Deposition Dos and Don’ts: How to answer 8 tricky questions

You must tell the truth, but you can answer skillfully to avoid falling into traps set by plaintiff’s attorneys

**CASE Direct question at deposition**

During your deposition in a malpractice suit, plaintiff's counsel asks you: “Are you saying it was impossible to foresee Ms. Jones’s pre-term premature rupture of membranes?”

How would you reply?

Ninety percent of malpractice cases are settled before trial, and the deposition often is the turning point in those cases. Your answer to tricky questions such as the one in the case fragment above could favorably affect a critical stage of litigation—or it might spur the plaintiff’s attorney to pursue the case more vigorously. Even if a case is settled in the plaintiff’s favor before trial, the effectiveness of the deposition may determine whether the settlement is $300,000 or $1 million.

Our central message in this article is: Don’t go to a deposition unprepared. We offer guidelines to help you anticipate many different scenarios, and we include examples of honest, skillful answers to difficult questions (see “Honest, skillful answers to 8 tricky questions at deposition,” on page 37).

**Digging for pay dirt**

Discovery begins after a formal complaint alleges malpractice. The parties to a lawsuit gather information through written interrogatories, requests for documents, and witness depositions—out-of-court testimony to be used later in court or for discovery purposes. The rationale for discovery is to reduce surprises at trial and encourage pretrial settlement. The witness being deposed is the deponent, and testimony is given under oath.

A discovery deposition is designed to gather information, with almost all questions asked by opposing counsel. If you are sued for malpractice, this is the type of deposition you probably will encounter.

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**Rules of engagement.** The plaintiff’s attorney initiates the discovery deposition. Ground rules vary by jurisdiction, but, in general, the Rules of Civil Procedure give deposing counsel substantial latitude in the questions that can be asked.10 The deponent and defending counsel, opposing counsel, and transcriptionist typically attend the deposition. To help you prepare appropriately, confirm with your defense counsel if other attorneys or the plaintiff will be present.

**Not-so-hidden agendas.** The plaintiff’s attorney’s primary goal is to gather as much information as possible about your side’s case (TABLE 1). No matter how accurate medical records may be, they require interpretation and follow-up questioning of key players to get the full story. Opposing counsel also wants to:

- “lock down” your testimony for use at trial (testimony captured at a deposition can be used to impeach a witness who gives inconsistent testimony at trial)9
- “size up” your potential impact on a jury by assessing your strengths and weaknesses as a witness.11

The impression you make may influence the opposing attorney’s decision about how far to pursue the case. Plaintiff’s attorney Bruce Fagel once told an interviewer that defense attorneys, too, may consider settling a case “if their client shows such arrogance in our deposition that they’re afraid to let him appear in front of a jury.”12

**Choosing a site.** Most depositions take place in a conference room in the law office of one of the attorneys or at a neutral site. Avoid any temptation to schedule the deposition in your office, even though meeting there might seem more expedient and comfortable for you.9 Scheduling the deposition at your site:

- might make you feel it is “just another day at the office” and dissuade you from preparing sufficiently or taking the deposition seriously
- allows opposing counsel to scrutinize diplomas, books, journals, and other materials in your office.

Questioning you about these materials during the deposition is not off-limits for the plaintiff’s attorney. You might find it difficult to explain why a book on your bookshelf is not “authoritative.”

**Prepare, prepare, and ... prepare some more**

Your emotional stress will probably wax and wane during the lengthy litigation process.13,14 Knowing what to expect and being well-prepared for the deposition may relieve some anxiety.

**Review the case.** At least twice, carefully review the entire database—including medical records and other depositions. Perform one of these reviews just before the deposition.3 Having the details fresh in mind will help you if opposing counsel mischaracterizes information when questioning you.

**Meet with your attorney.** Insist on at least two predeposition conferences with defense counsel.

At the first conference, volunteer all pertinent information about the case as well as any noteworthy medical inconsistencies.2 Find out what documents to bring to the deposition, who will be present, and how long the deposition is expected to take. You might wish to prepare mentally by inquiring about the style and personality of opposing counsel.

Defense counsel does not control how long a deposition lasts but might...
in which the defense attorney instructs you, for various reasons, to provide information beyond the question asked. For example, when a case is close to settling, your attorney might instruct you to lay out all evidence that supports your professional judgment and clinical decisions in the case. Do not use this approach, however, unless your attorney specifically instructs you to do so.

You are under no obligation to make opposing counsel’s job easier. In a discovery deposition, volunteering information may:

• open up new areas for questioning
• equip the deposing attorney with more ammunition
• eliminate opportunities for your attorney to use surprise as a strategy, should the case go to trial.

Consider, for example, a scenario in which you and a hospital are sued in regard to a labor-and-delivery case. At deposition, you might be asked whether you can identify written evidence in the patient’s chart that the mother was checked every certain number of minutes.

The correct answer is “No,” even though you know such checks are documented in a log kept at the nursing station in that hospital. You might be tempted to reveal this information, but don’t—instead, leave the timing of its disclosure to the defense attorney. Your attorney’s strategy may be to reveal this critical piece of information at trial, when the plaintiff’s attorney has less opportunity to strategize ways to discredit the evidence.

Keep your cool. Attorneys have different styles of questioning. Some may be excessively friendly or polite to get you to let down your guard—only to set you up for a devastating blow at the end of the deposition (or to save this for trial). Other attorneys might employ a bullying style that seeks to intimidate. In responding, always remain composed and resist the urge to counterattack.

In all circumstances, strive for humility and dignified confidence.
**FAST TRACK**

Never answer a question you don’t fully understand. Ask for clarification!

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**TABLE 3**

<table>
<thead>
<tr>
<th>Dos</th>
<th>Don’ts</th>
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<tr>
<td>Always tell the truth</td>
<td>Avoid long narratives, and don’t volunteer information</td>
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<tr>
<td>Actively listen to questions, and pause before answering</td>
<td>Don’t speculate or guess</td>
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<tr>
<td>Keep your cool; never lose composure</td>
<td>Avoid absolutes such as “never” or “always”</td>
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<tr>
<td>Answer only the question asked</td>
<td>Avoid jokes, sarcasm, and edgy comments</td>
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<td>Stop speaking and listen carefully if your attorney makes an objection</td>
<td>Ask for breaks if needed to keep from becoming inattentive</td>
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<tr>
<td>Remember: Nothing is “off the record”</td>
<td>Fast Track: Never answer a question you don’t fully understand. Ask for clarification!</td>
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<td>Don’t waive your right to read and sign the deposition transcript</td>
<td><strong>Remember:</strong> Nothing is “off the record”</td>
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**Listen carefully** to each question during the deposition. Pause for a moment to consider the question and allow time for other attorneys to object. Your attorney’s objection may suggest the best way for you to respond to the question. Refrain from answering any questions when defense counsel advises you to do so (TABLE 3).

Don’t answer questions you don’t understand. Rather, ask for clarification. Avoid using adjectives and superlative words such as “never” and “always,” which may be used to distort or mischaracterize your testimony at the trial.

**Don’t guess.** No rule prevents opposing counsel from asking a witness to speculate, but you should generally avoid doing so. You are required to tell the truth, not to speculate or to volunteer guesses. The best way to cause a jury to disbelieve your testimony is to make inaccurate or unfounded statements, which opposing counsel will surely point out at trial.

Don’t be tempted to “plumb the depths” of your memory for a forgotten piece of information, however. If you’re asked, for example, if a patient displayed a specific symptom during an appointment 4 years ago, the true answer is likely to be “Not that I recall,” rather than “No.” Qualify similar answers with statements such as “To the best of my recollection” or “Not that I recall at this time.”

If opposing counsel asks questions based on a particular document, ask to see the document. Review it carefully to determine:

- who signed or authored it
- when it was prepared and dated
- whether it is a draft copy
- whether it contains confidential information relating to patients other than the plaintiff
- whether it carries attorney–client privilege
- most important, whether opposing counsel has quoted it out of context.

**Procedural pitfalls.** Throughout the deposition, attorneys may periodically tell

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Honest, skillful answers to 8 tricky questions at deposition

THE IMPOSSIBLE DREAM
In law, there is a distinction between possibility and probability. The law considers anything possible, but something isn’t probable unless it is more likely than not—that is, when expressed mathematically, its chances are ≥51%.

Q. Doctor, are you saying it was impossible to foresee Ms. Jones’ preterm premature rupture of membranes?
A. I don’t know of any way that the rupturing of membranes could have been foreseen. It was an unfortunate event that was not possible to foresee.

THE HYPOTHETICAL
When confronted with questions containing a hypothetical, identify the hidden assumption before answering.

Q. Doctor, with a depressed pregnant patient, would you agree that the standard of care requires you to…?
A. I can’t agree with you that, in this case, we are talking about a depressed patient. Do you still want me to answer the question? OR
A. I can’t answer that based on the few facts you’ve given me. I’d need to examine that patient first.

INVITATION TO SPECULATE
Refrain from speculating, especially when you’ve been presented with an incomplete clinical picture.

Q. Doctor, is it fair to say that a patient with this history should be referred to a specialist in high-risk pregnancy?
A. I really can’t speculate based on that limited information—I’d just be guessing.

DID I SAY THAT?
Opposing counsel may mischaracterize or distort your testimony by attempting to paraphrase what you’ve said.

Q. Now doctor, as I understand it, what you’re really saying is that the patient…?
A. No. OR
A. No—that’s not an accurate summary of what I just said.

THE AUTHORITATIVE TREATISE
Opposing counsel wants you to acknowledge a specific piece of literature as ‘authoritative’ in gynecology, so that counsel can then impeach you at trial with points from the literature that contradict your testimony. Although you may be made to look foolish if you refuse to acknowledge anything as authoritative, that usually is the safest course.

Q. Doctor, do you accept Williams Obstetrics as an authoritative reference in your field?
A. It is certainly well-respected, but the entire text can’t be considered authoritative. OR
A. Significant portions may be authoritative, but I would need to see the portion in question to be able to answer your question.

THE TYRANNY OF YES OR NO
In an effort to control you, opposing counsel may demand only “Yes” or “No” answers. Listen closely to each question, and determine if you can convey the whole truth with “Yes” or “No.” Asking to further explain to avoid giving a misleading answer will make opposing counsel appear defensive if he (she) does not agree.

Q. Doctor, please answer the question; it requires only a simple “Yes” or “No.”
A. I cannot answer that question with only a “Yes” or “No.” Would you like me to explain? OR
A. A mere “Yes” or “No” answer to that question would be misleading. May I explain?

CONVOLUTED COMPOUNDS
When opposing counsel asks you a double- or triple-jointed question, ask her to reframe or break down the inquiry into simpler questions.

Q. Doctor, would you agree that a woman with a family history of diabetes who is taking … should be tested for … at least once a month, and that if there is evidence of … then the standard of care requires you to …?
A. Please repeat those questions again, one at a time.

GIVE ME MORE
Opposing counsel may try to “fish” for more information. You are under no obligation to make his job easier. Answers that contain a qualifier are useful.

Q. Doctor, to your knowledge, have you told me everything you consider important about your patient’s death after she hemorrhaged?
A. I have told you all the information I can remember at this time.
Personae sometimes adopted by plaintiffs’ attorneys to obtain information at deposition

“Mr./Ms. Friendly” Some attorneys look for an opportunity, before the deposition begins, to show that they are “friendly” and not to be feared. Remember: Discussions with opposing counsel without defense counsel present are inappropriate.

“Eager Student” Opposing counsel may play the “eager student” to massage your ego and pave the way for long narratives and volunteered information.

“Counselor Clueless” Opposing counsel may appear so ignorant of certain facts that you can scarcely resist jumping in to educate him or her.

“Mr./Ms. Silent Treatment” After you give a brief, honest answer, opposing counsel may sit silently as if expecting a more substantive response. Resist the temptation to fill the silence.

Keep your guard up!
Don’t allow yourself to be distracted if opposing counsel jumps from open-ended questions to clarification questions to “pinning-down” questions. An erratic approach could be part of opposing counsel’s strategy. Answer only the question asked, and give the shortest correct answer possible to each question.

Opposing counsel may ask a question in a way that suggests substantial confusion or misunderstanding. If this confusion does not affect your testimony, you don’t need to clear up matters for opposing counsel. If, for example, opposing counsel asserts that one of your statements is contradictory, an appropriate response may be simply, “No, it wasn’t.” It is opposing counsel’s job to explicate further details.  

Opposing counsel may approach the deposition with a particular demeanor—friendly, eager to learn—in an attempt to get you to let down your guard and speak more freely (see “Personae sometimes adopted by plaintiffs’ attorneys to obtain information at deposition,” above).

During a full-day deposition, particularly, the greatest likelihood of making a mistake begins around 4 PM. Some attorneys may reserve especially important questions for this time, hoping that the witness will be less guarded. Start the day well-rested and ask for breaks if fatigue begins to affect your concentration.

Be alert to questioning designed to elicit only “Yes” answers. This technique—often used by salespersons—makes it difficult to say “No” in response to an ambiguous question. Last, point out errors if opposing counsel misquotes earlier testimony or states facts incorrectly. These mistakes may be innocent, or an attempt to distort your testimony.

FAST TRACK
If plaintiff’s attorney appears confused, it may be a ploy. It’s not your role to clear up matters!

Some attorneys may ask if you wish to waive the right to read and sign the deposition transcript. Seek your counsel’s advice, but defendants usually choose to retain this right. Typically, you have 30 days to read the transcript and correct errors. Keep in mind that substantive changes beyond typos are likely to be the subject of intense cross-examination if the case goes to trial.  

Depositions are sometimes videotaped, usually because a witness will not be available at the time of trial. Because the jury will hear and see you, approach a videotaped deposition as if it were an actual trial. Dress appropriately, speak clearly, and look directly into the camera. Don’t feel embarrassed about making sure that you are taped with the best possible lighting, camera angle, and background.

You reply to plaintiff’s attorney: “I don’t know how the rupturing of membranes in this case could have been foreseen.”

CASE RESOLVED
Direct question at deposition
References