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Depositions: Common Questions and Guidelines for Preparation

Consider the following liability scenario:

> *A 76-year-old patient presents for outpatient physical therapy. He relays to an employed therapist that he is experiencing dizziness. The employee fails to report the finding to the referring healthcare provider for follow-up care, and the patient consequently suffers a debilitating stroke. A lawsuit ensues against the employee and the healthcare practice premised upon the employee's negligent actions. The patient's attorney asserts that the business owner is responsible for hiring and maintaining qualified staff. Both the owner and employee are required to give a deposition in the litigation proceeding prior to trial.*

Sitting for a deposition in a professional liability (PL) lawsuit is potentially one of the most stressful events a healthcare provider or business owner can encounter, in part because it represents an opportunity to directly influence the outcome of a case. According to data compiled by NSO and HPSO, more than $130 million was paid in PL judgments and settlements on behalf of nursing and physical therapy professionals from 2010 through 2015.[1] In a number of those lawsuits, deposition testimony revealed facts and supporting information that negatively affected the healthcare provider's defense in the underlying case.

Similar to when clinicians prepare to treat patients – either by researching available therapeutic options or consulting with peers on a plan of care – a deposition also requires their careful preparation. In fact, a poorly prepared witness can unnecessarily complicate a case if answers to critical questions are incomplete or inconsistent.

To help healthcare professionals and business owners understand the deposition process, this edition of *Healthcare Perspective®* provides a brief overview of the legal proceeding and associated expectations. It also imparts helpful tips on how to prepare for and provide deposition testimony.

WHAT IS A DEPOSITION?

A deposition is a question-and-answer session conducted under oath for the purpose of gathering information from an individual who is either named in a lawsuit (i.e., a named defendant) or is a witness to the matter being litigated. Depositions are legal proceedings that occur in the *discovery* phase of a lawsuit, which is the investigative process that takes place after the complaint is filed and before the trial. An attorney will ask the witness questions while a court reporter records the testimony verbatim. In some cases, the deposition may be videotaped.

Deposition testimony is particularly important in a jury trial, where a defendant healthcare professional takes the stand to describe to members of the jury what happened in his or her own words. Witnesses are held to the facts they gave at their earlier deposition, even though the proceeding may pre-date the trial by months or even years. Therefore, witnesses should review their deposition transcript when preparing to testify before the court, in order to ensure their courtroom testimony is consistent, as any discrepancy with prior testimony does not reflect well on a witness or the defense.

WHAT ACTIONS SHOULD BE TAKEN FOLLOWING RECEIPT OF A SUBPOENA?

The first action clinicians should take is to inform their PL insurance provider and employer's risk manager or legal counsel of the deposition notice. Together, these professionals help ensure that a proper response is filed, while also counseling clinicians against the unauthorized release of information in their response.

In advance of the deposition date, legal counsel will meet with the witness to outline the defense, as well as discuss the anticipated line of questioning. The amount of time devoted to the pre-deposition meeting will depend upon whether the witness actually cared for the patient or was a bystander to the event. For individuals who are directly named in the lawsuit, the preparation process typically covers treatment of the patient, follow-up care and any medical literature that directly bears on the care rendered.

To review additional preliminary steps, see "In the Event of Legal Action" on page 2.

1 See Nurse Professional Liability Exposures: 2015 Claim Report Update, A Comparative Analysis from CNA and Nurses Service Organization and Physical Therapy Professional Liability Exposure: 2016 Claim Report Update, A Comparative Analysis from CNA and Healthcare Providers Service Organization.

WHAT HAPPENS DURING THE PRE-DEPOSITION MEETING?

The pre-deposition meeting serves to inform the witness about the details of the lawsuit, including the specific allegations being asserted. It should be face-to-face with defense counsel and held well in advance of the deposition date, in order to allow sufficient time for preparation.

A primary objective of the meeting is to outline the legal arguments for the defense. Often, counsel may construct a defense theme that will resonate throughout the litigation process. For example, in the event a lawsuit alleges that written clinical policies and procedures are outdated and substandard, counsel might instead focus on the exceptional staff educational offerings.

The preparation meeting also serves to discuss the questioning process. Defense counsel will review standard guidelines designed to help witnesses provide truthful responses. While a witness is expected to provide clear, concise answers to each question, there is no obligation to explain a response. For additional deposition guidance, see "12 Essential Deposition Tips" on page 3.

WHAT MEASURES ARE REQUIRED BEFORE THE PRE-DEPOSITION MEETING?

Before the pre-deposition meeting, a witness should thoroughly review any pertinent documents, including the patient healthcare information record, personal notes and any medical literature consulted during treatment, carefully comparing the facts of care to the allegations asserted in the lawsuit. Any concerns or issues raised during the review should be shared with defense counsel at the meeting, in order to ensure that the witness has an accurate recall regarding the incident in question.

WHAT CAN A WITNESS EXPECT DURING DEPOSITION QUESTIONING?

Plaintiff attorneys will often try to restrict witnesses to one version of the incident, forcing them to be as accurate and precise as possible in their responses. Utilizing a number of techniques, attorneys may try to rattle witnesses or undermine their credibility, such as asking the same question in different ways or pointing out where testimony is contradictory, thus opening the door to inconsistent statements that can later be used to discredit witnesses during their trial testimony. It's important for a witness to remain calm during questioning and permit the defense attorney time to interject or object to an improper question.

For additional information regarding what to expect during a deposition, see *Healthcare Perspective*® Supplement 2016 – Issue 11 "Reference Guide for Deposition Involvement."

In the Event of Legal Action

The following recommendations are designed to help healthcare providers and business owners avoid potential missteps in the crucial first phases of a lawsuit:

- *Do not discuss the case with anyone except your defense attorney and your professional liability provider.*
- *Do not accept or sign any documents related to the claim from anyone without obtaining approval from your professional liability provider.*
- *Avoid discussing, commenting upon or taking issue with any information you receive regarding judicial or administrative proceedings.*
- *Do not admit to liability, consent to any arbitration or judgment, or agree to any settlement proposal without consulting with your defense attorney.*
- *Contact your attorney or professional liability provider before responding to calls or emails from other parties involved in the case.*
- *Report any communication you receive from the patient, patient's attorney or any administrative, licensing or regulatory authority to your professional liability insurance provider.*
- *Promptly return calls from your attorney and professional liability insurance provider.*

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WHAT IS LICENSE DEFENSE?

License defense is required when a patient, patient's family member, colleague or employer files a complaint with a regulatory or licensing board against a healthcare provider's professional license. These license protection claims differ from PL claims in that they commonly involve allegations unrelated to patient care, such as substance abuse, fraudulent billing, failure to supervise and inappropriate behavior. They are similar, however, in their requirements that the defendant healthcare provider retain legal representation and render testimony in a deposition or similar setting. Between 2010 through 2015, more than 1,400 license protection claims were filed against NSO- and HPSO-insured nursing and physical therapy professionals, averaging $4,000 in defense costs.[2]

Depositions can be stressful encounters whether the precipitating lawsuit is based upon allegations of patient injury, poor professional judgment, or both. In either case, adequate preparation is essential to a successful outcome. In addition to the guidance imparted here, NSO and HPSO professionals are available to assist insureds in the deposition process. CNA, the insurer of the NSO program, also has created a video, *Preparing for a Deposition*, to help clinicians better understand the deposition process.

12 Essential Deposition Tips

Despite thorough preparation, giving a deposition can be an anxiety provoking and uncomfortable experience. The following tips help witnesses convey a professional demeanor and confident responses:

1. *Listen carefully and think before you speak. Don't be pressured into rushing a reply.*
2. *Speak slowly and clearly, and answer in a courteous manner.*
3. *If you need to consult the medical record, ask to do so.*
4. *If your attorney objects, stop speaking.*
5. *Do not look at your attorney when a question is asked; this is your testimony.*
6. *If you do not know the answer to a question, do not guess.*
7. *If you do not remember something, say so.*
8. *If you do not understand a question, ask for clarification or rephrasing.*
9. *Answer only the question asked and do not anticipate further questions.*
10. *Understand the theme of the defense and assert it in response to allegations being made against you.*
11. *If you need a break, ask for one.*
12. *Always tell the truth.*

2 See claim reports cited in footnote 1.

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