Dr. Bovi charted in his medical record "All risks discussed. All questions answered."
- On June 27, 2009, Dr. Bovi performed carpal tunnel release surgery on Mr. Aiken's right hand at The Miriam Hospital.
- Mr. Aiken did not recover as expected during the post-operative period and complained of right hand weakness and numbness.
- Mr. Aiken did not fully recover the nerve function to his right hand and litigation ensued.
- Among the allegations asserted was a lack of informed consent, wherein Mr. Aiken testified that he would not have undergone the right wrist carpal tunnel release surgery had he been aware of the possibility of nerve injury.
- Mr. Aiken further testified that he did not sign the consent documentation he was presented with at his deposition.
- Dr. Bovi has no recollection of explaining the surgical risks to Mr. Aiken or of Mr. Aiken signing the electronic consent form.

PY 2015 - 2016 @ Risk Live Lecture Series Presented by Lifespan Risk Services, Inc. - Loss Prevention Rhode Island Hospital - George Auditorium				
@ Risk Live Lecture Series:	@ Risk Live Lecture Series:	@ Risk Live Lecture Series:	@ Risk Live Lecture Series:	@ Risk Live Lecture Series:
Mock Deposition	Diagnostic Error	Health Care Technology	Transitions of Care	Disclosure/ Apology
11/04/2015 12 - 1pm	12/10/2015 7 - 8am	01/21/2016 12 - 1pm	02/11/2016 7 - 8am	04/28/2016 12 - 1pm
11/20/2015 12 - 1pm	03/17/2016 12 - 1pm	06/09/2016 7 - 8am	09/15/2016 12 - 1pm	05/12/2016 12 - 1pm
	09/08/2016 7 - 8am	09/27/2016 5 - 6pm		

Tips for a Successful Deposition

DO:

Be honest. You are under oath to tell the truth. It is expected that you will give honest testimony during your deposition.

Be knowledgeable about the information in the medical record. It is important to have a complete understanding of the facts, thus promoting self-assured, intelligent answers.

Display confidence. Being deliberate and thoughtful rather than showing arrogance goes a long way in a deposition, and typically results in a better outcome.

Acknowledge that your emotions may be tested. Recognize it is difficult to think clearly and give effective testimony when you are angry.

Stay on track. Without volunteering facts, details, or explanations not asked for, provide the least amount of information necessary for your answer to be accurate, yet concise. Doctors are natural educators and this can be a difficult task.

Listen carefully to the question. Despite the best preparation, you may be nervous and hear the words, but not listen to the question. Slow down and ask to have the question repeated or read back by the stenographer. Attentive listeners make the best deponents.

Understand the question before answering it. If you don't, it is perfectly acceptable to say so. The attorney questioning you will rephrase the question.

Listen to and assist your counsel. Total commitment and candor are needed.

Complete your answers. An incomplete answer can be misleading. You have the right to complete your answer.

Be alert to any inaccuracies or misrepresentations and ask to correct them. Do not blindly accept the questioning attorney's summary of the facts.

Read documents before answering questions about them. You have the right to request an opportunity to read a document before testifying about it.

Take a break from the deposition when necessary. This is not a hostage situation and breaks can and should be taken as needed.

DO NOT:

Guess. You do not have to have an answer just because the other attorney is asking for one. It is perfectly acceptable to say you don't know or don't remember, as long as it is truthful. It is not uncommon to forget information over time or under pressure. But it is important to provide as much information as you do recall. Repeatedly responding I do not know or I do not recall can hurt your credibility.

Chat casually or "off the record" with opposing counsel. Anything you say may open the door to further questioning.

Blame others or point fingers. This creates a 'slippery slope' which makes the case more difficult to defend.

Comment on care you were not involved in. This requires you to speculate without having all of the facts or first-hand knowledge.

Bring any materials to your deposition. Your attorney will supply you with everything you will need to refer to.

Justify or explain your answers. Generally, there is no need to instruct or educate the opposing counsel. However, there may be select instances when a witness needs to volunteer or explain a decision or material point. Such instances will be part of preparing for your deposition.

Make jokes, be sarcastic or use slang. It can be misconstrued and used to undermine you at trial.

Try to anticipate the direction the attorney is going in or what the next question will be. This can cause you to lose focus or answer the question before the attorney has finished speaking. In doing so, you may volunteer information not being asked for.

Remember to focus on the care you rendered to your patient during your testimony, rather than on the extent of your charting about such care. As basic as it sounds, it is important to be nice, be patient, use good manners, dress appropriately and come to your deposition well rested. Remember, you are a competent and caring professional and it shows in everything you do. So...be yourself. With proper preparation and increased understanding of the process, anxiety can be managed and your deposition successfully navigated.

You Were Named in a Claim or Lawsuit — Now What?

Notify your malpractice carrier at once so they can help you. Never ignore the claim or summons. Even if you are not named as a party, but you are served with a subpoena to testify at a deposition, you should notify your carrier.

Only discuss the case with your attorneys and malpractice insurance carrier. Do not panic and talk to colleagues about it. Never “try the case” with friends, colleagues or co-defendants. Your attorney will guide you as to what constitutes a privileged discussion and who else you may talk with regarding the case.

All communication should go through your attorney, especially after a legal action is initiated. Do not contact the patient or their attorney. Once a claim is filed, anything you say to the patient or their attorney can be used against you.

Preserve the integrity of the chart. Do not review, amend, alter or even access the patient’s record after receiving notice of a pending claim or suit.

Be candid about your charting. Perhaps you could have written more. Learn from that and make changes to your documentation going forward.

Acknowledge that it is personally and professionally challenging to be involved in litigation. Appreciate that the legal process may be lengthy, often taking years from notice of a claim or suit to resolution. Your attorney and malpractice carrier will do their best to control the impact of litigation.

RM Corner: Reporting in

Lifespan President and CEO, Dr. Timothy Babineau, has stated that our commitment to “Deliver Health with Care” is a promise we make to:

**Treat our patients with respect
Do our best to restore their health; and most fundamentally
Do all that we can to ensure their safety**

Reporting events via Lifespan’s patient safety event reporting system is a meaningful way everyone in the organization can contribute to this promise. Improvements resulting in safer patient care can be made throughout our organization when all Lifespan staff and physicians participate in reporting the following types of actual or potential safety events at the time of detection, or as soon as possible thereafter:

**Near misses that did not reach the patient
Unsafe conditions that have the potential to result in a patient safety event
Actual events that reach the patient, regardless of harm**

Specifically, the staff member who is involved, observes or first becomes aware of a safety event should complete the report. In accordance with established procedures, all entered SafetyNet events are:

**Reviewed by patient safety specialists and managers of the involved areas
Forwarded within the SafetyNet system to appropriate consultants, including risk management, for prompt review & action
Events with potential significant risk are reviewed by a system-wide safety team twice a week**

The team determines if further review is warranted in the form of a root cause analysis, FMEA (Failure Mode Effect Analysis) or other appropriate action. Using these established methods, we can identify significant gaps in processes and system failures which are viewed as opportunities to make organizational change. And by involving staff, administrators and providers in the identification, evaluation and correction of the problem, everyone can contribute to the solution.

In addition to protecting our patient’s safety, reporting events through SafetyNet protects the safety of the information entered. After an event is entered, trended and analyzed, it is sent to a national Patient Safety Organization, the UHC Safety Intelligence PSO. *Within this PSO environment, legal protection of information is maximized.*

Susan Montminy, Director, Clinical Risk Management

As a reminder, patient safety events that are communicated within the SafetyNet system are protected from discovery in a subsequent lawsuit. Emails and text messages related to the event are discoverable and do not receive the same protection.

FOCUS on Nursing - The Power of Testimony

The purpose of this section is to share summaries of closed cases that have occurred in the New England area and represent real life issues that provide proactive risk management educational opportunities. The cases used may come from Lifespan affiliates, or other institutions or practices, or may be composites of several cases with very similar fact patterns. We present these cases because we believe they have some relevance to situations that you may encounter.

Not Just About the Medicine

ISSUE: The appearance and unusual testimony of a key witness can often distract a jury away from the medically defensible facts of the case, leading to an unexpected verdict.

FACTS:

- ◆ Mr. W was a 45 year old, married man with three adult children. He worked as a general manager of a small local business.
- ◆ One evening, the patient was out drinking and dancing at a party, when he passed out. He was taken to the ED by EMS for treatment.
- ◆ He was evaluated by Nurse 1 in triage, where he remained for one hour before being transferred to the Urgent Care area.
- ◆ The patient was cared for by Nurse 2 in the Urgent Care area where she observed the patient had unstable VS, was ashen in color and had a L eye droop. The patient was in the Urgent Care area for 20 minutes before being transferred to Trauma Room Two.
- ◆ In Trauma Room Two, the patient was cared for by Nurses 3 and 4. Nurse 3 was given a report by the Urgent Care Nurse (Nurse 2), who repeated the findings as indicated above. Trauma Room Nurse 3 handed care off to Nurse 4, leading her to believe the patient was generally stable by using a generalized statement (below).
- ◆ A surgical consult was called and a decision was made to do an exploratory laparotomy. After significant delay, the patient was taken to the OR. His abdomen was stable but a large PE was found, causing *cor pulmonale*, and the patient died on the OR table before the cardiac surgeon arrived.
- ◆ Experts in the case were supportive of the care, and opined that the patient's presentation was consistent with his treatment and inconsistent with a diagnosis of PE. They also stated this sort of PE had a 90% mortality rate, despite best medical rescue efforts.
- ◆ Based on the medical facts, Attorneys defending the case predicted a greater than 60% likelihood for a Defense verdict.
- ◆ *During the trial, Nurse 3 made quite an impact on the jury:*
 1. Nurse 3 appeared for trial wearing a short, tight, wildly patterned dress and army boots.
 2. When asked to tell the jury what she told Nurse 4 during the handoff, she stated: "...this is a drunk guy who passed out at a club, and he suffers from "HHS: *Hysterical [culturally insensitive word] Syndrome.*"
 3. In response to being told by the patient, "I don't know what is wrong," Nurse 3 offered to the jury, "I should have known something was up with this patient. Patients always end up dying when they say, 'I don't know what's wrong.'"
 4. She also told the jury, "The ED was overwhelmed that night."
- ◆ The jury determined the nurse and the hospital who employed the nurse was liable for the patient's death. In after-trial interviews, the jurors stated their decision was based on the poor appearance and unusual testimony of Nurse 3.

Insights is published by Lifespan's Department of Risk Management Loss Prevention division. Submissions and ideas are welcome and may be submitted to the department or faxed to **401-444-8963**.

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