

LEAP

with Dr. Gita Pensa



Discovery and Deposition: Overview

Note: this pdf is adapted from an article by Dr. Pensa, previously published in ACEP Now.

“I was going through the depositions and really stressing myself out. Not eating. Not sleeping. And I got pregnant at that time and miscarried shortly after, and obviously causality is difficult to prove, but I always thought that was part of the reason why.”

-Physician interviewee

After being served with papers initiating a malpractice lawsuit, the deposition is often the next stress-inducing event in the litigation timeline. Most physicians are unfamiliar with depositions at all, let alone how to perform skillfully during one.

An apt analogy is oral boards, if you have taken them: Imagine going into that exam (which is in no way similar to your usual practice environment or written exams) without any knowledge of the structure of the exam or strategies for success. Regardless of your clinical skills, you might fare poorly because of your lack of “boardsmanship.” Depositions are similar, and preparation for them—both the practical and psychological aspects—is key to increasing the odds of a favorable outcome in your case.

THE DEPOSITION PROCESS

Depositions are just one part of the discovery process; the stage of civil litigation that occurs after the lawsuit is initiated. In certain states, discovery begins only after the plaintiff submits an offer of proof or affidavit of merit, demonstrating that the case has been reviewed by a physician or panel that deems it legitimate. Unfortunately, there is almost always an available “expert” physician willing to craft a theory of negligence in exchange for a tidy sum. During discovery, parties on both sides gather information to help develop their arguments. Several facets of discovery often precede depositions, including requests for admissions (getting each side to agree on sets of facts that will not be in dispute during the case), interrogatories (questions each side directs to the other in written form), and requests for production of relevant documents or records.

Often, there is intermittent involvement of the court, as each side will inevitably be dissatisfied with the answers or documents produced, which then serves as the impetus for filing motions that compel divulgence of further information. Each motion will be ruled on by the judge after hearing arguments from both sides. Naturally, this takes time; in some cases, the discovery process can last years. While your attorney will be working steadily, your involvement in these steps is less



significant, other than answering the interrogatories with your attorney and reviewing any documents your attorney provides.

The deposition is where you first take center stage. A deposition is the sworn testimony of a witness conducted by opposing counsel, often taking place in their office. The plaintiff, defendant(s), additional witnesses, and medical experts hired for their opinion are all deposed separately. Videotaped depositions and virtual depositions are now more common; you should be notified ahead of time if it will be recorded or remote. Every word will be taken down by a stenographer and turned into a printed book of testimony that can be reviewed, parsed, and subsequently leveraged. Your words will be quoted back to you at trial, sometimes in out-of-context excerpts framed in a way to paint you in the least positive light. This is why it's so important to develop skills in answering questions truthfully, succinctly, and in the words of your choosing—not the plaintiff's attorneys. Attorneys have been trained in methods of tricking you into saying things that you don't really mean. Practice, know-how, and 'boardsmanship'—learning those tricks—will keep you in the driver's seat of your own testimony.

Almost as important as your words is your demeanor in a deposition. Both sides—your own attorney and the plaintiff's—will be sizing you up in terms of how you would appear to a jury when under pressure. Are you angry? Do you appear arrogant or callous? Or do you instead appear confident and caring? Regardless of the quality of your care, if it appears you will be unlikeable to a jury, the plaintiff's attorney will do their best to bring you to trial or hold out for a very large settlement. Emotional control is of utmost importance—and easier to achieve if you have been managing your stress.

Recognize that lawyers are trained in law school in the art of strategic questioning — and it is only right for *you* to prepare yourself for what you might initially see as their underhanded tactics. They're not underhanded — it's just how skillful depositions are conducted. And it's a good thing for *you* to be a skillful deponent.

Their goal in the deposition is not just finding out what happened, it's getting you to state things (or agree to their statements) in a manner that will give *their* case more leverage if testimony excerpts of their choosing were read aloud to a jury. After depositions, both sides will have a clearer understanding of the strengths and weaknesses of their cases — *and* their potential trial witnesses. Here are just a few tips to get you started. (Note: this is not exhaustive, and you should defer to your attorney's advice.) We will discuss these and other techniques more in our sessions, but this will start to lay the groundwork.

BEFORE DEPOSITION

- Talk to peers and trusted friends about the fact that this is happening, and how you feel about the legal events. The legal events are not secret, and you are very much able to discern the difference between this and discussing your case details. Seek support. It's helpful to talk to someone who has been through it if you can. Make self-care of your body and mind a priority — for real.



- Read any primers on malpractice litigation recommended by your attorney.
- Know the details of your chart well, including all nursing or staff notes relevant to your patient care in this case. The chart will be provided to you by your attorney or claims representative/insurer (do not go into the chart if you can help it.) You will be given a copy of the chart at deposition to reference, but you should already know the details. Anticipate how you will answer tough questions about what was documented.
- Practice answering questions truthfully and succinctly with your attorney, without offering extra information. As you practice, note you may speak in specific medical terms; it will not be helpful to “teach” the opposing counsel. At the same time, do not be demeaning or belittling. A professional demeanor is key.
- Discuss with your attorney whether and when to do any research on the relevant medical issues and keep all research as an “attorney-client work product” at their direction.
- Discuss with your attorney how you will handle questions about co-defendants in advance. In general, deposition is not the time for finger-pointing. Do not access or review their records, or you may be deposed about your interpretations of them; review only what your attorney provides (you may keep it confidential within attorney-client privilege).

DURING DEPOSITION

- Pay attention to your attorney. They may object to certain questions and may also give you nonverbal clues when they sense a trap. Physicians have even described their attorneys stepping on their toes under the table!
- That being said, don’t look at your attorney for help when you are given a difficult question. If you are being videotaped, this doesn’t give a great impression. And even if not, it’s a ‘tell’ that you feel like you’re in trouble.
- Look at opposing counsel as you would any other person in conversation. Look at their face without fear (but don’t stare them down!) Don’t only look away or down at the table. Your body language should be open and quietly confident, without being aggressive.
- Pause and reflect before answering. This helps you focus and gives your attorney an opportunity to object if necessary (if you are in a state where this is allowed. Follow your attorney’s instructions in that case.) Only answer once the question is complete and you know *exactly* what is being asked; ask for clarification if needed. Some examples:



- If the attorney asks you run-on questions, ask for them to be broken down.
 - If the attorney lists data before the question, ask to see the data to confirm it and then clarify the question. Stop looking at the data before you begin to answer. Ask for them to repeat the question if necessary once you've looked at the data.
 - Be wary of hypothetical or vague questions—they want you to generalize yourself into a corner.
 - You may ask for clarifications of questions or for more specific questions. For a non-medical example, if you are asked “What was the weather like?” you might say “Which specific factor of the weather would you like me to address?” And then when they ask “What was the temperature that day?” or “Was it windy?” you can answer that question completely and specifically (if you recall the answer.)
 - Beware the double-negative question—ask the attorney to rephrase until it's clear, or answer in a full sentence that says exactly what you mean.
 - Saying you “don't know” or “I don't remember at this moment” is preferable to vague recollections. You do not need to explain why you don't know or remember.
 - Do not agree to calling any text or journal article “authoritative” if you don't believe it can be disputed.
 - If a question cannot be answered ‘yes’ or ‘no’, simply say you can't answer it that way.
 - If a question starts with “Wouldn't you agree that...”, listen very carefully to make sure you agree with every word in the statement. If not, you can say “I don't agree with that the way you have phrased it.” And leave it there unless you are asked for more.
 - If the attorney starts with quoting your prior testimony (“Earlier, you said that...”) — make sure that is *actually* what you said before agreeing. Correct them if that is not the case.
- Learn to be comfortable with long pauses — your own, and those of opposing counsel. Don't fill them with rambling or by offering more conversation and explanations.
 - Ask for breaks when you need them. It's usually a long day, and you need to be focused. Be rested, hydrated, and fed with something that gives you stamina.
 - When the deposition ends, do not talk about it with your attorney until you are well away from the building.