The Deposition

A copyrighted excerpt from
Adverse Events, Stress, and Litigation: A Physician's Guide
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Discovery: Gaining a Foothold for the Defense

> When my adversary has drafted his writ against me, I shall wear it on my shoulder. And bind it round my head like a royal turban. I will give him an account of every step of my life and go as boldly as a prince to meet him.
>
> —Job 31:36-40

Within a time schedule set by the court, our lawyer responds with an appearance, that is, a letter to the plaintiff's attorney setting down the ground rules agreed to by both lawyers. These terms of engagement allow the defense to challenge through filing arguments, the "sufficiency" of the plaintiff's case. This instrument also defers a formal filing of the answer to the charges until this phase, known as the "pleadings," is completed.

Our lawyers eventually file an answer, which includes specific denials of each and every allegation of the complaint coupled with a request that the court dismiss the claim in its entirety. These pleadings can be amended throughout the discovery process up to and including the trial phase. We should not be surprised, during this period, when plaintiffs amend their complaint or we amend our answer.

Forms of Pretrial Discovery

Both in every state and in federal court, parties to a lawsuit engage in some form of discovery. The goal for both sides in discovery is to learn everything possible about each other's case before trial so that they can make intelligent decisions about how to manage the case.

Interrogatories

Pretrial discovery can take the form of written questions, or interrogatories. Each side asks the other to respond, under the seal of an oath, about background facts and information concerning the parties and any witnesses who may be called in the event of a trial. This first purpose of the process is to narrow the case's factual issues and to assist the lawyers in developing questions for depositions. In jurisdictions where "requests for admissions of facts" are allowed, interrogatories also produce valuable evidence to support requests that are used to establish that certain key facts are not in dispute. We usually participate in our lawyer's drafting interrogatories to the plaintiff and responses to the plaintiff's interrogatories to us.

Requests for Admission of Documents

To simplify the trial procedures that govern the introduction of documents as evidence, lawyers may use a "request for admission of genuineness of documents" whose purpose may be, for example, verification of the identity of medical records from another state. Discovery can also include "requests for production" that, as with interrogatories, are designed to flush out the opponent's documentary evidence. In most states, these requests are exchanged under oath, so anything less than full disclosure can result in monetary sanctions and the striking of allegations or answers, actions that can be legally damaging for those sanctioned.

Our lawyer uses this process to obtain all medical records concerning the plaintiff regardless of where or when the treatment occurred. Such a complete medical record history of the plaintiff may reveal the actual, or a contributing, cause of the injury that the plaintiff has attributed solely to our negligence. Lawyers may also use materials from the record to test the credibility of plaintiffs in their deposition.

Disclosure Before Trial

Most states and the federal court system allow broad discovery with disclosure of the findings before trial. Each side discloses the names of their witnesses, including experts. After the lawyers for both sides depose or question these witnesses under oath, they provide summaries of their proposed testimony. By the time the case is ready for trial, each side knows almost everything about the strengths and weaknesses of the other side's case. In view of full dockets and limited courtroom space, judges encourage broad discovery as a way to motivate the parties to settle or request dismissal before the case goes to trial.

We should actively familiarize ourselves with the rules relating to disclosure and the pretrial depositions of experts in our particular state. Oregon is one of the few states that prohibit pretrial disclosure of expert witness identities or their testimony. This limited discovery approach, known with mild cynicism as "trial by ambush," is the exception rather than the rule. In limited discovery, defense lawyers do not have

the opportunity to depose the other side's expert and must conduct their cross-examination without benefit of pretrial preparation. Familiarity with experts from previous trials, however, gives defense attorneys some sense of their style and credibility. Exploring the merits of the opponent's case in discovery may consume a substantial portion of the time it takes to resolve a claim. The trial therefore becomes less a forum for learning the other side's evidence and more a venue for determining which side has the most persuasive facts, opinions, and arguments.

Depositions

Judges give attorneys wide latitude in pursuing avenues of discovery, allowing them to ask questions and elicit answers about many matters that they would not admit into evidence in a trial. Such questions are justified by the evidentiary rules that foresee that the answers to these inquiries may lead to other admissible evidence. Physicians should expect attorneys on both sides to cast wide nets in their pretrial searches.

Our Deposition

It is almost certain that we will be deposed during the discovery process, that is, be questioned, under oath with a court reporter present just as in the courtroom. Attorneys for both sides are present and participate in our examination and cross-examination. Our deposition testimony is evidence that will influence, perhaps decisively, the outcome of the matter at issue. Even though depositions are taken in a setting less formal than the courtroom, in the lawyer's office, for example, and without a judge or jury present, it does not mean that we can lower our guard or approach the experience casually.

We learn how best to collaborate with our attorneys and come to appreciate that, just like us, they possess skills that serve us well in some ways but not in others. Because each case is different, our experience of doing well in one deposition does not justify our lowering our vigilance or lessening our preparation for a future one. As Dr. Laura West tells us, familiarity with the process is not the only criterion for giving a good deposition:

> I was smarter at giving a deposition the first time I ever did than with some of the other ones that I've given. Just try to do what you're supposed to do. Just answer the questions, don't give any other information. My deposition in this last case was poor. I just didn't stay on track. Maybe I had been up. I don't know if I had taken call, I just wasn't at my best that particular day. The best things to do are just know the case backwards and forwards and do exactly what your lawyer says. They know the law.[2]

General Directions for Our Deposition

Nothing less than thorough preparation for our deposition, including practice questions and answers, as well as testing our reactions to techniques used by

plaintiff lawyers to upset and unnerve us will suffice. Our lawyer will outline the contents of a good deposition and offer us a list of key points to follow in preparing ourselves to perform well. The following generally helpful suggestions are not legal advice; we should follow the lead of our attorney in specific circumstances.

TELL THE TRUTH. Just before jury deliberations begin, the judge instructs the jurors on the law and on how to judge the credibility of witnesses. In many jurisdictions, the standard instruction is that witnesses shown to be false in one part of their testimony are to be disregarded in all other parts. A single untruthful answer, even if given without intent to mislead or deceive, can destroy our defense. To give a truthful answer we must both hear and fully understand the question. We make a mistake whenever we assume that we know what the questioner means when they ask us: "She said you were not paying attention the second time she brought this up. Is that true?" To answer that question truthfully, we must understand who "she" is, when "the second time" was, and what "she brought up."

MANAGE OUR FEELINGS. Most of us are angry about being sued and about accusations that we failed to take proper care of our patients. Experienced plaintiff attorneys look for ways to agitate our already roiled feelings to make us express our anger and frustration. Venting such emotions not only shatters our calm attitude and demeanor but also, more decisively, robs us of our ability to listen and respond accurately to questions. Successful defendants immunize themselves against the implied criticism, sarcasm, or derision with which opposing counsel may lace their tactically hostile questions. We should respond to the disagreeable questions of the lawyer with an enlarged calm and increased self-control. Hostility may be the other side's sole weapon. If we are not cowed by such hostile approaches into making mistakes or errors in our testimony, these histrionic maneuvers may subvert their own case.

LISTEN TO THE QUESTION ASKED AND ANSWER ONLY THAT QUESTION UNLESS SOME, FURTHER EXPLANATION IS REQUIRED. Imagine a target with a bull's eye surrounded by concentric circles. A well-experienced attorney tells us that our answers should be aimed at and limited to the bull's eye and we should shape answers that will be precisely on target.

QUESTION: When did you finish your residency?

INAPPROPRIATE ANSWER: I finished my residency at Stanford University Medical Center in 1987.

APPROPRIATE ANSWER: 1987.

QUESTION: Have you been sued before?

INAPPROPRIATE ANSWER: I've had no other lawsuits but I have reported several incidents to my insurer that never became suits.

APPROPRIATE: ANSWER: NO.

TAKE TIME TO ANSWER THE QUESTIONS. Some questioners try to get us to say more than we need to by asking, in staccato fashion, questions that can only be answered "yes." They then append a key question, banking on our giving the automatic "yes" answer. Accepting the cadence of the questioner, we may later regret our hasty and erroneous answer. By listening with care to each individual question, we can avoid making the serious admissions that these trap-like inquiries are designed to manipulate out of us. If Rule One is never to feel rushed in a deposition, Rule Two tells us never to worry about how much time we take to think through and understand questions. This is why setting aside sufficient time for our depositions allows us to feel relaxed and unhurried.

AVOID THE NATURAL IMPULSE TO TEACH. We know a great deal about the medicine of our specialty and are usually highly experienced in delivering care in a safe, efficient manner. Some lawyers appeal to this expertise and prompt us to educate them, playing the unsophisticated dumb country lawyer, fumbling the vocabulary, mixing up the anatomy, and appearing unfamiliar with the chart. Beware of lawyers bearing such gifts and educate them only at your own peril. The best deposition witnesses follow their lawyer's advice and answer questions narrowly, volunteering as little information as possible and withholding correction of even inaccurate science and loosely constructed hypotheses.

QUESTION: Since 80% of women who have a CA-125 of less than 15 units have the likelihood of malignant disease, how do you explain your failure to consider that your patient had ovarian cancer?

INAPPROPRIATE ANSWER: Well, that is not correct. The data suggest that patients whose CA-125 is greater than 35 units have a greater likelihood of malignant ovarian cancer and....

APPROPRIATE ANSWER: I am unable to answer the question as you have stated it.

RECOGNIZE THAT HINDSIGHT IS NOT ADMISSIBLE. It is almost second nature for physicians to evaluate their care of patients openly and honestly and to value the judgments and criticisms of their peers. In retrospect, much can be said about any and every decision we make in real time with limited information. In a lawsuit, however, the focus is on events as they occurred at the time of the incident. Our lawyer will prepare us to answer this line of questioning, but we must restrain ourselves from peering back through the lens of the plaintiff lawyer's "retrospectoscope."

QUESTION: Doctor, wouldn't you have avoided severing the patient's common bile duct had you opened the patient immediately rather than continuing laproscopically?

INAPPROPRIATE RESPONSE: Well, yes, I guess I could have prevented the bile duct problem if I had opened the patient immediately.

APPROPRIATE RESPONSE: In the circumstances at the time, my decision was both clinically appropriate and in keeping with the community standard.

GAUGE THE ATTORNEY'S EXPERIENCE. Not all plaintiff lawyers are skilled in prosecuting medical malpractice claims. Lawyers without trial experience may and do bring negligence cases to trial. During discovery, inexperienced lawyers often make serious mistakes. They may, for example, ask questions that expose their own theory of the case: "Isn't it true, doctor, that someone in the OR warned you several times that...." This alerts our counsel to investigate which staff member in the OR may have issued a warning. The plaintiff attorney may also unwittingly reveal problems that could confront us later as a witness, giving our defense counsel the opportunity to remedy the situation with us before trial.

The Plaintiff Attorneys' Goals

PLAINTIFF ATTORNEYS NEED TO ESTABLISH WHAT WE KNOW AND, MORE, IMPORTANT, WHAT WE DO NOT KNOW. If, during our deposition, the plaintiff lawyer fails to pin us down on key facts or does not establish our lack of knowledge about them, we may be able to present previously unrevealed information that can turn a trial in our favor.

PLAINTIFF ATTORNEYS WILL TRY TO CAPITALIZE ON OUR LEGAL NAIVETÉ AND GET US TO MAKE ADMISSIONS THAT CAN BE USED AT TRIAL.

QUESTION: Doctor, are you familiar with Smith's text on orthopedic surgery?

APPROPRIATE RESPONSE: Yes, I am familiar with it.

QUESTION: Well, then, doctor, you recognize this text as authoritative, do you not?

INAPPROPRIATE RESPONSE: Yes.

APPROPRIATE RESPONSE: It is one of many useful texts.

This may seem like an innocent enough question about a text that, in scientific terms, may be authoritative. Legally, however, an affirmative answer may also be a potential bombshell. The plaintiff attorney can use our "yes" and our endorsement of it as an authoritative text to turn it into an expert witness against us by reading passages that contradict what we have said on the stand or in our deposition.

PLAINTIFF ATTORNEYS MAY ASK TRICK QUESTIONS TO CAUSE US TO MAKE ADMISSIONS THAT CAN BE USED AT TRIAL.

> QUESTION: Doctor, are you aware that when my client told his current doctor that you performed the surgery that left him crippled, Dr. Brown just rolled his eyes and shook his head?
>
> INAPPROPRIATE RESPONSE: Well, Dr. Brown has always been critical of my work and is responsible for generating several other lawsuits against me.
>
> APPROPRIATE RESPONSE: First, I was not aware of that. And second, I know of no reason why Dr. Brown would act that way. My care was completely appropriate and my patient's injury was an unfortunate but known side effect of the procedure, which I covered fully in the informed consent conference.

The inappropriate response opens up new lines of questioning. The lawyer may then ask what inspired Dr. Brown's criticism as well as about the other cases we mentioned. Neither of these lines of inquiry would have opened up had we answered the question appropriately.

PLAINTIFF ATTORNEYS GAUGE OUR STRENGTHS AND WEAKNESSES AS WITNESSES. Are we easily rattled or confused under intense questioning? Do we take the bait proffered by the plaintiff lawyer's challenges to our competency or in his insinuations that we are reckless or greedy? These lawyers also recognize when we are charismatic, unflappable, and articulate professionals. The credibility of the witnesses can determine the outcome of any case. If we have performed well in a deposition and the plaintiffs witnesses perform poorly, the plaintiff attorneys may re-think whether they should continue with the case.

PLAINTIFF ATTORNEYS MAY USE OUR DEPOSITION TO IDENTIFY OTHER WITNESSES, DOCUMENTS, OR EVIDENCE OF POTENTIAL VALUE. We may testify to the complex jumble of events surrounding our decision to perform an emergency cesarean section during a particularly difficult delivery. While the plaintiff lawyer will attempt to pin us down on the facts, as we believed them to be, he will also search our testimony for mention of other witnesses whom they may call as potential defendants or as witnesses who may contradict our version of what happened. The plaintiff lawyer may even ask us for the names of persons, other than our lawyer, to whom we have spoken about the case.

> QUESTION: Doctor, please name any individuals with whom you have discussed this case.
>
> APPROPRIATE RESPONSE: Aside from my lawyer, I have mentioned that I have been sued to some individuals and may have told them how I felt about it but I have not discussed the facts or circumstances of the case with anyone.
>
> APPROPRIATE RESPONSE: No one other than my lawyer.

PLAINTIFF ATTORNEYS MAY TRY TO MAKE US HOSTILE WITNESSES. Making us hostile witnesses means that the lawyer wants to make us a witness against ourselves by using our answers to undermine our own testimony. The plaintiff attorney attempts to achieve this goal by posing dilemma questions. Most of us profit from some instruction from our attorneys on how to recognize and respond appropriately to these questions.

> QUESTION: Doctor, isn't it correct that if the physician uses reasonable care, this result (referring to the patient's injury) does not ordinarily occur?
>
> INAPPROPRIATE RESPONSE: That's correct.
>
> APPROPRIATE RESPONSE: Although the result may not ordinarily occur, when it does occur, it is most often due to the inherent risk of the procedure.

Careful dissection of the question lays open its internal dilemma. Does this injury ordinarily occur? When it does, is it always the failure of the physician to provide reasonable care? By answering affirmatively to this double-pronged question, we qualify ourselves as expert witnesses against ourselves.

PLAINTIFF ATTORNEYS MAY USE THE DEPOSITION TO PRESERVE THE TESTIMONY OF SOMEONE WHO MAY BE UNAVAILABLE FOR APPEARANCE AT TRIAL. The time between deposition and trial may be lengthy and a key witness may not be able to testify in person because of illness or commitments scheduled long before the trial date was set. In such cases, their deposition, especially if available on videotape, is used instead.

The Defense Attorneys' Goals

DEFENSE ATTORNEYS FILTER OUT INAPPROPRIATE QUESTIONS. During our deposition, our interrogators may ask us questions that call for an objection. We must recall that the court reporter takes down each and every word spoken by anyone during the process. Objections made in timely fashion by our lawyers will be on the record, allowing a judge to rule later on their merits. In some instances, our attorneys will instruct us not to answer a specific question.

> QUESTION: Doctor, what was the finding of the hospital peer review committee concerning your care of my client?

Our attorney will interrupt the process and object on the grounds that this calls for us to reveal privileged information and will instruct us not to answer. The plaintiff attorney may then choose to contact a judge for a ruling on the objection "in real time." If the line of questioning is crucial to the plaintiff's case, they will have to argue the point, interrupting the deposition, which will have to be "continued" at a later time. Alternatively, the plaintiff attorney may note and seek a later ruling

on the objection. Our attorney makes the call on whether we answer the question that prompted the objection.

In some instances, our attorneys will object to the *form* of the question and still allow us to answer it. If such objections to form are not made at the time the question is asked, they are waived. It is important to understand this because our attorney's objection may preclude the use of this question and answer during the trial to impeach us, that is, demonstrate that we have contradicted ourselves.

DEFENSE ATTORNEYS PREPARE THEIR CLIENTS CAREFULLY. Defense lawyers prepare themselves and their clients carefully for a deposition. Our lawyers may suggest that we participate in witness school, in which instructors spend many hours preparing us, both substantively and stylistically, to answer the questions that are certain to come up during our deposition. According to a risk manager with a large malpractice carrier, however, not every attorney prepares their physician clients so thoroughly before their depositions. Dr. John Schmidt ruefully describes his own experience.

> The attorney for this particular case was a weakling, who, in my experience, was not very adept or experienced, not very verbal and vocal about things, and didn't play hardball with the plaintiff attorney at all. And just sort of sat there. He did not have a lot of objections during the time and, I thought, kind of just let me be strung out. So, I almost felt abandoned by my attorney. I'm not sure what legal malpractice is or not but I know good attorneys versus not so good attorneys. I thought he would be very adequate in my defense and I thought he should do OK, but much to my dismay, it did not turn out that way. So, I've usually had someone in other cases who was trying to prepare me, give me the proper advice in advance, of what to read, what to expect, and how the deposition would be conducted. But at that particular deposition it was just the opposite and that didn't turn out well. I realize that a deposition is different than a trial. I think that during the deposition, latitude is far greater, that they can ask what they want and say what they want and things can be stricken at a later time. But it sure is difficult to sit through.[3]

Tips Defense Attorneys Give Physicians to Prepare for Deposition

- *Pay close attention throughout the deposition.* By answering too quickly we may "step on" our lawyer's objection.
- *Pause slightly at the beginning of every answer to make sure we understand the question and to give our lawyer time to object.*
- *Listen to the objection.* Our lawyer is giving us important information about how to answer the question.

QUESTION: Doctor, didn't your nurse call the patient's mother and tell her not to worry about the situation?

COUNSEL: Objection, the witness has no personal knowledge.

MESSAGE: *The message to us is clear.*

INAPPROPRIATE RESPONSE: Well, the nurse is a very caring person so she might have said that.

APPROPRIATE RESPONSE: I do not know.

QUESTION 2: Doctor, you had a great deal of difficulty visualizing the operative site and you did take the opportunity to clear the field before proceeding, isn't that correct?

COUNSEL: Objection, compound question.

MESSAGE: *This is our clue to ask the examiner to rephrase the question or break it down into two parts.*

QUESTION 3: Isn't it true, Doctor, that the radiologist's report of my client's mammogram was crystal clear?

COUNSEL: Objection, the question is vague and ambiguous.

MESSAGE: *This is our clue that we need to ask for clarification.*

APPROPRIATE ANSWER: The report stated: _____ . I would not equate that with your characterization that the mammogram was crystal clear.

- *Be prepared to see the plaintiff at deposition.* All parties to a lawsuit have the right to be present when another party is examined under oath. In an attempt to make us uncomfortable, the patient may sit directly across from us. The plaintiff attorney also believes that to testify in the client's presence makes us more cautious or conciliatory. Our attorney will intervene if the patient is overtly disruptive by, for example, grimacing or making sounds that serve as commentary on our answers. We must simply ignore them, whiting them out, and focus our attention on the attorneys and their questions.

Dr. John Schmidt arrived at his deposition to find not only the attorneys present but also his patient's widowed husband and his two teen-age daughters.[4]

> They sat there looking at me, and what a bad guy I am, I killed their mother. So this intimidation with family members around during a deposition was very memorable, obviously with all those eyes looking at me, peering at me, staring at me during that same time. I was aware of that as being a ploy. It had happened before. I learned my lesson early on about intimidation.... Teenage daughters, tears running down their eyes about Mom, and what a bad doctor I am again, and you did this, you didn't do that. That was particularly memorable with the young daughters there. The husband always sneering and leering at me. So that particular deposition

was one of the most trying ones I have ever had just because of the daughters being there and their emotional reaction.... And the questions typically being offered and asked about me, my background, and hearing all these things about, "Well, doctor, you've been sued 14 times" and these questions going on about that and the significance of it or lack of significance. So those kinds of things you take to heart so much and it's so grinding, just so intolerable. There is no way to squirm out of it. There is no way to not answer the question. You're there. You've got to step up to it.

- *Unless advised against it by our attorney, be present during the patient's deposition and those of key plaintiff experts.* Exaggerating is always more difficult in the presence of the very professional being criticized. It is by no means unusual for us not to know what really went on at and around the time of the incident. Charts tell only part of the story. Frequently, the patient's version of events is totally at odds with that of the hospital. For such reasons, many defense attorneys insist that their clients attend the plaintiff side's depositions.
- *Be prepared for other attempts to intimidate us.*
- *Be prepared for the possibility that the plaintiff attorney may videotape our deposition.* There are advantages to videotaping. On cross-examination at trial, opposing counsel can project the actual deposition testimony side by side with a transcript of our answer so that the jury can evaluate both our demeanor and the content of our answers. Videotaped sworn testimony may be admissible if, for some reason, a witness is not available for the trial. Juries have a much greater sense of the witness's credibility when they can view the actual question and answer exchanges. If we are in a jurisdiction in which depositions are routinely videotaped, we should be prepared well, working with our attorney to make the best presentation possible.
- *Understand the difference between close-ended and open-ended questions.*

CLOSE-ENDED QUESTION: You did not tell the patient about the risks of this surgery, did you, doctor?

Clearly, the questioner is attempting to elicit a concession from the physician.

Signal flags are raised by questions that begin with, "Isn't it true that... ?" or "You don't disagree that... ?" or "Aren't you saying that... ?" These are efforts to pin us down or to concede a key point. Attorneys generally ask open-ended questions when they are simply interested in obtaining information. Our temptation is to provide too much information. We should respond by asking for clarification or in a way that forces the questioner to ask for more precise information.

OPEN-ENDED QUESTION: Doctor, what did you tell your patient about the risks of surgery?

APPROPRIATE ANSWER: I told my patient that there were some risks.

QUESTION: Which risks?

INAPPROPRIATE ANSWER: Well, as with any surgery, there are risks, and this was a particularly difficult procedure that I am now much more familiar with. However, I don't see what that has to do with the lawsuit, which in my opinion has no merit whatsoever.

APPROPRIATE, ANSWER: Infection, bleeding, damage to another organ, even death.

- *Listen for questions that contain assumed facts.* Sometimes lawyers ask questions embedded with some fact or series of facts. The question appears to be seeking information about who was in the room but, in fact, the attorney is maneuvering to have us confirm that we alone made a decision crucial to the case.

QUESTION: Who was in the operating room when you made the decision to continue laproscopically?

OBJECTION: Object as to the form of the question. The question is compound. You can ask him who was in the room and then ask him whether or not he made a decision at that time.

Compelled to answer the question, we may say the following:

APPROPRIATE, ANSWER: I made no decision alone, and the following people were in the room.

If our attorney does not object to the compound nature of the question, we should take the initiative and give the following answer:

APPROPRIATE ANSWER: I cannot answer the question as you have phrased it. Please break it up into two separate questions.

- *Listen carefully to the questioner's cadence.* We need to be sensitive to the questioner's pace and phrasing of questions. Experienced plaintiff lawyers may vary their cadence, asking two or three questions very quickly and then asking one in a slow manner. They may also jump from one subject to another. If we do not listen carefully, the change in pace and abrupt shift in subject matter may throw us off. Expecting a logical progression, we may be lulled into anticipating questions that never materialize. It is not useful to formulate answers while questions are being asked. It is far better to focus on the one question being asked and then to take the time to formulate the best answer. Our lawyer may have past experience with the plaintiff attorney and may help us understand how to deal with his or her typical style. The key is being alert to being lulled into a sense of complacency or so mesmerized by the pace and tempo of the inquiry that we lower our guard and lose our attention and concentration.
- *Pay attention to efforts by the plaintiff attorney to get us "off script."* During the preparation of our deposition with our counsel, we concentrate on

organizing the chronology of events as well as an account of all the actions we took on behalf of our patient. That familiarizes us fully with the case and enables us to answer all questions truthfully and in ways helpful to our case. The good plaintiff attorney may use any of the previously discussed tactics in an attempt to pull us "off guard" and "off the script." They may ask such questions as, "Can you explain, doctor, why ... ?" or "Please give me all the reasons that you ..." or "What was your plan going into the case?" *We do not want to answer these questions quickly.* The examiner's chance of striking gold rises exponentially whenever we respond to issues that we are not prepared to discuss. In this instance, we want to respond truthfully but in a limited way. If we are asked questions for which we are poorly prepared, we may begin to improvise responses and drift into areas dangerous to our defense. Our lawyer should prepare us for such questions, as they may be a part of our deposition. • *Do not get angry or show irritation if the attorney repeatedly asks the same question.* Sometimes the attorney will pose the same question, with minor variations, over and over. Usually this is an attempt to trick or frustrate us and turn us into an angry, frustrated physician who is no longer able to perform well.

The Defendant's Goals

As every guide or lecture presentation on the subject emphasizes, deposition preparation is vital to a successful defense. Good preparation demands time from both physicians and experienced lawyers. The physician must also be rested and in total command of the chart and accompanying materials.

OUR PRINCIPAL GOAL IS TO FINISH THE DEPOSITION WITHOUT MAKING A MAJOR MISTAKE. A deposition free of material error leaves the factual underpinnings of our presentation to the jury intact and provides our defense expert witnesses with a firm basis for their testimony. We accomplish this when we answer questions truthfully, behave professionally, and demonstrate mastery of the medicine and documentation in the case. Our performance need not, however, be perfect. We must remember that lawyers are professional advocates who practice the art of questioning every day. We can always review our performance critically, finding areas in which we can improve. Should the case go to trial, we will have ample time to address such issues with our defense attorney.

WE WANT THE PLAINTIFF ATTORNEY TO BELIEVE THAT WE ARE FORMIDABLE OPPONENTS. We want the attorney to know that we give the jury an impression of us as competent, caring physicians who practiced within the standard of care and did everything possible to provide appropriate care for our patient. If the case comes

down to who is more credible, and with all things being equal, jurors frequently side with the physician over the patient. Smart plaintiff attorneys will factor this into the chances of winning a verdict and, as noted previously, following a strong physician performance in a deposition, will often drop the case. Doing well in our deposition gives us a sense of strength and resolve helpful at trial. We have engaged the enemy and we have performed with distinction. We solidify our defense by completing our deposition without major mistakes.