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Depositions: Are they legal jeopardy?

By **Jay Weaver, JD, EMT-P,** Attorney, Private Practice; Paramedic, Boston Public Health Commission; Adjunct Faculty, Northeastern University, Boston.

Editor's note: *A few years ago, I was thoroughly enjoying a warm Midwest spring morning with my daughters before they caught the bus to school. I walked my daughters down the driveway to their school bus, kissed them goodbye, and watched them board the bus. As the bus drove away, it revealed another vehicle that stopped where the bus had just been. Out stepped a sheriff to hand me a subpoena. I didn't know it then, but I was being named as a defendant in a medical malpractice suit because a clerk had wrongly placed my name on an X-ray requisition form for a patient who had an untoward event at the facility where I worked. Later, I was dismissed from the case after submitting to a deposition and spending a whole day to prove that I had never seen the patient. Yet, I remember that morning more for how the subpoena ruined the day rather than for how the day had started.*

Judging from the number of requests for information on how to handle depositions on previous Reader Surveys, many readers have had similar experiences. Being a risk manager and an attorney, I had knowledge of the process involved in lawsuits, but nevertheless, I still had a sinking and somewhat nauseating feeling when I was served, a feeling that resurfaced as the time of the deposition neared. The deposition is the first substantial involvement for a physician as a defendant or as a witness. Furthermore, the legal issues involved in the deposition may not be readily apparent to the physician deponent. Being aware of the deposition process and having some guidelines with which to approach a deposition will assist the deponent manage the inevitable anxiety that accompanies the experience. In this issue, the author provides us with some insight into the deposition process and some guidelines that will help the health care provider approach a deposition with equanimity. — Richard Pawl, MD, JD, FACEP

For health care providers, service of a deposition notice can be a heart-stopping experience. Medical schools offer no courses in trial preparation, and nursing students receive no instruction in testimony. When ED personnel are served with a deposition subpoena, the reaction generally is one of worry, if not outright panic, and the question arises: "Do I really have to go?"

Such concern is not unreasonable. As an extension of a courtroom proceeding, a deposition is an extremely serious matter. Depositions can have a profound affect on the outcome of a trial, and as a result, they may permanently alter the lives of the parties to the lawsuit. When conducted as part of a medical malpractice lawsuit, a deposition may elicit damaging testimony that can ruin the career of the witness or a colleague.

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Because most ED personnel are not well versed in trial procedure, this article will begin by describing the nature and purpose of a deposition. Some of the controversial issues that have faced health care providers during past depositions and suggestions to improve performance and minimize stress when appearing at a deposition will be offered. Liberal portions of actual deposition transcripts have been included to give the reader a feel for the character of these proceedings.

The Deposition: What Is It?

The purpose of any trial is to determine issues of law or fact.[1] Before a lawsuit proceeds to trial, however, the parties have a right to investigate the relevant facts for themselves. This process, known as *discovery*, permits the attorneys representing each side to prepare an appropriate strategy.

Discovery takes many forms. One party may send a written list of questions, or *interrogatories*, to the other.[2] A party may seek an order compelling the production of specified documents for inspection.[3] Depending upon the nature of the suit, a judge may order one or more individuals to undergo physical or psychiatric examination.[4] The results of these investigations may be put into evidence at trial.

One of the most common forms of discovery is the deposition. Unlike interrogatories, which by their open-ended nature allow the responding party great leeway in answering, depositions entail the face-to-face questioning of a party or witness by a lawyer representing each side. This provides a unique opportunity to evaluate the demeanor and credibility of these individuals prior to trial, and thereby, depositions are employed in virtually every major lawsuit.[5]

A deposition has much in common with a trial. Under the laws of most states, a deposition must occur under oath[6] or affirmation.[7] Every participant — whether a party or a witness — has the right to be accompanied by counsel.[8] As in a trial, the attorney for one party poses questions to the witness, with the attorney for the opposing party objecting to any questions deemed inappropriate under the rules of evidence.[9] The opposing party's attorney then has a chance to ask questions of his or her own during a portion of the deposition known as *cross-examination*.[10] Refusal to be sworn or failure to answer a question may be treated as contempt of court, punishable by a fine or even imprisonment.[11] A stenographer generates a written transcript

of most depositions, but upon agreement of the parties, audio or audiovisual recording is permissible instead.[12]

The biggest difference between a trial and a deposition is that depositions do not occur in the presence of a judge. Thus, there exists no arbiter at a deposition to decide whether a particular line of questioning is relevant or privileged, and, therefore, whether the witness must answer. The Federal Rules of Civil Procedure, which have been adopted practically verbatim by nearly all states, permit a party to instruct a witness not to answer only "when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion" to limit or end the questioning.[13] But with no judge present to determine whether an attorney's question falls within one of these categories. Differences of opinion often occur, causing tempers to flare.

Case #1. *Zaden v. Elkus*[14]

On July 31, 1997, Helen Zaden underwent total left hip replacement surgery at St. Vincent's Hospital in Alabama. As she recovered from the operation, Ms. Zaden found that she could not move her left leg. She also discovered that she had lost all sensation from her left leg and foot. The orthopedic surgeon who had performed the procedure, Dr. Richard Elkus, told Ms. Zaden that stretching or bruising of the sciatic nerve during the operation had caused her symptoms. He referred Ms. Zaden to a rehabilitation hospital known as HealthSouth for additional care.

Ms. Zaden remained at HealthSouth for two months. While she was there, Ms. Zaden received treatment from many physicians, including a neurologist, Dr. David O'Neal, and her primary physician, Dr. Marin Salmon, a physical-medicine and rehabilitation specialist. During her stay at HealthSouth, Dr. Salmon consulted with another neurologist and concluded that Ms. Zaden indeed had sustained a bruised or stretched sciatic nerve.

Another orthopedic surgeon, Dr. Richard Sanders, assumed responsibility for Ms. Zaden's care after her discharge home. The feeling had returned to Ms. Zaden's leg by this time, but pain had replaced the loss of sensation. A year later, the pain persisted. Dr. Sanders surmised that scar tissue was exerting pressure on Ms. Zaden's sciatic nerve, and on Nov. 20, 1998, he performed surgery on Ms. Zaden.

As he dissected the sciatic nerve from the surrounding tissue, Dr. Sanders discovered that the nerve had been transected. The gap between the severed ends was nearly 2 inches wide. Dr. Sanders described this damage to Ms. Zaden after the operation, and the patient immediately brought a medical malpractice action against Dr. Elkus, alleging that her sciatic nerve had been damaged permanently during the hip replacement surgery.

Ms. Zaden's attorney requested a deposition from Dr. Salmon. Reed Bates, an attorney from a Birmingham, AL, law firm, represented Dr. Elkus, and attorney Frank Burge represented Ms. Zaden. A third attorney, Robert Cooper, accompanied the deponent, Dr. Salmon.

As Dr. Salmon testified, Mr. Burge became alarmed by behavior that he later described as "evasiveness." Mr. Burge showed Dr. Salmon a schematic diagram of the nerves in a normal hip and asked the doctor to assume that a portion of the sciatic nerve had been transected and was missing. The following exchange then took place:

Mr. Burge: "What part, if any, would the transected or missing portion of Zaden's sciatic nerve play in the symptomatology that you found and the complaints that you took from Ms. Helen Zaden at the time you did the history and physical?"

Mr. Bates: "Excuse me, Doctor. I need to object to the form of the question. It's an improper hypothetical, but . . ."

Mr. Burge: "You may answer, sir."

Dr. Salmon: "I don't like hypothetical questions."

Mr. Burge: "OK. Then tell us whether or not the symptomatology you found and recorded in the history and physical would be consistent with that much of a sciatic nerve being transected out or missing when surgery was performed a few months later."

Mr. Bates: "Object to the form. Improper hypothetical."

Dr. Salmon: "I don't know."

Mr. Burge: "Would the fact that there was no response that could be elicited from the left sural sensory nerve be consistent with the section of Ms. Zaden's sciatic nerve that was missing when her second surgery was performed a couple . . . several months after the hip replacement was done by Dr. Elkus?"

Mr. Bates: "Object to the form. Improper hypothetical."

Dr. Salmon: It could be a bruise or any damage. It doesn't mean that it was resected or anything like that."

Mr. Burge: "I'm asking you, assume that when Dr. Sanders did the surgery, he found this missing and he marked it Plaintiff's Exhibit Two. Assume that to be true. Would that bring about, quote, 'no response elicited from the left sural sensory nerve,' as reported to you by Dr. O'Neal?"

Mr. Bates: "Object to the form. Improper hypothetical."

Dr. Salmon: "Not necessarily. And I think you'd best ask Dr. O'Neal."

Mr. Burge: "Dr. O'Neal might be able to give me a better answer. But based upon your education, training, and experience in your profession, give us your answer. If you cut that much of the nerve out up at the hip joint, you're going to have severe neuropathies in everything distal to where it's cut out, aren't you, Doctor?"

Mr. Bates: "Objection to form."

Dr. Salmon: "It's not my specialty. I don't know."

Mr. Burge: "You spent a year in postgraduate work in neurology, is that true, sir?"

Dr. Salmon: "Yes."

Mr. Burge: "And why do you not know that if you cut out a big hunk of the sciatic nerve that it will not cause neuropathies distal to that in two segments that branch off of that sciatic nerve, the peroneal and the tibial?"

Dr. Salmon: "Like I told you, I think it would, but you'd do best to ask Dr. O'Neal."

Mr. Burge: "You think it would? Is that your professional opinion; that it would? We'll get to Dr. O'Neal. I've got a very good doctor here in front of me right now. Is that your professional opinion; that it would?"

Dr. Salmon: "All I can say is, I think it would. But I yield to Dr. O'Neal."

Three weeks later, Ms. Zaden deposed Dr. O'Neal. Dr. Salmon's attorney, Robert Cooper, attended this deposition. The presence of Mr. Cooper at a deposition that did not seem to involve his client, coupled with Dr. Salmon's repeated deference to Dr. O'Neal at the previous deposition, caused Ms. Zaden and her attorney to become "suspicious" of the relationship between the two doctors. The following exchange took place during Dr. O'Neal's deposition:

Mr. Burge: "Do you know Richard Elkus?"

Dr. O'Neal: "I do."

Mr. Burge: "Do you know whether or not your liability insurance is the same company that represents Dr. Elkus?"

Mr. Cooper: "Don't answer that question, Doctor."

Mr. Burge: Did you hire the gentleman here, the lawyer here, that's representing you today?"

Mr. Cooper: "Don't answer that question, Doctor."

Mr. Burge: "Are you the person that's going to pay the lawyer that's here with you today, Doctor?"

Mr. Cooper: "Don't answer that question, Doctor."

Mr. Burge pursued this same line of questioning for several more minutes. Each time he asked Dr. O'Neal a question, Mr. Cooper instructed him not to answer. Mr. Burge later filed a motion on behalf of Ms. Zaden, asking the court to compel Dr. O'Neal's testimony on grounds that Ms. Zaden had a right to discover any "witness bias, prejudice, or perjury." The implication, of course, was that Dr. O'Neal — and possibly Dr. Salmon as well — had conspired to give evasive or false testimony to protect their colleague, Dr. Elkus.

After the jury returned a verdict in favor of Dr. Elkus, Ms. Zaden raised this issue in her appeal. "Patient sues her doctor for negligently severing her sciatic nerve during surgery," she wrote in her brief to the appellate court. "The testimony of the subsequent doctors who found, tested, and surgically repaired the damaged nerve is critical to the case. When two of these doctors are deposed, an attorney appears on their behalf. The same law firm later appears on behalf of a third witness doctor. The patient's lawyers suspect that the defendant doctor or his malpractice insurance carrier hired this lawyer to influence the testimony of these doctors. The trial court, however, refuses to allow the patient's lawyers to ask any questions as to the nature of their relationship."

Ms. Zaden also challenged the propriety of meetings between the attorneys for Dr. Elkus and the other physicians who had treated her. "Doctor's attorneys and liability company meet ex parte with patient's other treating physicians," Zaden wrote in her appeal brief. "These physicians mysteriously align with doctor's theory of the case. Patient seeks discovery regarding extent of ex parte contacts. Trial court denies discovery."

The appeals court ultimately affirmed the decision in favor of the defendant. The court found that Ms. Zaden had introduced no evidence of collusion among the doctors, or between the doctors and their

insurance company, and that, as a result, Mr. Burge had no right to explore this issue during the deposition. Moreover, the appeals court found that Mr. Burge had done nothing wrong in contacting Ms. Zaden's other doctors prior to trial. "No party to litigation has anything resembling a proprietary right to any witness's evidence," the appeals court wrote, quoting a 1983 decision by the U.S. District Court for the District of Columbia. "Absent a privilege, no party is entitled to restrict an opponent's access to a witness, however partial or important to him, by insisting upon some notion of alliance."[15]

Whether subpoenaed to a deposition as a party or a witness, a health care provider is wise to bring along an experienced attorney. Litigators know which subjects may be explored and which ones remain privileged, and at a deposition they can prevent ED personnel from unnecessarily incriminating themselves, their colleagues, or their employers.

Because no judge is present to rule upon objections at a deposition, witnesses at these proceedings generally must answer all questions posed to them. An attorney may register an objection only when the testimony is offered as evidence at trial. Still, by bringing a lawyer to the deposition, a health care professional may avoid unnecessary intimidation and harassment by opposing counsel.[16]

Deposition Controversies and Difficulties

Zaden was not the first case to address the issue of contact between a lawyer representing a medical malpractice defendant and other physicians who had treated the same patient. To the contrary, many courts nationwide have been asked to decide whether such communications may occur, and their decisions have varied widely. At one end of the spectrum, the Supreme Court of Alabama held in *Romine v. Medicenters of America Inc.* that "the potential for influencing trial testimony is inherent in every contact between a prospective witness and an interlocutor, formal or informal, and what a litigant may justifiably fear is an attempt by an adversary at improper influence for which there are sanctions enough if it occurs."[17] In other words, lawyers for medical malpractice defendants may communicate freely with other doctors involved in the patient's care, provided the meeting does not unduly influence the testimony of those doctors.

At the other end of the spectrum, stands the Pennsylvania Superior Court, which held in 1962 that physicians in the position of Dr. O'Neal and Dr. Salmon never are allowed to speak with a defendant's attorney because they have a duty to refuse affirmative assistance to their patient's adversary in litigation.[18] Most jurisdictions have adopted a position somewhere in between. Some courts have held that *ex parte* communications may occur once the plaintiff has waived physician-patient privilege, while others have held that consent or a court order is necessary.[19] The overwhelming majority of appeals involving depositions in medical malpractice cases revolve around precisely that issue.

Zaden v. Elkus also demonstrates several other lessons about depositions. Most obvious is the fact that depositions, like trials, can devolve into emotional, and at times even furious, confrontations. Litigation is by nature an adversarial process, and lawyers have a duty to seek every advantage for their clients. The zealous nature of a lawyer's advocacy sometimes crosses the line into unfounded allegations; for example, the suggestion of collusion leveled against the physicians who were deposed in *Zaden*. When entering a deposition, then, medical professionals should be prepared to defend not only their skills and decision-making abilities, but their credibility as well.

Zaden illustrates yet another problem with depositions: The absence of a judge sometimes produces confusion over the limits of permissible questioning. The lawyers for the physicians in *Zaden* had both a right and a duty to instruct their clients not to answer questions that pertained to malpractice insurance because the courts generally treat the existence of malpractice insurance as a privileged matter.

Unlike lay deponents, doctors face a unique dilemma when deciding whether to answer questions pertaining to a medical malpractice lawsuit. A deponent cannot arbitrarily withhold answers. Unless the subject matter is privileged in some way, a doctor's refusal to answer deposition questions that fall within the realm of permissible discovery may result in sanctions by the court. However, answering a lawyer's questions at a deposition may constitute an unauthorized disclosure of confidential patient information, and doing so may expose the doctor to liability for a breach of the physician-patient fiduciary relationship. Because health care professionals cannot always distinguish questions that must be answered from those that can be ignored, the safest course of action is to retain the services of an experienced attorney and heed that attorney's advice.

Normally, doctors have an obligation not to disclose confidential information about the patients they treat. However, this ban is lifted when the patient initiates a medical malpractice lawsuit against the treating physician. Forcing a doctor to defend against such a suit without discussing the patient's condition would place the doctor in a position of unfair disadvantage, the courts have decided.

The converse also is true. As the following case illustrates, patients who demand that their treatment information remain private by raising the physician-patient privilege at a deposition, cannot later use that information in a suit against their doctors.

Case #2. *Gibson v. Bronson Methodist Hospital*[20]

On May 20, 1987, Billie Jean Gibson arrived at Michigan's Bronson Methodist Hospital in a coma. The admitting physician, Dr. Jonathon Hopkins, could not determine whether Ms. Gibson was suffering from a tumor or a blood clot, and six weeks passed before Ms. Gibson finally went to the operating room. There, surgeons removed a hematoma from her brain. She emerged conscious, but blind and suffering from a "significant loss of motor function."

Billie Jean's father, Robert Gibson, brought a lawsuit against Dr. Hopkins and the hospital. Mr. Gibson did not allege medical malpractice in his complaint. Rather, he claimed that the doctor and employees of the hospital had misrepresented the availability of a second opinion prior to his daughter's brain surgery. By failing to make such a consultation available, he alleged, the defendants had delayed his daughter's operation, thereby adding to her injury.

The defendants scheduled a deposition of two physicians who had been consulted about Ms. Gibson's care. As the deposition began, a lawyer retained by Mr. Gibson announced that Ms. Gibson had not waived the physician-patient privilege. In the discussion that ensued, the lawyer stated that Mr. Gibson "asserted" the privilege. The depositions were canceled.

Dr. Hopkins and the hospital moved for summary judgment. By asserting the physician-patient privilege, they maintained, the plaintiff was prohibited by a Michigan regulation from presenting at subsequent trial "any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition." By its language, the regulation in question applied only to medical documents, but the trial court concluded that it *should* have applied to courtroom and deposition testimony as well, since no other interpretation would correspond with existing common law on the subject. Because Mr. Gibson could not possibly meet his burden of proof without introducing evidence of his daughter's condition, the trial court dismissed his lawsuit.

Gibson took a bizarre twist in 1994, when the Michigan Supreme Court reversed the trial court's decision and remanded the case for retrial. Unlike the trial court, the high court interpreted the words of the regulation literally, holding that a plaintiff who had asserted a physician-patient privilege was precluded under Michigan law from introducing medical documents at trial, but that verbal testimony about the patient's condition — by doctors other than the treating physician — would be permitted. Michigan closed this loophole by amending the regulation's prohibition to include depositions beginning in September of that year, thereby falling into line with virtually all other states.

Under the Federal Rules of Civil Procedure and the laws of most jurisdictions, testimony elicited during a deposition may be used "for any purpose."[21] Attorneys most commonly use depositions to uncover specific facts that will prove useful at trial. Depositions serve another important purpose, however. By exploring the knowledge of a witness before trial, a lawyer can determine what a witness will say on the stand. This gives the lawyer an opportunity to seek contrary evidence, if necessary.[22]

Appearing at a deposition locks witnesses into their testimony. A witness may not say one thing at a deposition and something else at trial. A court may exclude the testimony of a witness who provides false or misleading information at a deposition, and most jurisdictions permit judges to impose fines or other sanctions against witnesses who do so.[23]

Health care providers may be called upon to provide not only factual testimony at depositions, but also to render professional opinions, therefore, they must choose their words carefully. As the following case demonstrates, careless behavior during a deposition can have a tremendous effect on the trial that follows.

Case #3. *Gouveia v. Phillips*[24]

In June 1994, Carl Gouveia was riding in his girlfriend's van when it collided with another vehicle. The van rolled onto its side, and Mr. Gouveia's hand

was crushed between the van and a palm tree.

Mr. Gouveia, an artist, arrived at a Florida hospital shortly after midnight with severe injuries to his dominant hand. The emergency physician (EP) who treated him instructed a nurse to contact a surgeon by telephone. The nurse had Mr. Gouveia sign a preprinted consent form, and she told him that the surgeon would explain the operative procedures when he arrived. The possibility of amputation was not discussed at that point.

The surgeon, Dr. F. Leigh Phillips, arrived at the hospital approximately 40 minutes later. He ordered the nurse to add the handwritten words "possible amputation of fingers right hand" to the consent form already signed by Mr. Gouveia. No one at the hospital ever asked the patient to sign a new consent form.

Mr. Gouveia later testified that he told Dr. Phillips, "I'm an artist. You need to save my fingers." According to Mr. Gouveia, Dr. Phillips never described the operation he intended to perform and never mentioned amputation. Mr. Gouveia remembered only that Dr. Phillips took photographs of his injured hand. The surgeon would recall the interaction differently. He later testified that he told Mr. Gouveia that "amputation was possible."

Dr. Phillips amputated his fingers, effectively ending Mr. Gouveia's artistic career. Two years later, Mr. Gouveia sued Dr. Phillips, alleging that the surgeon had performed the operation negligently; that he had failed to obtain informed consent by neglecting to mention the possibility of amputation; and that Mr. Gouveia's use of alcohol and marijuana before the collision had invalidated any consent that might have been given.

Before trial, Mr. Gouveia's attorney deposed a Dr. Garrod, another physician who had treated him, as an expert witness. The following exchange took place during that deposition:

Mr. Gouveia's attorney: "Have you looked at the informed consent issue in this case?"

Dr. Garrod: "No, not *per se*."

Mr. Gouveia's attorney: Do you have any opinions that you're going to be expressing, Dr. Garrod, in this case regarding the informed consent issue?"

Dr. Garrod: "No."

Mr. Gouveia's attorney: "Do you have any opinion that you'll be expressing about whether Carl Gouveia was given adequate informed consent about the procedure that was proposed, what the options were, what his knowledge or understanding of what was being relayed to him, anything like that?"

Dr. Garrod: "No."

Mr. Gouveia's attorney: "We can leave that alone?"

Dr. Garrod: "Yes."

Mr. Gouveia's attorney: "I wanted to ask you about informed consent, and you told me that you have no opinion, that sort of thing. Do you have, after speaking with Carl or his mother, any thoughts or information about what was discussed? Look at the next section [showing Dr. Garrod a part of Gouveia's medical record]. It says this, referring to the severe nature of his hand, likelihood of amputations, it says this was discussed at length with the patient, as well as the mother."

Dr. Garrod: "Where was that?"

Mr. Gouveia's attorney: "I'm sorry. The second page, under "Impression." The only reason I'm asking you this is [because] you met with him and examined and saw him."

Dr. Garrod: "Right."

Mr. Gouveia's attorney: "I'm wondering if he ever expressed, to your recollection or memories or thoughts, about this topic, that is to say, what was discussed with him and at what length and with what particularity."

Dr. Garrod: "No."

Mr. Gouveia's attorney: "Did he ever say anything about that?"

Dr. Garrod: "No."

Mr. Gouveia's attorney: You take no position on what was discussed with the patient's mother, and to what extent the degree of injury and the options available were discussed with these people?"

Dr. Garrod: "I don't have any opinion about that. But I do recollect that during one encounter with the patient and his mother, the patient basically felt that he had four fingers attached to his hand when he went into the operating room and he wound up with some significant amputations, and he was obviously angry and that was part of it. I have no specific problem with what was done with the informed consent. I wasn't there and privileged to that conversation."

Mr. Gouveia's attorney: "OK. Fine."

At trial, Dr. Garrod was called as a witness and asked whether a physician could obtain informed consent from a patient who had used alcohol or drugs. The defense moved to exclude this testimony on grounds that Dr. Garrod had disclaimed in his deposition any opinion on the subject of informed consent.

Dr. Phillips's attorney characterized this testimony as an attempt to "bushwhack" and "sandbag" the defense. "He knew informed consent was an issue," the defense attorney complained to the judge. "I raised it at the depo on five separate occasions. I asked about opinions regarding informed consent. He had none. He took no position. I covered it every way I could. To permit this guy to come in here now and through the back door express informed consent opinions is outrageous."

Mr. Gouveia's attorney argued in response that the proposed trial testimony had nothing to do with Dr. Garrod's deposition answers. At the deposition, the attorney claimed, Dr. Garrod had declined to express an opinion on whether Mr. Gouveia had received sufficient disclosure of medical information to constitute informed consent to treatment. Here, though, Dr. Garrod would not testify about the sufficiency of the information given to Mr. Gouveia. He would discuss the circumstances under which an intoxicated patient could render a valid consent to treatment.

The trial judge refused to allow the testimony. "I will not allow him to offer his opinion on this based upon what I think was pretty clear coverage of the issue in deposition, in which the doctor said he had no opinion," the judge said. "You certainly could have put the defense on notice ahead of time so they could prepare for it."

Because Mr.Gouveia could produce no expert testimony as to the applicable standard of disclosure, Dr. Phillips moved for a directed verdict on the claims pertaining to informed consent. The trial court granted this motion, but allowed a jury to consider the issue of malpractice. The jury returned a verdict in favor of Dr. Phillips.

The Florida Court of Appeals ruled that the trial court had acted properly in refusing to allow Dr. Garrod to testify at trial on the issue of informed consent. The appellate court also held that Mr. Gouveia did not need an expert witness to prove that Dr. Phillips had amputated his fingers without his consent. For that reason, the case was remanded for retrial.

Gouveia stands, among other things, as a reminder that deponents must choose their words carefully. When asked to give a deposition, health care providers must look ahead, to consider the effects of their testimony. Answering questions in a way that precludes subsequent trial testimony can tie the hands of one of the parties and prevent the truth from coming to light in the courtroom. This can have a serious effect on the deponent, on his or her medical colleagues, and on the health care facility in which they work.

Gouveia also illustrates the importance of a deposition in the formulation of legal strategy. Attorneys use the information elicited from depositions to develop theories upon which they will base their arguments. For the deposition to have any value, the attorney must be able to rely on the accuracy of the testimony, without worrying that the witness will say something entirely different at trial.[25] It was for this reason that the trial judge in *Gouveia* excluded the testimony of the plaintiff's expert witness. In the eyes of the trial judge — and in the eyes of the judges of the appellate court — allowing a witness to testify about informed consent, after leading the opposing party to believe that the witness would not touch that subject, prevented the defense from mustering an appropriate response. At least one court has referred to such a tactic as "guerilla warfare."[26] Altering testimony between a deposition and trial constitutes unfair surprise, if not outright deceit, and for that reason the courts do not permit it.[27]

Another common dilemma that arises from depositions involves the paid testimony of witnesses. The law permits parties to compensate witnesses for their time, and in some instances, it requires them to do so. In Illinois, for example, a party who subpoenas a witness must pay that witness at least $20 per day of testimony and 20 cents for each mile that the witness travels to and from the trial.[28] Unlike lay witnesses, who may testify only about their personal knowledge regarding the facts of the case,[29] medical professionals are permitted to express opinions on virtually any topic that falls within their area of expertise, including the severity of a plaintiff's injury, the likely cause of that injury, and prognosis.[30] Indeed, some lawsuits, such as medical malpractice suits, require such testimony; otherwise, the court must dismiss the claim for want of evidence, without sending it to the jury.[31] Individuals who render professional opinions in legal proceedings fall into a special category known as *expert witnesses*, and as a general rule, they may set their own hourly rates for testifying.

At common law, each party bore his or her own costs of litigation.[32] This included the cost of depositions, including witness fees and expenses associated with recording and transcribing the testimony.

Over the years, however, many states adopted statutes that permitted courts to award specified litigation costs — including witness fees — as part of

their judgments.[33] Today, it is not uncommon for the losing party to pay not only the cost of his own witnesses, but for those of the opposition as well. The following case illustrates this principle, but it also shows that courts do not always award witness fees automatically.

Case #4. *Irwin v. McMillan*[34]

On Sept. 2, 1995, Robert P. McMillan drove his car into the back of another vehicle. The owner of that car, Janice K. Irwin, suffered injuries and later sought treatment from an orthopedic surgeon, Dr. Craig Popp. Ms. Irwin also received care from her family physician, Dr. John Kelly, and a physical therapist, Ms. Lynn Batalden.

Ms. Irwin brought a negligence action against Mr. McMillan. Ms. Irwin's attorney videotaped a deposition of Dr. Popp and introduced the videotape as evidence at trial. Dr. Popp and Ms. Batalden also testified on Ms. Irwin's behalf in the courtroom. Mr. McMillan's attorney subpoenaed Dr. Kelly, yet, ironically, Dr. Kelly testified for the defense. The jury found Mr. McMillan liable for negligence and awarded Ms. Irwin $23,685.86 in damages. At the close of the trial, Ms. Irwin moved for an award of legal costs in the amount of $5,514.92. These costs included a witness fee of $750 for Dr. Popp's videotaped deposition, a witness fee of $3,000 for Dr. Kelly's videotaped deposition, and a witness fee of $900 for Ms. Batalden's videotaped deposition. The trial court granted Ms. Irwin's motion. Mr. McMillan appealed, claiming that the court had exceeded its authority in awarding all of these witness fees to Ms. Irwin.

The State of Illinois has adopted fairly typical rules governing awards of witness fees. Section 5-108 of that state's Code of Civil Procedure permits a court to award "certain costs" to a plaintiff who prevails on a lawsuit. The Illinois Supreme Court previously had defined "costs" as "allowances in the nature of incidental damages awarded by law to reimburse the prevailing party, to some extent at least, for the expenses necessarily incurred in the assertion of the party's rights in court."[35] In ruling on McMillan's motion, the Illinois Court of Appeals held that the court appearances of all three medical professionals were necessary to Ms. Irwin's case, and that the fees demanded by these witnesses, therefore, had been taxed properly by the trial court to the defendant.

The appellate court viewed the award of Dr. Popp's deposition fee with considerably greater skepticism. The Illinois Supreme Court had ruled in *Perkins v. Harris*[36] that a trial court may assess the costs of videotaping, editing, and transcribing an evidence deposition only if that deposition "is necessarily used at trial." Ms. Irwin had not "necessarily used" Dr. Popp's videotaped deposition at trial, the appellate court held, because Dr. Popp also had testified personally in the courtroom, and one form of the doctor's testimony essentially had duplicated the other. Holding that the term "necessarily used" should apply only to situations where "a crucial witness has died or disappeared" or the like, the court reversed the trial court's award pertaining to Dr. Popp's deposition.

How to Prepare for a Deposition

In preparing to give a deposition, health care professionals must take into account the nature of the testimony they are expected to give. On those rare occasions when nurses and doctors are called as ordinary witnesses, the attorney for one of the parties will question them about the relevant facts of the case — what they saw, what they heard. Health care providers who appear in this capacity must do little more than arrive at the deposition ready to discuss the events in question.

However, health care professionals frequently appear not as ordinary witnesses, but as experts. In a medical malpractice lawsuit, the plaintiff generally must present expert testimony to establish that a standard of care existed and that it was breached. Similarly, in personal injury and wrongful death lawsuits, the plaintiffs must produce expert testimony that demonstrates the nature and extent of the injuries caused by the defendant. This type of testimony requires entirely different preparation on the part of the medical practitioner.

The U.S. Supreme Court held in *Daubert v. Merrell Dow Pharmaceuticals* that "unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation."[37] Accordingly, doctors and nurses called as experts often are asked to describe illnesses and injuries, symptoms, treatment, and prognoses. At times, they even will be expected to pass judgment on the wisdom of decisions made by other professionals.

Therefore, testifying as an expert requires much advance preparation. Obviously, the doctor or nurse

must possess a thorough understanding of the condition or treatment in question. Early in the deposition, the attorney who subpoenaed the health care provider will grill the deponent on his or her education, training, and experience. This establishes the deponent's qualifications as an expert. In some jurisdictions, the deponent must demonstrate familiarity with the local standard of care.[38] A party may avoid this requirement, however, by showing that the standard of care is the same in all EDs throughout the United States.[39]

Physicians are not necessarily disqualified from testifying as experts on matters that fall outside their area of specialty, provided they are familiar with the condition or procedure at issue. In *Hedgecorth v. United States*, the trial court allowed an ophthalmologist and an emergency medicine specialist to testify as experts on the standard of care for cardiac stress tests, although neither physician was a cardiologist. "The fact that [the physicians] are not cardiologists does not render their testimony on stress testing inadmissible," the judge wrote in his decision, "but merely goes to the weight given it by the trier of fact."[40]

A practitioner must demonstrate a factual basis for his or her opinions. The deponent's status as a professional does not, by itself, render all of his or her medical opinions admissible. "Theoretical speculations" carry no weight at a deposition or in court.[41] When appearing as an expert witness, a medical professional should be prepared to support his or her opinions by citing generally accepted scientific data, such as a study published in a peer-reviewed journal.[42] Testimony based solely on the statements of other health care providers would be excluded as inadmissible hearsay.[43] Deponents are wise to read as much about the subject of their testimony as possible, because in many jurisdictions, attorneys are permitted to challenge the testimony of expert witnesses by confronting them with contradictory scientific literature or treatises.[44]

Familiarity with the patient's medical course is as important as familiarity with the subject matter. The doctor or nurse should review all of the patient's medical records thoroughly prior to the deposition. Some attorneys feel that practitioners should prepare for depositions by reviewing statements made by other health care providers to ensure consistency. Others discourage this practice, on grounds that it will produce artificial-sounding testimony. Either way, the health care provider should consider bringing the patient's medical records to the deposition. The rules of evidence permit witnesses to refresh their recollections with written materials while testifying,[45] and these materials may prove invaluable to a deponent who faces questions about precise details such as drug dosages, vital signs, and dates and times of treatment.

When testifying at a deposition, ED personnel should adhere to the following guidelines[46]:

• **Listen carefully to the question posed by the attorney.** If you do not understand the question, ask the attorney to repeat it or rephrase it.

• **Answer only the question that the attorney has asked.** Give the shortest, most direct answer possible. Do not volunteer information. If the attorney desires elaboration, he or she will say so.

• **If you do not know the answer to a question, say so.** Do not speculate. Discuss only what you personally witnessed, unless the question specifically instructs you to do otherwise. If your answer involves an approximation, make that fact clear.

• **Maintain professional demeanor at all times.** Joking and aloofness may be misinterpreted as insensitivity, which may damage your credibility in the eyes of the judge and jury if the deposition testimony is admitted into evidence at trial. Judges and lawyers occasionally will make humorous remarks during legal proceedings, but they are present at every stage of the lawsuit, and they have a better feel for when it is safe to do so. When appearing as a deponent, remember that an attorney has portrayed you not only as an expert witness, but also as a medical professional. Behave accordingly.

• **Do your best to remain calm.** Do not allow a hostile attorney to goad you into an angry response, or worse, into providing unsolicited information. Attorneys have an obligation to represent their clients zealously, and they will employ a variety of techniques to elicit useful testimony. Some attorneys may pause for an extended period of time after the witness has answered, hoping that the deponent will grow uncomfortable with the silence and add to his or her answer. Others will feign shock or anger in response to the deponent's answer, in an attempt to intimidate the deponent or cause him to question his own statement. Do not fall for these traps. Attorneys are like actors, and the courtroom or deposition is their stage. No matter how outraged a lawyer might appear, remember that it is only an act. Attorneys do not take lawsuits personally, and neither should you.

• **Consistent answers are crucial.** An attorney

may ask you the same question repeatedly, changing the wording only slightly in the expectation that he will elicit a different response. Attorneys also may paraphrase your testimony, beginning their questions with phrases such as, "So is it safe to say. . ." or "So, what you really mean is . . ." Usually, these questions will contain a subtle twist that changes the meaning of your original answer. Watch closely for such changes, and if the attorney's follow-up question does not accurately reflect your statement, point this out. Remember that a savvy attorney will challenge your credibility by identifying inconsistent statements. ("You've provided two different answers on two different occasions. How do we know that you're telling the truth now?")

• **Do not discuss any aspect of the lawsuit, especially your deposition testimony, in any public place.** Although prohibited from doing so, attorneys have been known to engage deponents in conversation during breaks. Remain on guard at all times. The possibility always exists that your conversation will be overheard, and that the information will be used to your disadvantage.

• **In most states, a deponent has the right to review the written deposition transcript between the deposition and the trial, and to make written corrections.** ED personnel who give depositions should consider asserting this right.

Conclusion

Depositions are serious matters. They often represent a pivotal moment in a lawsuit, and the lives of the parties may be changed forever by the testimony that flows from them. Whether appearing as a paid expert witness or as a defendant to a medical malpractice action, an ED practitioner must prepare adequately before giving a deposition. Preparation entails a review of the medical condition and treatment at issue, a review of the patient's medical records, and a discussion about the implications of the impending testimony with an experienced lawyer.

ED personnel must respect their patients' confidentiality. They should think twice before disclosing information about patient care to inquisitive lawyers. At the same time, hiring an attorney to protect the deponent's interests generally represents a wise investment. Experienced counsel can prevent the deponent from being intimidated, from answering improper questions, from violating patient confidentiality, and from implicating the deponent or others unnecessarily in wrongdoing.

Giving a deposition can be a stressful and difficult experience. However, medical professionals must try to remain calm while testifying. At all times, ED personnel called as deponents should leave the arguing to the lawyers.

Endnotes

1. *Black's Law Dictionary* (6th ed.).
2. *See*, *e.g.*, Fed. R. Civ. P. 33. *See also* Wright CA. *Law of Federal Courts* (5th ed. 1994), § 84.
3. *See*, *e.g.*, Fed. R. Civ. P. 34.
4. *See*, *e.g.*, Fed. R. Civ. P. 35.
5. Mauet TA. *Pretrial.* 3rd ed. New York City: Aspen Law Publishing; s1995, 232.
6. *See*, *e.g.*, Fed. R. Evid. 603; Mass. R. Civ. P. 28.
7. *See*, *e.g.*, Mass. R. Civ. P. 42(d).
8. *See* Mauet, *supra* note 5, at 234-235. *See also Zaden v. Elkus,* No. 1012149 (Ala. 2003).
9. *See*, *e.g.*, Fed. R. Civ. P. 30(d)(1).
10. *See*, *e.g.*, Fed. R. Civ. P.30(c).
11. *See*, *e.g.*, Fed. R. Civ. P. 37(b)(1).
12. *See*, *e.g.*, Mass. R. Civ. P. 30(b)(2).
13. Fed. R. Civ. P. 30(d)(1).
14. No. 1012149 (Ala. 2003).
15. *Doe v. Eli Lilly & Co.,* 99 F.R.D. 126 (D.D.C. 1983).
16. *See*, Mauet, *supra* note 5, at 255-56.
17. 476 So. 2d 52 (Ala. 1985) (quoting *Doe*, *supra* note 13). *See Gregory v. United States,* 369 F.2d 185 (D.C. Cir. 1966).
18. *Alexander v. Knight,* 177 A.2d 142 (Pa. Super. Ct. 1962).
19. *Compare Stempler v. Speidell,* 495 A.2d 857 (N.J. 1985) (ex parte communications that are not precluded by law constitute an acceptable method of assembling facts and documents for trial); *Langdon v. Champion,* 745 P.2d 1371 (Alaska 1987) (the law does not preclude communications between defense counsel and the treating physician when the patient has waived physician-patient privilege); *Green v. Bloodworth,* 501 A.2d 1257 (Del. Super. Ct. 1985) (same); *Domako v. Rowe,* 475 N.W.2d 30 (Mich. 1991) (same); *Brandt v. Medical Defense Assocs.,* 856 S.W.2d 667 (Mo. 1993) (treating physician has no duty to give testimony favorable to patient and detrimental to the defendant physician); *with Tobin v. Petrillo,* 483 U.S. 1007 (1987) (confidential relationship between physicians and their patients preclude ex parte conferences); *Horner v. Rowan Co.,* 153 F.R.D. 597 (S.D. Tex. 1994) (patient must give express authorization for ex parte communications); *Crist v. Moffatt,* 389 S.E.2d 41 (N.C. 1990) (ex parte communications not allowed in the absence of the patient's consent or a court order).
20. 517 N.W.2d 736 (Mich. 1994); 495 N.W.2d 162 (Mich. Ct. App. 1992).
21. *See*, *e.g.*, Fed. R. Civ. P. 32.
22. *See* Mauet, *supra* note 5, at 237.
23. *See*, *e.g.*, Fed. R. Civ. P. 37(c)(1).
24. No. 4D99-3951 (Fla. Dist. Ct. App. 2002).
25. *See Bart v. Union Oil Co. of California,* 540 N.E.2d 770 (Ill. App. Ct. 1989).
26. *Uhr v. Lutheran Gen. Hosp.,* 589 N.E.2d 723 (Ill. App. Ct. 1992).
27. *See*, *e.g.*, Ill. Supreme Ct. R. 220(d), which provides: "To the extent that the facts known or opinions held by an expert have been developed in discovery proceedings through interrogatories, deposition, or requests to produce, his direct testimony at trial

may not be inconsistent with nor go beyond the fair scope of the facts known or opinions disclosed in such discovery proceedings."
28. *See*, *e.g.*, Illinois Circuit Courts Act § 4.3(a).
29. *See*, *e.g.*, Fed. R. Evid. 602.
30. *See*, *e.g.*, Fed. R. Evid. 702.
31. *See*, *e.g.*, *Rosenberg v. Cahill,* 492 A.2d 371 (N.J. 1985); *Bowie v. Montfort Jones Mem. Hosp.,* 861 So.2d 1037 (Miss. 2003).
32. *See Irwin v. McMillan,* 750 N.E.2d 1246 (Ill. App. Ct. 2001); *Perkins v. Harris,* No. 5-98-0767 (Ill. App. Ct. 1999); *Galowich v. Beech Aircraft Corp.,* 441 N.E.2d 318 (Ill. 1982).
33. *See* id.; *Gleason v. Carter,* 212 Ill. App. 206 (1991).
34. 750 N.E.2d 1246 (Ill. App. Ct. 2001).
35. Galowich, *supra* note 32.
36. No. 5-98-0767 (Ill. App. Ct. 1999).
37. 509 U.S. 579, 592 (1993).
38. *See*, *e.g.*, *Falcon v. Cheung,* 848 P.2d 1050 (Mont. 1993) (physician disqualified as expert on standard of care in rural Montana where the physician had never practiced in Montana, nor at a rural hospital in any other state).
39. *See McNeill v. United States,* 519 F.Supp. 283 (D.S.C. 1981).
40. *Hedgecorth v. United States,* 618 F.Supp. 627, 631 (E.D. Mo. 1985).
41. *Richardson v. Richardson-Merrell Inc.,* 857 F.2d 823 (D.C. Cir. 1988).
42. *In re* "Agent Orange" Product Liability Litigation, 611 F.Supp. 1223, 1244 (E.D.N.Y. 1985).
43. *Id.*
44. McCormick, *Evidence* § 321, at 900 (3d ed. 1984).
45. *See*, *e.g.*, Fed. R. Evid. 612.
46. Richard R, Balsamo RR, Brown MD. "Risk Management in American College of Legal Medicine." In: Sanbar SS, Firestone MH, Buckner F, eds. *Legal Medicine*. 6th ed. St. Louis; Mosby: 2004; Mauet, *supra* note 5, at 257-259.