EFFECTIVE STRATEGIES IN OPHTHALMOLOGY DEPOSITIONS


Preparation for a deposition is the most important factor in achieving effective testimony when defending a medical malpractice case.

BY THOMAS A. MOBILIA AND KENNETH R. LARYWON

A deposition, or *examination before trial*, is testimony given under oath prior to a trial. The primary objective of a plaintiff's attorney who is taking a defendant ophthalmologist's deposition is to obtain testimony that can be used against him or her at trial. A deposition, therefore, is not the ophthalmologist's opportunity to tell his or her side of the story.

USE OF DEPOSITION TESTIMONY AT A TRIAL

Generally, deposition testimony can be used during a trial to contradict or impeach the witness if the trial testimony is different from the deposition testimony.[1] It also can be read to the jury in the event that the witness is unavailable to testify at trial, and it can be relied on by experts for both sides in formulating opinions about the case.[2] In New York, for example, the deposition of a person licensed to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances.[3]

ADVANCE PREPARATION

For the ophthalmologist, there is no substitute for careful preparation well in advance of a deposition. Federal rules underscore the need to be well prepared, as no objections may be made at a deposition except, for example, objections to the form of the question.[4] In New York, if an objection is made by counsel, the witness must still answer the question, unless doing so would violate a privilege or right of confidentiality, or, if the question is palpably improper, answering it would cause significant prejudice to any person.[5] So-called *speaking objections* to assist the witness are prohibited; any objection by an attorney must be framed so as not to suggest an answer to the witness.[6]

In preparation for the deposition, the ophthalmologist must review the plaintiff's office record and hospital chart to become thoroughly familiar with the treatment rendered, as well as reports from prior and subsequent treating physicians. The ophthalmologist must be prepared to succinctly answer questions concerning, for example, the reason for the referral, previous medical and surgical histories, the initial patient contact, presenting complaints, history of presenting illness, and the care and treatment rendered during the office visit. The defendant must also be prepared to answer questions regarding any changes in the history provided, complaints, or patient's condition during each subsequent encounter.

Before the deposition takes place, the ophthalmologist must also develop an excellent understanding of the liability, proximate causation, and damages claims being asserted in the lawsuit because they will be the focus of plaintiff's attorney's questioning. Accordingly, the ophthalmologist must review and analyze the claims set forth in the *bill of particulars* and/or written interrogatories. Similarly, given that the plaintiff's testimony can directly affect issues related to informed consent, the ophthalmologist should be aware of what the plaintiff claims was said, or not said, to him or her regarding treatment options and risks and benefits. The plaintiff's deposition is typically conducted prior to the defendant's deposition.

PRINCIPLES OF EFFECTIVE TESTIMONY

There are several principles that the ophthalmologist should follow during questioning.

No. 1: Never become angry. This must be true no matter what the plaintiff's attorney asks or says to you.

No. 2: Do not volunteer information. If clarification is needed, your defense attorney will elicit it later during the deposition. If you do not understand a question, ask for it to be rephrased. If you did not hear the entire question, ask for it to be repeated.

No. 3: Listen carefully, and pause after each question. Often, a plaintiff's attorney will ask you a question utilizing part of your previous answer,

but he or she will include additional information that you did not state, and then ask you if that is a true statement. Listening carefully and pausing after each question allows your attorney to make any appropriate objection and affords you time to frame a proper answer. If a lawyer says "off the record," do not make any gratuitous comments. Such comments can still be used against you.

No. 4: Be prepared to answer general questions. The ophthalmologist will be asked general questions about the medical disease or condition at issue in a case, such as: "What is glaucoma?" and "What are the signs and symptoms of glaucoma?" Although these generalized questions may seem irrelevant or innocuous, they are not. In the case of the latter question, the plaintiff's counsel's goal is to have the ophthalmologist provide a list of all the signs and symptoms associated with a particular condition, and then in subsequent questioning elicit testimony that one or more of these signs or symptoms were present, yet the ophthalmologist failed to recognize and evaluate the patient for the condition.

SCOPE OF QUESTIONING

The deposition will likely address every aspect of the treatment at issue, including the indications for surgery as opposed to conservative treatment. With proper preparation in such a case, the ophthalmologist can explain his or her management of the patient, the use of different medications, the components of the medication that was prescribed and why it was selected for the particular patient, and why the physician eventually concluded that such treatment was ineffective and that surgery should be performed. This testimony may be effective in rebutting a claim that the ophthalmologist negligently opted for surgery instead of more conservative treatment.

Other questions may focus on the patient's medical history and follow-up care. The physician should be prepared for the plaintiff's counsel to ask questions regarding conversations with the patient. If the physician recalls conversations with the patient that were not documented in the chart, he or she should be prepared to answer questions as to why the conversations were not noted.

The plaintiff's counsel may also inquire whether the physician has performed expert reviews as a consultant or testified as an expert witness at a trial. Concise, accurate responses are essential because it can be verified whether a witness has or has not testified as an expert.

The physician also must be alert for questions that seek to elicit concessions to a departure from accepted practice. Needless to say, any such concessions would have a devastating impact at trial and might even form the basis for a summary judgment motion by the plaintiff.

If portions of a surgical procedure were performed by a fellow or resident acting under the physician's supervision, or if testing was performed by a certified ophthalmic assistant or certified ophthalmic technician, the physician must be prepared to give an accurate, factual account of the involvement of such persons.

USE OF MEDICAL LITERATURE

In advance of the deposition, it is important to determine whether there is any medical literature related to the ophthalmic care that was rendered that may have a positive or negative impact on the defense. A plaintiff's attorney's goal is to have the ophthalmologist recognize a particular study, article, book chapter, or treatise as *authoritative* in his or her field, so that statements contained in that literature can be read to the jury at trial in the guise of cross-examination or be used to impeach the physician's credibility.

Articles written by the ophthalmologist on subjects related to the condition at issue must also be reviewed, particularly if they contradict the rationale for the treatment rendered to the plaintiff. The ophthalmologist should be prepared to qualify any statements in the articles he or she has written based on differing circumstances or increasing acceptance of different techniques.

THE MEDICAL JUDGMENT DEFENSE

In a medical malpractice claim, it may be a defense strategy to claim that a physician made a choice among medically acceptable alternatives: for instance, utilizing sulcus fixation rather than an alternative such as anterior chamber IOL implantation or suturing an IOL or, in the case of glaucoma treatment, performing a trabeculectomy rather than continuing to treat with medication. In New York, for example, the trial court can charge the jury that a "doctor is not liable for an error in professional judgment if he or she does what he or she decides is best after careful evaluation, and if it is a judgment that a reasonably prudent doctor could have made under the circumstances."[7] If the medical judgment defense is potentially applicable to the facts of the case, the reasons why the physician selected the particular treatment option in question can be elicited at the deposition.

CONCLUSION

Effective deposition testimony is critical in defending a medical malpractice action. An ophthalmologist's meticulous preparation with defense counsel in advance of the deposition is the key to achieving that result. ■

1. New York Civil Practice Law & Rules (NY CPLR), Rule 3117(a) (1).
2. NY CPLR, Rule 3117(a) (3).
3. NY CPLR, Rule 3117(a) (4).
4. Federal Rules of Civil Procedure, Rule 30(c)(2).
5. New York Codes, Rules and Regulations §221.1–221.3.
6. NYCRR §221.1(b)
7. New York Pattern Jury Instructions 2:150.

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