

Tips on Testifying

—by Robert P. Landau, Esq., Roberts, Carroll, Feldstein & Peirce, Providence

Imagine yourself in one of the following hypothetical situations:

- ▶ You are a defendant named in a medical malpractice lawsuit and your attorney has just informed you that your deposition has been scheduled.
- ▶ You have just been served with a subpoena requiring you to testify in a medical malpractice case as a non-party witness because you are an involved health care provider.
- ▶ You have just learned that you will have to testify at a deposition in a medical malpractice case where you have been retained as an expert witness.

A deposition requires that you testify under oath in front of a stenographer by answering questions posed

by an attorney. A transcript of the questions and your answers is prepared. Before you face that situation, you will probably have many questions of your own.

- ▶ How do I prepare to testify?
- ▶ Does it matter if I am a defendant, a non-party witness, or an expert?

- ▶ What difference does it make if I am testifying at a trial or if the deposition is videotaped?

First Things First

While this article can help familiarize you with some basic aspects of a deposition, it cannot and should not substitute for a meeting with your attorney about your specific situation. If you are notified about a deposition by anyone other than your appointed attorney, the first thing you should do is to contact Lifespan Risk Management. Even if you are being deposed as a non-party witness (i.e., you're not being sued), you need to contact the Lifespan Risk Management Department, who will discuss appropriate legal representation. While you might assume that you only need to explain your treatment, opposing counsel may place you in the uncomfortable position of testifying against your peers or they may ask questions that implicate you. Proper preparation is essential.

Upon learning they are going to have to answer questions under oath, many well-intentioned clinicians take steps that are not legally advisable, for example, conducting a literature search or discussing the case with colleagues.

When you hear about your deposition, consult with your attorney before doing any preparation. He or she may advise you not to speak to colleagues about the case (or even about the medicine involved). If you are testifying as an expert, you'll also be advised to carefully consider what documents you relied on to



Lifespan Risk Management

www.lifespan.org/risk

167 Point Street
Suite 170
Providence, RI 02903
tel: (401) 444-8273
fax: (401) 444-8963

continued on page 2

inside...

As a Juror, How Would You Vote?...page 7 Continuing Education...page 8

form your opinions. For example, a chronology summarizing medical records may have assisted you in your initial review, but opinions presumably are based on the actual medical records rather than the chronology itself.

Rules of Thumb

In all of these situations, you must work together with your attorney. As needed, educate him or her in the area of medicine involved, but also let your attorney educate you about the legal concepts involved (e.g., reasonable degree of medical certainty¹ and standard of care²) and the key aspects of the case. You need to feel confident and prepared to testify. Taking time for preparation is important so that you feel as comfortable and confident as possible. Here are some of the generic tips we pass on to anyone being deposed.

Do not be surprised. A well-prepared witness is more effective than one who appears uncertain or surprised by a question. Read and be familiar with any materials your attorney provides, e.g., relevant medical records, deposition testimony, answers to interrogatories (i.e., written answers to questions) or hospital policies. If you are asked to testify in court in a case for which you were previously deposed, carefully read your own deposition testimony beforehand. The opposing attorney will key in on any discrepancies between your testimony on the stand and in your deposition. Be prepared to define medical terms, list possible signs and symptoms of an illness, identify causes of a condition, or provide possible differential diagnoses. Stay within your area of expertise. If you do not know, say so.

Hear, hear. Listen carefully to each question. Be sure you understand the question; ask to have the question read back or rephrased if needed. Do not guess or speculate. Refer to documents when necessary; this is not a memory contest. Your attorney will have the medical chart available for your review. Do not let

yourself be interrupted. Maintain a professional demeanor; a neutral affect is better than one that appears defensive or argumentative. Avoid medical jargon when testifying in front of a jury (e.g., use “walked,” not “ambulated”). Never hesitate to ask for a recess if you need one. For example, you may need to speak to your attorney about correcting an error in your testimony.

Be careful what you volunteer. Some attorneys will tell witnesses never to volunteer information. I believe that, although generally you should limit your

A well-prepared witness is more effective than one who appears uncertain or surprised by a question.

responses, some important issues or open-ended questions lend themselves to more than a “yes” or “no” answer. For example, be careful to explain your answer to general questions so it is less likely to be taken out of context. If appropriate, say “I don’t know,” “I don’t remember,” or “it depends.”

Getting beyond “yes.” Be careful with leading questions (i.e., questions whose wording suggest the desired answer.) Resist the impulse to limit your answers to “yes” or “no” when responding to those questions involving important issues mentioned above. If you find yourself answering “yes” to a whole series of questions, that may be a signal that you should explain your answers further. At trial, you should try to use the same technique, unless the judge tells you otherwise.

Less than total recall. You are likely to be asked “do you recall...” or “do you know...” questions. If you respond “no,” be clear if you mean “I don’t know one way or the other” or “it didn’t happen.” Sometimes, you may not recall if an event occurred, yet you know that it did based on your custom or practice. For example, if you always advise a patient about certain risks related

continued next page

to a procedure, but you cannot recall doing so in the particular case in question, you still can testify that you always follow a routine that includes informing the patient about those risks.. Therefore, an independent recollection is not always required in order to be able to testify about certain subjects.

Watch for repeated questions. Do not change your answer just because the attorney repeats the question or suggests that you did not answer it the first time, or didn't answer it satisfactorily. If you think your answer is appropriate, stick with it. Do not let the attorney mischaracterize your testimony. Watch for "do you agree with this statement..." questions. If the statement is too general or doesn't apply to your case, point that out or say that while the statement could be true, generally, there are exceptions.

Question authority. Reflect carefully before ever agreeing that any text or journal is an authoritative treatise or reliable authority. If you consider a publication to be out of date, or if you disagree with statements in that source, say so. Once you say a text or journal is authoritative, you give opposing counsel a free expert witness and the opportunity to take statements from that source out of context.

Assume hypothetical questions are dangerous. If the questioning attorney asks you to assume certain facts to be true and then poses a question based on those assumed facts, beware. The assumptions may be inaccurate or incomplete. If you are required to respond to a question that calls for speculation, state that your

answer is also hypothetical, or state that additional information would need to be added to the assumptions.

Honor objections. Occasionally, your attorney will object to questions. At a deposition, no one will rule on them. Follow your attorney's lead if he or she instructs you not answer the question. Listen to the grounds of the objections. Examples of some common objections include:

- 1 already asked and answered,
- 2 misstates evidence,
- 3 ambiguous,
- 4 assumes facts not in evidence,
- 5 form (of question),
- 6 foundation (no basis established to indicate that the witness would or should know),
- 7 privilege (e.g., conversations with counsel),
- 8 argumentative, and
- 9 calls for speculation.

If you think your answer is appropriate, stick with it.

An objection raises a red flag. Be certain that the question is clear and accurate.

Set an example. Dress appropriately. If you are testifying on video, think of the camera as the jury; maintain eye contact with the camera accordingly and be aware of your facial expressions. A videotaped deposition should be treated in the same manner as

continued next page

Risk Management staff is available to provide risk management education to clinical and hospital departments at any one of the Lifespan affiliated institutions. Requests should be directed to:

Peggy Martin, Senior Risk Management Coordinator, Lifespan Risk Services.

e-mail: pmartin2@lifespan.org phone: 444-6491

testifying before a jury. Your attorney probably will reserve your right to “read and sign” which means you will have a chance to review the transcript for mistakes. You can correct significant typographical errors (e.g., hypothyroid v. hyperthroid), or portions of

a response that the stenographer failed to record. You can also make substantive changes. For example, you can correct errors or clarify your testimony by adding or deleting information.

The chart below summarizes some of the differences between deposition and trial testimony:

Testifying in Court

Testifying at Deposition

Formal setting

Relaxed setting

Jury probably present, be a teacher

No jury (parties may be present)

Take your cues from the judge

Take your cues from your attorney

Let judge rule on objections before responding to question

Listen to objections, but no one rules on them

Be prepared for questions from the opposing attorney, your attorney, and the judge

Only the opposing attorney will question you

Avoid mentioning insurance

Avoid mentioning insurance

Keep voice up, speak slowly, and look at jury

Use normal tone of voice and look at the inquiring attorney

Keep your language simple, define or explain terms

Use normal voice, style

Judge controls recesses

Ask for recesses as needed

Try to avoid long pauses, the judge or the questioning attorney will intervene if you are nonresponsive

You control the clock, pauses don't matter (unless it is videotaped).

Being involved in any way in a malpractice action is difficult for anyone. For most clinicians, the process and the courtroom itself is a strange, uncomfortable experience, with a whole new set of rules. Defense attorneys should spend the amount of time necessary to prepare clinicians to testify. Likewise, clinicians must cooperate by devoting sufficient time to work with their attorneys until they feel confident in their ability to function in the legal environment.

¹ *In order for a medical opinion to be admissible, it must be expressed to a reasonable degree of medical certainty; that is, the opinion must be more probable or more likely than not. Sometimes this concept is explained as sufficient certainty to tip the scales or just over 50%.*

² *“A physician is under a duty to use the degree of care and skill that is expected of a reasonably competent practitioner in the same class to which he or she belongs, acting in the same or similar circumstances.” “A doctor is required to exercise the same degree of care and skill as that exercised by practitioners of ordinary competence engaged in the same practice at the time the doctor rendered the care involved in this action having due regard, of course, for the state of medical knowledge at the time the care was rendered.” Parrella v. Bowling, 796 A.2d 1091 (R.I. 2002). 🌟*

Mandatory Reporting to the Department of Health

—by Sherri Ferland, Risk Manager, Rhode Island Hospital

One of the roles of Risk Management is to identify events and incidents that occur in our hospitals and to reports those events and incidents to the Department of Health (DOH), consistent with state law and DOH regulations.

Mandatory reporting can be broken down into two categories; reportable **events** such as fires and power outages, and reportable **incidents**. When a “reportable incident,” which usually involves direct patient care, is identified, the law requires that we report it to the DOH within 3 days and that we send it to the appropriate services for a Peer Review as well.

What incidents are reportable to the DOH?

- ▶ Brain injury
- ▶ Mental impairment
- ▶ Paraplegia
- ▶ Quadriplegia
- ▶ Birth injury
- ▶ Subjecting a patient to a procedure/treatment not ordered or intended by the patient’s attending physician.
- ▶ Any paralysis
- ▶ Loss of use of limb/organ
- ▶ Impairment of sight or hearing
- ▶ Surgery on the wrong patient
- ▶ Suicide of a patient during treatment or within five days of discharge from inpatient or outpatient units.
- ▶ Any serious or unforeseen complication that is not expected or probable, resulting in an extended hospital stay or death of the patient
- ▶ Blood transfusion error
- ▶ A medication error that necessitates a clinical intervention other than monitoring
- ▶ Any incident reported to our malpractice insurance agent.

Are incidents that do not occur in the hospital reportable?

Only incidents that are a result of patient care at the hospital are reportable. Therefore, if a patient arrives in the ED with paralysis, it is not reportable. However, if a patient develops paralysis as a result of care, it is reportable, even if it is a known complication of the surgery or treatment.

How do I report a “reportable incident”?

If you become aware of an incident that you believe is reportable, please contact your facility Risk Manager. Since we only have 3 days to report to DOH, your prompt reporting to Risk Management is essential.

What information is provided to the DOH?

When we report an incident to the DOH, we give the patient’s medical record number, date of the incident and a very brief description of the incident. We do not give the name of the provider involved in the incident.

What is the purpose of the peer review? Is the review discoverable?

The purpose of the peer review is to determine whether the standard of care was met, identify systems issues, define opportunities to improve patient care and make recommendations to improve existing policies, or to create new ones, if appropriate. These recommendations are provided to the

continued next page

Insights is published quarterly by Lifespan’s Risk Management Department. Submissions and ideas are welcome and may be submitted to Peggy Martin via e-mail: pmartin2@lifespan.org or fax: (401) 444-8963.

editorial committee chairperson: Peggy Martin

committee members: Paul Adler, Joan Flynn, Rick Almeida, Joseph Melino and Roland C. Loranger

design: Ellen Watt/IGN

appropriate Chief(s) or administrator(s) who are in a position to implement change. The proceedings of peer review committees are not subject to discovery.

What is sent to the DOH in follow up?

If the standard of care was met, we simply report that fact. If the standard was not met, the law and regulations require that we provide information about the circumstances surrounding the incident, the effect of the incident on the patient and a summary of actions taken to correct any identified problems.

Does the DOH ever conduct follow-up on the reports sent to them regarding reportable incidents?

Occasionally. They may either independently investigate incidents that are reported or they may follow up to make sure that we adequately addressed the issues that were identified during the review.

A robust reporting and peer review system is an important patient safety tool. The process is not intended to be punitive, but rather to identify system issues that need to be corrected in order to provide optimal quality of care to our patients. Please help by reporting issues to Risk Management as quickly as possible. ☀

R.I. Sound Enterprises Insurance Co., LTD (RISE) Risk Management Grant Award Program

The Grant Program was created to support innovative efforts to reduce liability exposure through funding of specific education/research projects. The grant must be related to professional liability (malpractice), general liability, or patient safety efforts.

A subcommittee of the Lifespan Quality Oversight Committee, acting as the Risk Management Grant Advisory Committee, has announced the awarding of two grants for 2004.

Proposals approved for funding are:

- ▶ “A collaborative model and education plan to reduce the incidence of hospital acquired pressure ulcers” submitted by **Donna Huntley-Newby, PhD, RN**, Director, Center for Practice Excellence/Special Projects, Department of Nursing, Rhode Island Hospital

- ▶ “Prevention and early detection of pressure ulcers in high risk, hospitalized patients” submitted by **Cynthia A. Padula, PhD, RN**, Center for Professional Practice Development, Nursing Department, The Miriam Hospital

The Committee extended its congratulations to those whose proposals were accepted and acknowledged its appreciation to all those who submitted proposals for their efforts to identify opportunities to decrease liability exposure.

Applications for the 2005 grant cycle will be distributed in the Fall.

For information about the grant program and how you can apply, contact Peggy Martin at Lifespan Risk Services, (401) 444-6491 or pmartin2@lifespan.org.

As a Juror, How Would You Vote?

—by David Carroll, Esq., Roberts, Carroll, Feldstein & Peirce, Providence

The following testimony occurred during an actual malpractice trial. The outcome of this case (a verdict for the defendant or the plaintiff) rested, in large part, on when the physician wrote the brief operative note – before or after the surgery. The plaintiff’s attorney asked the physician the following questions.

Q: There is a note that says “brief op.” When did you make that note?

A: Prior to surgery.

Q: In that note you gave a postoperative diagnosis as well as describing the procedure, didn’t you?

A: Correct.

Q: You put “condition stable?”

A: Correct.

Q: The condition was stable when?

A: We fill out a lot of paperwork prior to surgery. You know, to expedite matters prior to surgery, this would be our typical operative note that we would write. Saves time after the surgery.

Q: So you wrote this note before you knew her condition was stable and before you knew she would be extubated or... what does it say?

A: “Extubated to recovery room.”

Q: You wrote all of this beforehand?

A: Yes, it saves time after the surgery. If there are any changes, I would just amend it after. At the time of the operation, which I left to answer a page to the ED, the case was proceeding routinely.

Q: In the same note, you stated that the estimated blood loss was “minimal” but you know now from reviewing the records that’s not the case?”

A: Correct.

Q: You didn’t go back and correct the record to say that the estimated blood loss was not “minimal” but in fact was substantial?

A: I did not correct the record. I was called to the ED and never got back to the surgery.

In this case, the substantial volume of blood loss was important. The patient asserted that the fact it was not properly addressed caused her harm.

As a trial attorney who has been involved in medical malpractice cases for the last 35 years, it has been my experience that jurors will assess matters based on the facts. The trial of a case depends, however, not only on the actual facts, but on the jurors’ perceptions regarding the facts. If the operative note referenced

The trial of a case depends... not only on the actual facts, but on the jurors’ perceptions regarding the facts.

above was a crucial part of the evidence, how would it impact your decision if you were a juror? I can tell you that, based on the significant number of times that I interview jurors, the testimony recited above would not be well received and would probably go a long way in resulting in a verdict against the doctor and, possibly, others involved in the case. The fact that the note was written before surgery took place would not be accepted as good practice by a juror. The fact that it was not corrected is worse.

Separately, they hurt the defense of a case; together they make a successful defense almost impossible.

It has been my experience that there is a wealth of good will in the community involving doctors. Jurors really want to believe a doctor and understand that what the doctor did was appropriate and within the standard of care. However, also based on my experience, it is unlikely the jury would overlook the testimony quoted above and bring in a verdict in favor of the doctor.

In this case the jury returned a verdict in favor of the plaintiff and the award was in the high range. ☀

“Case Studies in Risk Management,” a monthly CME program for physicians

Second Tuesday of the month, Collis Conference Room (Hasbro, 1st floor), 12 noon to 1pm

The Rhode Island Hospital Department of Continuing Medical Education and the Risk Management Department presents a monthly one-hour program for physicians. Case studies from actual and potential claims will be discussed and pertinent loss prevention strategies will be reviewed.

Bring your lunch. Cold drinks, coffee and dessert will be provided.

Rhode Island Hospital is accredited by the Rhode Island Medical Society to sponsor intrastate continuing medical education for physicians. Rhode Island Hospital designates this continuing medical education activity for a maximum of 1 category I credit toward the AMA Physician’s Recognition Award.

Each physician should claim only those credits he/she actually spent in the educational activity.

Rhode Island Hospital fully intends to comply with the legal requirements of the Americans with Disabilities Act. If any participant of this conference is in need of accommodation, please contact the Rhode Island Hospital CME office at (401) 444-4260.

This CME activity is also designated for a maximum of 1 category I credit in Risk Management.

Program Dates

August 10

September 14

October 12

November 9

December 14

Lifespan
Risk Management
167 Point Street
Suite 170
Providence, RI 02903

