

## **Inside the Litigation Process: Behind the Scenes of a Medical Malpractice Lawsuit**

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*(Part 3 of a Multi-part series detailing the events that occur during the investigation and litigation of a medical malpractice lawsuit)*

### **Party Depositions**

#### **a) The Plaintiff**

Although the most significant part of the discovery process in a lawsuit generally begins with the deposition of the plaintiff, there is actually very little information of overwhelming significance that comes from the plaintiff's deposition itself. Most plaintiffs do not impact the ultimate standard of care issue by their testimony, except to set up a potential version of factual events that may differ from the medical records involving their care.

Despite our knowledge that the plaintiff's version of the facts may be erroneous, debating those points with him/her in their deposition usually is pointless, as they are not likely to change the version of the "truth" that they have now been repeating to themselves and/or have been coached to tell by their attorney for several months.

Because the plaintiff's deposition usually won't lead to any significant bomb-shells, I don't make it a practice of requesting my physician clients to waste their time attending. You should be aware, however, that you have the right to attend any deposition taken in a case in which you are a party, so if you wish to actually hear the plaintiff say that you were an uncaring, inattentive individual, instead of just reading the transcript later, you can certainly do so.

#### **b) The Defendant Physician**

In my opinion, the most important single event in the defense of a malpractice case is my client's deposition. While a doctor's testimony on the witness stand at trial is ultimately critical, the performance of my client at his/her own deposition often is the determining factor in whether a case ever goes to trial.

The more likely result of a good deposition performance may be the plaintiff's re-assessment of the relative culpability of multiple defendants, or concern about his ability to convince a jury that this particular doctor may have deviated from the standard of care.

There are two separate, but equally important factors to the defendant's deposition performance: his answers and his demeanor. The importance of his answers is obvious. The defendant who can rationally explain all of the actions he took may shed light on details that are missing from the records upon which plaintiff's expert based his opinion.

The demeanor of the defendant may influence how plaintiff's counsel pursues the rest of the case. If he feels the defendant is an honest and caring physician, he may focus his wrath at a corporate defendant or at a less sympathetic co-defendant, knowing that a jury may do similarly at trial. If the doctor comes across as arrogant or egotistical, that only motivates the typical plaintiff's attorney to "go after" that physician.

The best physician witnesses, therefore, reach a happy medium between overt arrogance and jocular babbling, notwithstanding the type of opponent they face. These are some very simple suggestions for how to handle your deposition, whether being taken by an aggressive opponent or not.

□ Listen carefully. That means listen to the whole question. In everyday conversation we all interrupt each other as we talk, knowing what the people with whom we speak are saying even before they finish their sentence.

□ Tell the truth. After this past year, in which the President's deposition answers were so vigorously scrutinized and attacked, you should understand the ramifications of not only lying under oath, but of being "evasive" with the truth.

□ Short answers. If the question calls for a yes or no answer, then just say that. Witnesses always seem to think they need to say more.

□ Set the pace. Just because the opposing attorney is rapid firing questions at you does not mean you must respond similarly. Answer at a calm pace.

□ Take breaks. Ask to take a short bathroom or stretch break every hour or so. Even if you get up and just walk for a minute or two, it helps keep you fresh.

Most importantly, however, is what you should do before the deposition: prepare. Take a good look at your medical record. Be familiar with details, and know where to find the lab values, consultation and progress notes, or other parts of the chart that are likely to be relevant to the care you provided. Set aside an appropriate amount of time to confer with counsel before your deposition, and make sure you aren't looking at the records for the first time during that meeting.

When the deposition is all over, and you ask me if the plaintiff will now dismiss you from the case, I'll probably still tell you "no". But we'll both know that the plaintiff's attorney now realizes that despite his hope to the contrary, this is going to be a very difficult case for him to pursue, and he's probably out in his car cursing the investment that he's going to have to make in this case if he has any chance of winning.

Source: The Keane Insurance Group; March 1999