PREPARE AND BE A GOOD WITNESS

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Wanted: An employee who will work nights and weekends under adverse conditions with no additional compensation, reward or acknowledgment. Good communicative skills are also required of this position. The respondent must not be shy of lights and cameras.

Certainly, there should be no volunteers for this advertised position; however, you as the medical director will most likely be called on to fill this position during your career. The position being advertised is one of a witness for a case in litigation. Your corporate trial attorneys are the ones who placed the advertisement and are the ones who will be the most demanding of your time and patience. All good trial attorneys know that thorough preparation of a witness may be the most important work they perform while handling a lawsuit. Obviously, to discharge this obligation, the attorney needs witnesses who are willing to do the work required of them. The intent of this article is to assist you in being a good witness.

Witness

You will be called on to perform the duties and tasks of being a witness only twice in a lawsuit. Your first appearance as a witness will be at a deposition. Your second appearance as a witness, if required, will be at the trial of the case when you will be called on to testify before a judge and jury. Despite the pomp and circumstance associated with being a witness at trial, your most important appearance will not be in the courtroom. Long before that date, your deposition will be taken by opposing counsel. Your deposition is the most important and significant appearance you will make as a witness. This is so because most cases settle prior to an actual trial, and if they do not, your performance at your deposition will define, and perhaps limit, your role as a trial witness. To grasp the importance of a deposition, you must understand what constitutes a deposition and why trial attorneys utilize them.

Deposition

A deposition is a legal proceeding which usually occurs at an attorney’s office or a court reporter’s office. In attendance, besides yourself as a witness, will be the attorneys for the parties to the lawsuit, the court reporter who most likely is also a notary public, and perhaps the parties or their representatives. You, as the witness, will give an oath to tell the truth and then you will be asked questions by the attorneys present. The behavior of the attorneys as examiners and yourself as the witness are governed by Rules of Civil Procedure and Evidence. These rules allow the opposing counsel, who is asking you questions, leave to ask just about any question that is relevant to the lawsuit or may lead to relevant evidence. Arguably, most questions asked may lead to the discovery of relevant evidence. Thus, there are few limitations put on the examining attorney. These same rules, however, restrict your attorney to a very limited role of making form or standard objections at your deposition. As the Honorable Judge Gawthrop stated:

"The underlying purpose of a deposition is to find out what a witness saw, heard, or did — what the witness thinks. A deposition is meant to be a question and answer conversation between the deposing lawyer and the witness. There is no proper need for the witness' own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness' words to mold a legally convenient record. It is the witness — not the lawyer — who is the witness. In short, depositions are to be limited to what they were and are intended to be: question and answer sessions between a lawyer and a witness aimed at uncovering the facts in a lawsuit. When a deposition becomes something other than that because of strategic interruptions, suggestions, statements, and arguments of counsel, it not only becomes unnecessarily long, but ceases to serve the purpose of the Federal Rules of Civil Procedure; to find and fix the truth."1

There are many utilizations for a deposition. For example, the opposing trial attorney will take your deposition to (1) obtain information, (2) learn the facts of the case as you know them, (3) determine the extent and limits of your knowledge, and (4) importantly, evaluate you as a witness. Further, the trial attorney will use your sworn testimony to evaluate the case for settlement.
purposes and as a tool in settlement negotiations. You should be aware that most cases settle before trial, because, in most instances, the case has been won or lost following the depositions of the key witnesses.

There are, however, cases that are tried before a jury and judge. Again, the role you played as a witness during your deposition becomes critical. The deposition transcript can be used by a trial attorney for many purposes at time of trial. The most significant are: (1) preservation of testimony, (2) impeachment of you as a trial witness, and (3) the discrediting of other witnesses at time of trial. Most jurisdictions fully allow the use of testimony originating from a deposition to be used in place of calling a witness to actually come to court and testify. Thus, the judge and jury may well hear your deposition testimony read to them, or more likely will observe the videotape of your deposition as opposed to listening to you testify at trial. Secondly, the trial attorney hopes to utilize your deposition testimony to impeach you as a witness at time of trial. Once you have given your deposition, you have committed statements under oath, and if you attempt to change any of these statements at time of trial, the trial attorney will most certainly read to the judge and jury your prior inconsistent statements. In the hands of a good trial attorney, what may appear to you to be an insignificant change in testimony becomes fertile grounds to attack your credibility as a witness. Finally, the opposing trial attorney will try to utilize your deposition testimony to discredit other witnesses testifying on your company’s behalf. If you, as a medical director, give testimony as to why certain benefits were paid and others denied, and then other company employees give different testimony, the opposing trial attorney will have established a conflict in testimony which, like impeachment, most certainly will result in adverse consequences to the company’s case.

Behind the Scenes

Given the significance of being a good witness at your deposition, I will now analyze with you what occurs prior to your actual deposition and what will be required of you during this period of time.

Before giving a deposition, you must meet with your company’s trial attorney. You should be prepared to spend some time with the attorney at this meeting and subsequent meetings. A good trial attorney will have started to prepare for your deposition long before your initial meeting. Most likely, your attorney has utilized formal discovery requests such as: (1) Interrogatories, which are written questions to the opposing party that are required to be answered in writing, (2) Request for Production, a written request for specific documents or perhaps categories of documents to be produced to your attorney, and (3) depositions of opposing party and other material witnesses. In addition, your attorney has conducted informal discovery such as hiring consultants to discuss medical issues in a case or experts in the field of insurance coverage. Certainly, your attorney has reviewed the company’s documents and interviewed other employees who may be potential witnesses in the case. In summary, your attorney has done his homework.

Armed with this knowledge, your attorney is now prepared to work with you on preparing you for your deposition. Now it’s time for you to do your homework. During your first meeting with your attorney he will ask you many questions which you may not find to be relevant to the issues as you see them in the case. As previously discussed, there are few limitations on questions which may be asked during a deposition by the opposing counsel. He may ask any question which may lead to the discovery of relevant evidence including questions to establish bias or the untrustworthiness of the witness. Often times, opposing counsel will question a company witness about his or her financial relationship with the company in order to show that the witness’s testimony is cloaked with a bias favorable to the company. Opposing counsel will point out that the witness is a company person, with a good salary, years of loyal service, and good benefits. Further, as long as the employee remains a faithful and loyal employee, the employee will receive a significant retirement package. Thus, the company employee is naturally biased towards the company. You must be prepared to address these issues.

Thus, to prepare you, not only for obviously relevant issues but also for those areas into which the courts permit inquiry, your attorney will review with you your educational background, employment history, your current job duties and responsibilities, any past experiences you may have had as witness or a party to a lawsuit, and of course, your knowledge of the issues in the subject case. All of this is being done to prepare you to be a good witness.

Guidelines

Finally, your attorney will give you guidelines as to how to conduct yourself during the deposition. The following is a list of do’s and don’ts that I utilize in most of my pre-deposition conferences with witnesses:
(1) Listen to the question that is being asked and only answer that question.

Remember, this is opposing counsel's only opportunity to question you before the trial of a case. You should not volunteer any information. If the question is, "Please state your name," only give your name. Do not give your address, the name of your employer, etc.

(2) Understand.

Make sure you understand the question before you answer it. You are entitled to a clear and understandable question from the opposing attorney. Do not be embarrassed to state that you do not know the meaning of a word used by opposing counsel or that you do not understand the question itself. Remember, you have given an oath to tell the truth and you cannot discharge this oath unless you understand the question that is being asked.

(3) Make no assumptions.

Do not make assumptions in order to make a response to opposing counsel's question. If you make an assumption and it turns out that the assumption is incorrect, this mistake will be used to attack your credibility during settlement negotiations and, of course, at time of trial. Remember, a case is won by the party with the more credible case. Tell the attorney that you cannot answer the question as worded and will he please rephrase it.

(4) Use "I do not know" or "I do not recall."

These are perfectly good answers to many questions you will be asked during the course of your deposition. Psychologists tell us that it is human nature for a witness to want to answer questions and not be perceived as one who does not know or has a bad memory. If you are asked what day of the week you decided a particular treatment was not necessary, your answer probably would be "I do not recall." Of course, your memory can be refreshed if you had before you your notes and a calendar. By reviewing these documents, you could give the date and probably the day of the week the decision was made. Without these documents, your answer would be only a guess, at best. If, however, you were asked to describe a medical procedure about which you know nothing, the correct response would be "I don't know." A simple answer; however, one that is too often ignored during a deposition.

(5) Do not be influenced by good guy/bad guy.

Do not be influenced by the demeanor of the opposing attorney. Opposing counsel will use whatever tools he has available to disarm you in an effort to obtain answers he wants to his questions as opposed to well thought out responses from you as the witness. The demeanor of opposing counsel can run the gamut of the "white hat"/good guy to the "black hat"/bad guy. Frequently, the opposing attorney will behave like a nice guy who is just trying to do his job. He will smile at you frequently and try to get you involved in giving narrative type answers. If he accomplishes this, you are violating all of the above guidelines. Just as often as the attorney will wear the white hat, he will wear the black hat. Wearing the black hat, the lawyer threatens and tries to intimidate you. The purpose of this style of examination is to make you mad. A witness who loses his temper will answer questions without thinking about his response, in violation of the above guidelines, resulting in a deposition which will work to the detriment of the company. Thus, listen to the question that is being asked and ignore the manner in which it is presented.

(6) Beware of the misquoted statement.

Often during the course of a deposition, the opposing counsel will ask you to agree that your prior testimony was WXY&Z when in reality it was only XY&Z. Whenever opposing counsel prefaces his question with the phrase, "You previously testified to the following:" beware, he is trying to trap you! Obviously, he did not like your first response and is attempting to have you modify it. These types of questions usually are asked late in the deposition when you are tired and probably more interested in the work that is piling up on your desk or dinner that is waiting at home. This is the time you may not pay close attention to the question and just answer "yes." Remember guideline #1 - LISTEN!

(7) Tell the truth.

You took an oath to tell the truth; please do so. By being truthful, accurate, and fair you discharge your oath and will be viewed by the jury as a credible witness. Your attorney will win the case with credible witnesses.

(8) Correct your answer.

During the course of your deposition, you may discover that you were inaccurate in answering a previous question. Now is the time to correct the
mistake. Do not wait until after the deposition. Any attempt to correct a mistake after the deposition is cloaked in the bias of your attorney talking. Remember, it is easier to explain an incorrect answer during the deposition than at a later date in front of a jury.

Lights, Camera, Action

Having met with your attorneys, reviewed the appropriate documents, studies and committed to memory the guidelines about giving a deposition, you feel you are now ready to give your deposition. Not yet! Technology has brought dramatic changes to depositions. The video camera is now being used with increasing frequency at deposition. In fact, many attorneys use portions of the videotape in their opening statements. The use of the video camera at depositions increases the importance of being prepared for your deposition. The deposition can no longer be used as a practice session to prepare for the trial. If the deposition is being videotaped, you can no longer ponder a question before answering it or ask to be excused to converse with your attorney. The importance of being prepared for your deposition is magnified by the presence of the video camera. The video camera captures on film your demeanor! A look of confusion or surprise will be preserved to be shown to the jury. In fact, there are experimental programs where trials are being conducted totally by videotape without the appearance of witnesses.

Even if your deposition is not being videotaped, you should conduct a practice deposition. Golfers use videotaping to improve their swing, you should use it to assist you in preparing to be a good witness. The practice deposition should mimic the actual deposition. You should hire a video team to videotape your deposition in a conference room. Your trial attorney should bring a partner or senior associate to act as the opposing counsel. The practice deposition should be conducted as if it was the deposition. After 20 or 30 minutes, I suggest that you turn off the video camera and lights and play back the videotape. You should study both the visual image and your responses to the questions being asked. Remember, the jury will have the benefit of both the visual and audio responses to opposing counsel's questions. This is your opportunity to see if you are prepared to be a witness and have mastered the guidelines of giving a deposition.

Conclusion

With preparation and practice you will be a good witness. Follow the deposition guidelines. Listen to the question, understand the question, and then answer the question without making any assumptions. If you do not understand the question or if you have to make assumptions to answer it, do not answer the question; but, ask the examiner to rephrase it or explain the question. If you cannot answer the question, please do not; just respond with "I do not know," or "I do not recall." Be patient and attentive during the deposition. Do not let the demeanor of the examiner affect you. Do not be shy of the video camera. Use it as a tool to make you a better witness. Above all, tell the truth and be precise in answering the questions. Good luck!

Reference