Under Oath: Preparing for a Deposition

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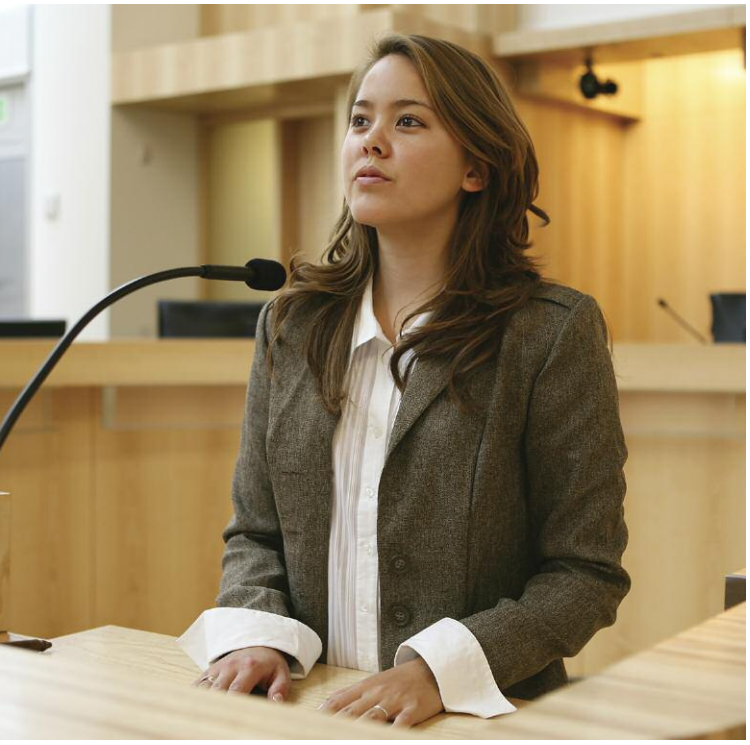
When a plaintiff initiates a lawsuit, the involved parties, with the assistance of their attorneys, begin the process known as discovery. During this time all parties attempt to uncover the facts that led them to litigation in the first place. While the parties conduct investigation, including consulting with experts and meeting with potential witnesses, they also can question their adversaries on a wide range of relevant issues. Typically, this type of discovery takes two forms: written discovery, in which each side submits written questions to the other, and the deposition. A deposition is a question-and-answer session in which attorneys have the opportunity to ask witnesses questions under oath. For a healthcare provider, even one who has not been named in a lawsuit, being asked to give a deposition can create anxiety and uncertainty.

The most basic advice for any witness preparing for a deposition is to follow the old adage "be prepared." This includes having an understanding of what you will encounter when entering the room. While depositions can be conducted by videoconference or even over the telephone, the typical deposition takes place in a conference room with all the attendees sitting around a table. A court reporter is present to make a transcript of the attorneys' questions and the witness's answers. Attorneys for each party, any of whom may ask questions, are also present (if a case involves multiple plaintiffs and co-defendants, the audience can be relatively large). As a witness, you may also have counsel present on your behalf, even if you are not a party to the litigation. For the witness, navigating the complex procedures can be intimidating. However, careful consultation with an attorney and an appropriate presentation can help make the best of an unpleasant situation.



Many times, healthcare providers are asked to give sworn testimony during the course of discovery. In a medical malpractice suit, the defendant-physician is almost certainly going to be deposed by the plaintiff's counsel. In litigation involving long-term care (LTC) facilities, a plaintiff may request the depositions of medical directors, administrators, nurses, or members of the interdisciplinary care team. Put simply, virtually every employee, from the director of maintenance to a certified nurse assistant, may be called on to offer deposition testimony. It is also of utmost importance to be aware that while the deposition may appear to be a relatively casual event, the witness is still providing testimony under an oath that has the same force and effect of the oath that the witness would take prior to testifying in open court. Perhaps more important, if the witness gives an answer at the deposition that is inconsistent with testimony at trial, that witness will likely be asked to explain the change in answer.

The laws regarding discovery depositions vary from state to state. However, a few general themes are usually applicable across the board.

1. Consult with an attorney.

If you've been asked to give a deposition as a witness, take the time to consult with an attorney. Sometimes, in the case of a LTC facility, the defendant facility will provide an attorney. This is particularly true if the provider is an employee or former employee of the facility. If as the provider you have insurance coverage, contact your carrier or your employer to see if counsel will be made available. In some cases, a witness will have more than one option with regard to counsel.

2. Determine the capacity in which you are being deposed.

As a medical provider, you will want to consult with your attorney and determine why you have been

asked to give a deposition. Many times, a provider is simply a fact witness who is going to be asked on the record what he or she recalls about certain events, policies and procedures, or the customs and practices at a facility. Be sure to discuss with your attorney whether you will potentially be named in the lawsuit or brought in as an additional defendant. In some situations, the provider's treatment may have occurred several years ago, and the plaintiff will be precluded from adding any additional defendants no matter what testimony they can offer. However, each state and situation is different, so this matter should be addressed with an attorney.

Many times, fact witnesses are merely asked to give their recollection of events. However, when the witness is also a treating physician, there is the potential that the physician will be asked "expert" questions. For example, a treating oncologist may be asked whether an earlier diagnosis of cancer by a defendant physician would have changed the patient's prognosis. Such testimony by a treating physician could have a major impact on the case.

In some jurisdictions, such as Pennsylvania, the attorney for the defendant may not speak off-the-record with a treating physician. However, the attorney for the plaintiff is allowed to speak with the treating physician. As such, if the defense attorney wishes to know the treating physician's opinions prior to trial, the only recourse (aside from a review of the medical records) will be to take that physician's deposition. In these situations, the treating physician, who now becomes an important witness, may be placed in the middle of litigation between a patient and a colleague.

The witness should try to gain a clear understanding of what the purpose of the deposition is and come to an agreement with counsel about what level of preparation is needed.

3. Tell the truth.

A deposition is sworn testimony. The most important rule for any deponent is to tell the truth. The witness must use this as a guiding principle beginning with the preparation for the deposition. As a witness, you should know that being truthful sometimes means testifying that you honestly do not recall a particular fact. For example, if you truly do not remember something that occurred and are asked a question about it, say, "I don't recall" or "I don't remember." That is the honest and truthful answer. Don't substitute a guess or speculation for a truthful answer. Even if you do not recall a specific incident, you may be asked what your custom and practice would be in a certain situation. Again, these are the type of questions you should discuss with counsel. As a general rule, however, an attorney does not want the witness to randomly guess or speculate.

4. Prepare.

A witness should consider how much preparation will be required prior to giving deposition testimony. Again, this is an issue to discuss with counsel. Some witnesses may be asked to give broad testimony regarding years of treatment with boxes of documents. Other witnesses may be asked about a single incident that occurred at a specific time and place. The witness should try to gain a clear understanding of what the purpose of the deposition is and come to an agreement with counsel as to what level of preparation is needed. Documents, including charts, policies and procedures, or state surveys, may be necessary to review. At other times, the attorney and witness may not want to review documents that they have not seen before, or documents that did not involve the provider's own care, to avoid unnecessary speculation or "hindsight" testimony regarding evidence not relevant to the witness's care.

Some jurisdictions do not allow witnesses to consult with an attorney during the deposition, especially while a question is pending. As such, the witness should make sure that he or she discusses these rules with the attorney to know how to handle unexpected lines of questioning. If the witness is being deposed in a jurisdiction where consultation during the examination is forbidden or restricted, the predeposition preparation session becomes even more important.

By following these guidelines and consulting with an attorney, you will be in a better position to face a deposition. Through preparation and discussions to understand the purpose behind the deposition, you may have a better idea of what to expect even before the first question is asked. ALC

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