IADC Committee Newsletter

MEDICAL DEFENSE AND HEALTH LAW

May 2012

IN THIS ISSUE

The authors illustrate why traditional witness preparation with physicians simply does not work, and what strategies attorneys should adopt instead to prepare their defendants for deposition and trial.

The Doctor's Dilemma Before Deposition: "To Be. Or Not To Be Me." How Can You Help Your Deponent Do Both?

ABOUT THE AUTHORS

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ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Have you ever lost a very defensible medical malpractice case? Have you ever spent multiple days preparing a doctor for deposition only to have him essentially concede a breach of the standard of care in the first hour?

Plaintiffs sometimes win medical malpractice suits simply because the defendant doctor was not prepared to testify ... not prepared properly, anyway. That does not mean defense counsel failed to invest time and energy in preparing the doctor, but rather that the traditional approach to witness preparation simply didn't work.

In traditional witness preparation, we tell deponents too much, and yet not enough.

We relate a dozen "deposition rules" including don't talk too much, answer yes or no if possible, don't volunteer anything, don't guess, etc. You know the drill.

The problem is a doctor's job is the antithesis of that of a deponent.

Doctors tell patients what they **need to know** irrespective of what question the patient asks. A doctor's job is all about volunteering information and educating patients—in fact, patients report that as the hallmark of a good doctor.

A deponent's job, on the other hand, is to tell the truth and answer only the questions that are asked.

So, traditional witness preparation essentially tells doctors to not be themselves for that 8-hour deposition period ... to ignore their training, habits, and instincts … to suspend their personalities. But, if not themselves, who should they be?

Traditional witness preparation (TWP) simply does not give doctors the communication strategies to be a good deponent while being a good doctor, too.

Why does TWP fail?

TWP just tells doctors what <u>not</u> to do, but not what TO DO instead.

TWP ignores powerful and often negative emotions that can interfere with the doctor's ability to testify truthfully. Again, the doctor's job in deposition is to tell the truth. The truth is defensible.

We trade on the integrity of medical providers. If jurors don't believe in the underlying character of your defendant and in his or her good intentions, you lose—and you lose in many ways.

Money is often the least of the losses incurred after medical malpractice lawsuits. Some doctors take malpractice claims personally—as a sign of failure or as a betrayal. Many doctors end up angry, bitter, disillusioned, and demoralized. Many leave the field. Many lose sleep for days or months or years while the suit is pending. Many change their practice habits to be more defensive medicine than good medicine. From that negative emotional space, doctors often think their way to escape the suit is to spill it all.

A doctor may reason, "If I demonstrate complete and forthright disclosure, and say absolutely everything I was thinking, the plaintiffs will realize I am a good doctor, and I did my best, and they'll drop the lawsuit." Never happens. Well, it has happened once in my career—in that case, a nun was accused of

not providing care to the indigent—really a tough sell for even the best plaintiff counsel.

> **TWP doesn't teach doctors how to recognize standard of care questions** (e.g., "Doctor, wouldn't you agree that it would be prudent to do X, Y, and Z with a patient like this?").

Although this may sound like plaintiff counsel is discussing "the generic patient," the answers in deposition will surely be used against this doctor, in this case, with this patient, under these circumstances. Consequently, a simple "Yes" can be catastrophic as it can be used at trial to argue that the defendant doctor himself admitted a breach of the standard of care because even he said Z would have been the prudent thing to do, yet he did not do Z in this case. Likewise, a simple "No" can be problematic as it can be used to argue that the doctor is incompetent, or uncaring, etc.

> **TWP gives the doctor no practice using new communication strategies.** Think about it—we develop our communication habits over decades. It is hard to adopt new habits of any sort unless you practice. This does not mean you rehearse or script testimony or have pat lines—rather, it means you have an *alternate strategy*.
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> Finally, **TWP can backfire if the doctor misinterprets all of the "deposition rules" to mean he should be recalcitrant or argumentative** with opposing counsel. This can be especially damaging if the deposition is videotaped and excerpts are played at trial. Even if your doctor "gives up little" in terms of harmful admissions, he may have lost the game if jurors conclude his taciturn demeanor reflects his "true persona" as a doctor.

Jurors infer how good a doctor is based in part in how good a witness he is—it is completely unfair, but that's all they know of him. By making opposing counsel drag the facts out of him, a taciturn doctor is demonstrating a character that is wholly inconsistent with that of a caring, compassionate, and competent physician who takes the time to talk to his patients and ensures they understand everything that is important with the care plan.

Even if he does a stellar job on direct examination, a poor performance on cross-examination can "sink the ship" as jurors believe that the witness' "real" personality emerges when his back is against the wall, not when his own attorney is asking him soft-ball questions on direct.

What should attorneys do instead of TWP?

Develop home bases encapsulating the defense themes using the doctor's own words. It is the doctor's testimony, after all.

Teach new communication strategies to convey home bases that crystallize key elements of the defense. Doctors can use the home bases like a rudder to navigate through dangerous territory and remain focused on the big picture and overall defense strategy throughout the deposition.

Provide specific feedback to the doctor on his or her communication patterns through mock cross- examinations. You would never send a basketball player out on a soccer field

without some training when he doesn't even know the rules, let alone how to play. Do not assume an abstract discussion of "the litigation game and deponent's rule book" will equip your doctor with the skills to score.

Address negative emotions the doctor harbors as they can derail the testimony and undermine his main job—to tell the truth—or cause him to unwittingly admit a breach of the standard of care.

Doctors can win with the right message, delivered in the right tone, even while under attack.

Doctors overcome tremendous challenges to become competent and caring physicians. They make dozens of life-altering treatment decisions on a daily basis—testifying really ought to be easier than that, no?

Help your client be a good doctor and a good witness at the same time by teaching him or her an alternate communication strategy for deposition. After all, it is easier to defend a good deposition than a bad one.

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Thomas J. Hurney, Jr. and Michael S. Hull

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