

DEPOSITIONS, TRIALS and OTHER SWORN
TESTIMONY: WHAT THE EXPERT NEEDS TO
KNOW

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DISCLAIMER

- THIS LECTURE DOES NOT CONSTITUTE LEGAL ADVICE. ATTENDEES SHOULD CONSULT WITH THEIR OWN COUNSEL REGARDING SPECIFIC ISSUES.

AFFIDAVITS.

- A sworn statement under oath.
- Usually drafted by the attorney that engaged you.
- Sign and notarize.
- Carries the same testimony weight as a statement under oath during depositions or trials.

DEPOSITION LAW & PROCEDURE

- **What is an expert deposition? A deposition is defined as the testimony of a witness taken upon oral question or written interrogatories, not in open court.**
- **Expert witnesses are witnesses, who due to their “knowledge, skills, experience, training, or education”, may give testimony in the form of an opinion.**
- **Fact Witness: A fact witness’s testimony is limited to what the witness observed, heard, smelled, tasted, or felt. Fact witnesses generally are not allowed to testify in the form of an opinion.**
- **Depositions in civil cases are governed by the Rules of Civil Procedure of the Court where the action is pending. This may vary from state to state. The Federal Rules of Civil Procedure govern actions filed in Federal Court in all 50 states.**
- **Deponents should always assume, however, that whatever they say at a deposition is being recorded on the record. Therefore, be careful of what is said “off the record”.**
- **Videotaped depositions are often used when the attorney is concerned that the witness will not be available for trial because of terminal illness, upcoming travel plans, or other reasons. A videotaped deposition can be used instead of paying for the expert’s time at trial.**

DEPOSITION LAW & PROCEDURE

- **Discovery:** The Federal Rules of Civil Procedure (FRCP) permit very liberal and broad-based discovery. The purpose of this is so that all parties know all there is to know about the other side's case, they will be able to evaluate the merits or weakness of the case rationally and settle the matter.
- **Limits to Discovery:** Although discovery is broad-based, it is not unlimited. For example, physician/patient privilege, husband/wife privilege, and the attorney/client privilege. Federal Rule 26(b)(2) provides further limits on discovery. As you can see, this rule protects parties from discovery that is overly burdensome or expensive.
- **Work Product - Trial Preparation:** Attorney work product is usually non-discoverable. If an expert is working as a consultant on the case and the attorney does not intend to call him/her as a witness at trial, the expert is not required to give a deposition in the case.
- **Protective Orders:** The court can issue a protective order to prevent a person from "annoyance, embarrassment, oppression, or undue burden or expense". An attorney may request a protective order to reduce what he or she considers to be an unreasonable fee from an expert witness or a request by an expert to prevent discovery of personal and sensitive information.

DEPOSITION LAW & PROCEDURE

- Sanctions: If a party, deponent, or attorney unjustifiably refuses to disclose requested information, the party seeking the information may make a **Motion to Compel** the party or deponent to provide the requested discovery. The prevailing party may bring a motion to compel the other side to pay attorney's fees and the costs for the motion to compel.
- Stipulations, objections, and instructions not to answer.
- Objections: Objections may be in the form of the following: Form of the question (leading the witness), competency, relevancy, materiality, and non-responsive answer.

WHAT TO DO WHEN AN OBJECTION IS MADE DURING DEPOSITION OR TRIAL:

- Stop testifying immediately.
- Listen carefully to the objection.
- Learn as much as you can about the grounds for the objection.
- Let the lawyers battle it out between themselves.
- Resume testifying when counsel so instructs you.
- Instructions not to answer: What to do and what can happen!!!

WHY EXPERTS ARE DEPOSED.

- Preservation of Testimony for use at Trial.
- Experts have the knowledge, education and unique experience that the legal system needs to make decisions.
- Lawyers look for experts that have special knowledge in unique areas of medical training.
- Lawyers are observing your demeanor for use at trial.
- Lawyers want to know what your opinions are.

Discovery Depositions: What opposing counsel is trying to accomplish?

- **Your opinions.**
- **Your qualifications.**
- **Lock down the expert.**
- **Evaluate the probable credibility of the deponent in front of a jury.**
- **Probe for reasons of possible bias that can be brought before the jury.**
- **Determine the factual assumptions that are the foundation of your opinion.**
- **Gather as much information as possible.**
- **Use your opinions to help opposing counsel's case (flip the witness).**
- **Intimidate the expert (this is not for the faint of heart).**
- **Learn as much as possible about the opponent's case (don't educate opposing counsel, just answer the question).**

PREPARING FOR YOUR DEPOSITION.

- Do not alter any records.
- Thorough preparation: review the chart, take notes, discuss the pertinent issues with the retaining attorney and prepare the attorney on what to expect, **before the deposition.**
- Having an updated curriculum vitae (CV) ready for deposition.
- Review the important dates.
- Mastering the important facts of the case.
- Rest and relaxation.
- Allow adequate time for the deposition.

SUBPOENAS DUCES TECUM AND **THE USE OF DOCUMENTS AT DEPOSITION**

- **The subpoena:** This legal document will specify the name of the case and give the time and date of the deposition. This is often scheduled by the retaining attorney. This is a legal document and requires the expert witness to be present for the deposition.
- **Failure to appear:** Without good reason, if an expert witness fails to appear he/she may be held in contempt of court and be liable for court costs, including attorneys fees.
- **Subpoena duces tecum.** This usually requires the production of certain items, such as patient chart, x-rays, CV, financial data, etc. These are documents that are in your “custody or control”.
- **At the time of deposition** have all of the requested documents listed in the subpoena duces tecum present for inspection.
- **Dealing with exhibits:** Be sure you are familiar with the correct exhibit number the attorney is referring to.
- **Take your time.** Review the exhibit and respond appropriately after careful review.
- **Handwritten notes:** Be able to explain underlining, highlighting, and margin notes that appear in your files.
- **Private notes:** There is no “private note” privilege.
- **Attempts to hide documents:** This is not proper and it can ruin your credibility.
- **Cover letters:** The cover letter sent to the expert by retaining counsel is not protected by attorney/client privilege and must be produced.
- **Billing information:** Have fee schedule available, billing statements, and payment records available.

ANSWERING COUNSEL'S QUESTIONS.

- Always tell the truth.
- When the expert witness was retained.
- Qualifications of the expert: Be prepared for close questioning.
- Curriculum vitae: Be sure it is updated and accurate.
- Your expert opinions: Will your opinions change if the circumstances change? Dealing with hypothetical issues. Leave yourself the option of changing your opinion at a later date should additional records become available.
- Strategy: Opposing counsel will be seeking admissions and concessions to be used later at trial.
- Do not be overeager to give your opinion and do not be an advocate.
- Opinions and rationale. Frontal assault: Do not get caught off guard.
- When did the expert form his opinions?
- Your opinion and the opinions of other experts.
- Interrogatory answers: Expect to be questioned about these depositions and/or trial.
- “Doctor, will you be offering any other opinions at trial?” Answer: “Not at this point.”
- What is the factual basis of your opinion?
- Be prepared for hypothetical questions.

ANSWERING COUNSEL'S QUESTIONS.(cont.)

- **Methodology used to determine the facts upon which you based your opinions.**
- **Equipment and testing: Did the expert use good and reliable testing equipment and testing procedures?**
- **Be careful of opposing counsel's summary questions.
Answer, "I don't agree with your characterizations".**
- **Avoid bias and be impartial.**
- **Avoid being perceived as being inflexible (a different set of circumstances may in fact change your opinion).**
- **Personal / social relationship to retaining party: Avoid the perception of being chummy with the retaining side.**
- **Professional witness ("hired gun").**
- **Do not be an advocate: Just state your opinions.**
- **Fees and Compensation (you are being paid for your time, it is what it is).**
- **Expect aggressive questioning by opposing counsel, it is part of the system, and it is allowable.**

ANSWERING COUNSEL'S QUESTIONS.(cont.)

- **Financial interests in the case (unpaid bill), future surgery and procedures you perform.**
- **Professional discipline: Be careful about criticizing other witnesses/ experts.**
- **Mischaracterization of your testimony by opposing counsel.**
- **Catchall questions: “Doctor, do you have anything else to say or add to your testimony before we conclude the deposition?” Answer: “Not at this time”.**
- **Authorative writings / textbooks.**
- **Impeachment; be careful of inconsistent prior sworn testimony.**
- **Prior mistake in deposition testimony: Do not cover it up, deal with it and move on.**
- **Your own writings and publications: Know what you wrote and be prepared to explain it.**
- **Another expert’s opinion: Hold onto your opinions and do not be swayed by other expert opinions.**
- **Contradictory fact testified to by another witness: Another witness may be mistaken, know the facts prior to deposition.**

DEPOSITION ADVICE FOR EXPERT WITNESSES

- **Always tell the truth. Be on time and be prepared.**
- **Location: Your place or mine. Advantages and disadvantages.**
- **Proper attire: Videotaped deposition versus non-video depo.**
- **Never argue with counsel. Be polite and professional at all times.**
- **Making drawings: If you are making a drawing freehand, so state it on the record. Try to use professionally done visual aids.**
- **Do not exaggerate, speculate, guess, or estimate. “Guessing” is not allowed under the Rules of Evidence. If your statement is not sound, it may be thrown out of court.**
- **Do not interrupt the attorney asking you questions and do not allow the attorney to cut off your answers.**
- **Listen to the question carefully before responding.**
- **Keep it simple: Yes, No, I don’t know. Explain when necessary.**

DEPOSITION ADVICE FOR EXPERT WITNESSES (cont)

- **Do not memorize your testimony.**
- **Your response to objections: Stop talking and listen to the objection carefully.**
- **“Off the record” comments: Be careful what you say, it may be used against you.**
- **Read and sign the deposition. Do not waive.**
- **Silence is golden: Know when not to talk.**
- **Avoid gesturing (nodding, pointing, etc.).**
- **Do not show weakness, boredom, exasperation, or fatigue (attorney’s can smell blood in the water). Don’t let them see you sweat.**
- **Maintain the proper demeanor (confidence, calmness, control, care, and coolness under fire).**
- **Be confident without being arrogant.**
- **Remain calm, cool, and collected.**
- **Maintain control of your responses even with zinger questions.**
- **Do not come across as arrogant or pompous.**

DEPOSITION ADVICE FOR EXPERT WITNESSES (cont)

- Act naturally and be yourself.
- Avoid jokes and sarcastic or inappropriate remarks (“give me a break”, “he blew it”, “yeah, right”, etc.
- Listen carefully to the question and answer appropriately, neither too quickly nor hesitate.
- Act dignified and polite at all times.
- Do not be argumentative or loose your temper: When you argue, you are not thinking clearly. This is what the attorney wants.
- Do not raise your voice and do not talk rapidly: These two traits are perceived as threatening.
- Do not ramble: You will come across as being unfocused and not an effective witness.
- Avoid absolute words: absolutely, positively, always, never, etc.
- Do not elaborate or volunteer information: Just answer the question yes, no, I don’t know, or briefly explain, if necessary. The more you talk, the more questions will be asked of you.
- Be careful when using hedge words: “I believe”, “it seems”, “it’s possible”, and “I would say”.

DEPOSITION ADVICE FOR EXPERT WITNESSES (cont)

- Know when to make concessions and move on.
- “I don’ t know” : If you do not know, say so, no expert can be expected to know everything.
- “I don’ t recall” : You cannot say this too many times.
- Beware of open ended questions: Be concise and do not volunteer information.
- Avoid slang words: (“crock”, “nope”, “give me a break”, etc.).
- Use of slang words will cheapen your testimony and reduce your credibility.
- Be careful of counsel’ s “bumble and fumble” ploy: Do not assist the attorney as he searches for words.
- “Doctor, just answer yes or no” : If you can answer yes or no, okay. If not, explain that you must be able to explain your response in order to give it adequate explanation.
- Dealing with irrelevant, sensitive questions: Know your rights.
- Dealing with hypothetical questions.
- “Doctor, will your opinion change if.....”???

DEPOSITION ADVICE FOR EXPERT WITNESSES (cont)

- **Correcting mistakes during deposition:** As soon as you discover the mistake, correct it immediately and move on.
- **Do not speculate.**
- **“Possibility”:** If your opinion is only a possibility, the judge may not allow it to be presented to a jury.
- **Do not guess.**
- **“I don’t understand the question”.**
- **Be aware of compound questions:** Get the attorney to break the question down or rephrase it.
- **“I assume”:** Do not make unsupported or unsubstantiated assumptions in an attempt to answer questions at deposition. A better response is, “I don’t know.”
- **Taking breaks during depositions:** If you need a break, take it. Be prepared to explain any discussions you had with anyone during the break.
- **Avoid marathon depositions:** Have an understanding of how long the deposition will be scheduled for.
- **Consulting with counsel during the break:** Be prepared to state what you discussed.

SETTING YOUR FEE, BILLING, AND COLLECTING.

- Scheduling, and cancellation policy for depositions and trials.
- The party seeking to depose you as an expert witness is responsible for your fee.
- Charge a reasonable amount for your deposition / trial time.
- Billings and collections: Get paid in advance, if possible.

VIDEOTAPED DEPOSITIONS.

- **Used to preserve your testimony at trial and also to lower the lawyers expenses.**
- **Jurors are more likely to be influenced by a video presentation than a deposition transcript.**
- **The deposition notice must specify if the deposition will be videotaped.**
- **Looking good for the camera: Watch your demeanor.**
- **Be aware of tricky lawyer tactics: (pacing, pointing the camera up, poor lighting, casting a shadow, and getting the witness angry).**
- **A videotaped deposition may be used to impeach you if you appear as a witness at trial (be aware of any inconsistent statements at deposition).**

HOW TO EXCEL DURING VIDEOTAPE DEPOSITIONS.

- Dress and look like a professional.
- Avoid annoying, distracting, or unfavorable mannerisms.
- Look directly at the camera when testifying.
- Avoid long pauses: This may make you appear evasive or unformed.
- Avoid eating, smoking, drinking, chewing gum, or chewing on pencils or pens.
- Do not pick at your fingernails or face.
- Turn off pagers, cell phones, and beepers, and do not take phone calls.
- Avoid making unnecessary and distracting noise such as rustling papers, tapping your fingers on the desk, etc.
- Avoid anger, arrogance and combativeness.
- Be sure you look good.
- Be aware of your “body language”. Do not appear evasive, suspicious, nervous, or anxious.
- Do not let yourself be distracted by counsel.

HANDLING ABUSE

“THIS IS NOT FOR THE FAINT OF HEART” .

- **Abusive questioning:** Repetitive lengthy questioning, vulgarity, hostility, personal attacks, demeaning and sarcastic remarks by counsel.
- **Expect aggressive questioning, it is allowed under the legal system.**
- **Attorneys may be abusive by the following; abusive questioning, nonpayment of your fee, and wasting your time.**
- **Abuse is the following: When the deposition is conducted in bad faith or in such a manner to unreasonably annoy, embarrass, or oppress the deponent.**
- **What to do if the attorney continues the abusive attack: Warn the attorney on the record. Is terminating the deposition what you really want to do??? If you do terminate the deposition, contact your attorney. Be careful, you may be responsible for sanctions. Getting a protective order.**
- **Charge by the hour, not a flat fee for the deposition.**
- **Have a fee agreement that is signed by the attorney in advance regarding your fee for deposition, any travel time portal to portal, cancellation fees, etc.**

TRIAL TESTIMONY.

- **Prepare thoroughly, and watch your demeanor.**
- **Get to court early, and let the attorney know about any areas of concern.**
- **Dress like a professional and act like one.**
- **Have a conference with the retaining attorney prior to trial testimony.**
- **Have a clear understanding of courtroom appearance fees and try to get paid in advance.**
- **Avoid the following: sunglasses, flashy jewelry, excessive makeup, inappropriate attire, nervous mannerisms, open back shoes, etc.**
- **Follow the same rules and practices as for depositions.**
- **Do not be defensive about your fees, it is what it is.**
- **Have the chart indexed for ease of retrieving specific documents.**
- **Bring a magazine to read when waiting outside of the courtroom.**
- **Turn off cell phones, and beepers. Do not bring them to Federal court.**
- **Be sure your credentials are in order.**

SUMMARY OF SWORN TESTIMONY.

- **Giving sworn testimony is part of the practice of medicine. Get used to it or run for the hills.**
- **Keep it simple: Yes, no, I don't know, can you repeat the question, please?**
- **Probable: More likely than not. Possible: Less likely than probable.**
- **Remember, you are the expert. That is why they are taking your deposition.**
- **Do not educate opposing counsel, let him/her do their homework.**
- **The American Judicial System is an adversarial system, do not take it personally. It is usually about money.**
- **If attorneys cannot attack the evidence, they will attack the witness.**
- **If you stand in between a pot of gold, you become the target.**
- **Education, training, and experience: Use it to the best of your ability to come across as being honest, forthright, and a compassionate human being.**
- **Be polite and considerate at all times, without rolling over and playing dead.**

PEARLS FROM THE BATTLEFIELD,

MIAMI, FLORIDA.

- Do not raise your voice and do not talk rapidly.
- The louder and faster opposing counsel talks, the softer and slower you talk.
- “Kill them with kindness”.
- “Let them eat cake”.
- Identity of the claimant: Have ID in chart, i.e. copy of driver’s license, ID in medical records, tattoos, body images, etc.
- Be careful of criticizing other professionals!!!



ANTHONY J. DORTO, M.D.

DEALING WITH TRICK QUESTIONS.

- **“How much are you being paid for your testimony?”**
- **“Have you stated all of your opinions in this case?”**
- **“How was Ms. Brown referred to you?”**
- **“Doctor, you had a conference with opposing attorney before this deposition, what did you discuss?”**
- **“Doctor, what were you asked to do in this case when opposing attorney hired you?”**
- **“How much have you been paid to date for your involvement in this case?”**

AVOIDING PITFALLS WITH FORENSIC ISSUES.

- **IME versus CME.**
- **Doing an IME out of town, hospital, nursing home, other facilities. Reviewing the hospital / nursing home chart, etc.**
- **Who will be present? Claimant, relative, friend, court reporter, video photographer, opposing counsel, etc.**
- **Dealing with audio recording.**
- **Chaperones.**
- **Dealing with problematic attorneys.**
- **Use of interpreters.**
- **Keep a Federal Rule 26 list.**
- **Elkin's list.**

ELKIN'S LIST

- **Florida Rule of Civil Procedure 1.280**
- **Scope of employment in the pending case and the compensation for such service. What have you been hired to do?**
- **The expert's general litigation experience , including the percentage of work performed for the plaintiffs and defendants.**
- **Keep the list for 3 years.**
- **List depositions & trials. Approximate # of IME's performed in one year.**
- **An approximation of the portion of the expert's involvement as an expert witness, may be based on # of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.**

FEDERAL RULE # 26

- List all depositions & trial for the past 5 years.
- Must include the following:
- Date, case name(claimant),court(civil or Federal), deposition or trial, case #, attorney who hired expert, P/D, location of legal proceedings.

BODY LANGUAGE TESTIFYING

- **Feet flat on floor, arms on armrest & hands on table in front. Sit erect.**
- **Gesture normally. Avoid touching your face, licking lips, odd facial expressions. Keep your lips hydrated.**
- **Speak to the jurors.**
- **Slowly lean forward when questioned.**
- **Speak-up with confidence with steady & strong volume until the end of your response.**
- **Do not be confrontational. Always take the high road.**
- **When an objection is made, keep silent and wait for direction on how to proceed.**

Florida: Medical Causation Threshold

- **Reasonable Degree of Medical Certainty(RDMC).**
- **Example: The opinions expressed in this report are within a reasonable degree of medical certainty.**

Frye Standard

- **Frye test, or general acceptance test is a test to determine the admissibility of scientific evidence.**
- **It provides that expert opinion based on scientific technique is admissible only where the technique is generally accepted as reliable in the scientific community.**

Daubert Standard

- **Provides a rule of evidence regarding admissibility of expert witnesses' testimony during United States legal proceedings.**
- **Under Daubert, a trial judge has a duty to scrutinize evidence more rigorously to determine whether it meets the requirements of Federal Rule of Evidence 702.**
- **Dec 17, 2013 - Florida courts must now adhere to the Daubert Standard for admitting expert testimony.**

SKELETONS IN THE CLOSET

- **DUI**
- **ARREST HISTORY**
- **DOMESTIC VIOLENCE**
- **MEDICAL LICENSE COMPLAINTS /
RESTRICTIONS**
- **BANKRUPTCY, CHILD SUPPORT, ETC.**
- **BE UP FRONT AND MOVE ON.**

OPPOSING ATTORNEY DEPOSITION TRICKS

- **Connecting to the internet and communicating with another expert (wifi).**
- **Questions to you from unknown experts.**
- **Faxing professional articles to the deposition and having them submitted into evidence.**
- **Discussing a video CME: Does it match the report??**

RESOURCES TO SUPPORT YOUR OPINIONS

- **Official Disability Guidelines: Work Loss Data Institute.**
- **Medical Disability Advisor: Presley Reed, M.D.**
- **A Physician's Guide to Return to Work. AMA Press.**
- **AMA GUIDES, 6th EDITION**
- **FLORIDA UNIFORM PERMANENT IMPAIRMENT RATING SCHEDULE, 1996**

REFERENCES

- **How to excel during Depositions: Techniques for Experts That Work. S. Babitsky, Esq. and J. Mangraviti, Jr., Esq.; SEAK, Inc., 1999.**
- **Anthony J. Dorto, M.D.; Professional Experience over 30 years (School of Hard Knocks).**

THE END

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*** Reference: How to excel during depositions: Techniques for experts that work. S. Babitsky, Esquire and J. Mangraviti, Jr., Esquire; SEAK, Inc., 1999.**