

# 15 Key Deposition Techniques in a Medical Malpractice Case

Contributed by Gerry Oginski

## QUESTIONS TO ASK THE DEFENDANT DOCTOR

### WARNING:

Preparation is the entire key to a doctor's deposition. You must spend countless hours reviewing the entire file, reviewing all the medical records, notes and entries in the chart. You must know and review your theory of liability, causation and damages before you begin to review the file. You must keep track of anything in the chart that will help you in your quest to prove each element of liability, causation and damages.

1. Most lawyers ask the same boring questions at the beginning of every deposition:

- a. State your name and address
- b. State your qualifications, pedigree, schooling, etc.

Comment: OK, this is fine, but very boring and very expected by defense counsel and the doctor. Mix it up a bit. I advocate never starting a doctor's deposition this way. Why not go right to the heart of the case with the very first question? You can always get the doctor's credentials later or at the end. Besides, the credentials are usually found online or in a curriculum vitae, and don't help except to establish where he went to school and whether he's board certified in any specialty. On more than one occasion the doctor has been disoriented by this approach. They are usually prepared for questions in a lock-step manner and do not expect something so unusual, but legally permissible set of questions right off the bat.

2. Go ahead- ask why they operated on the wrong side of the brain as your first question. "Objection, no foundation," says the defense attorney. "So where does it say in the CPLR I need to lay a foundation question?" Despite this exchange of "ideas", if you get such an objection, then simply ask:

- a. "Didn't you operate on my client on this date?"
- b. "Isn't it true you operated on the wrong leg?"
- c. "Why?"

3. I always advocate asking the "why" question at deposition. It is much better to know the reasons why a doctor did or didn't do something now, rather than save the question for trial. At trial, the reason may be devastating to our case, and if so, I want to know about it now. Besides, when you question a doctor at trial, as an adverse witness, you never want to ask a question in which you don't know the answer. If you do, you subject yourself, your client and your case to inherent risks that could jeopardize the case.

4. Make the doctor read his notes into the record. This is important for anyone who is trying to decipher the doctor's handwriting later on. Your expert will definitely need to know whether the scribble is important, and the only way to do that is if the doctor explains, on the record, what his scribble means.

5. Be polite. At all times. You can't imagine how many lawyers don't listen to this recommendation. They think they know it all, are sarcastic, belligerent, annoying, and really annoy everybody in the room. The doctor's attitude in responding changes as well. No longer is the doctor as verbose. No longer does the doctor look like the perpetrator. Rather, he might begin to look like a victim if attacks against him and his credibility are kept up.

6. You can still make all your points without being hostile, angry, yelling or screaming. The old saying "you get more with honey than with vinegar" speaks volumes. Naturally, you're not going to bend over and sweet talk your way to getting the doctor's admissions about how he screwed up. But, the key is being professional and knowledgeable. You gain more respect from your adversary- (don't worry about respect or lack of it from the doctor) by being respectful than you do if you are antagonistic.

7. There are times when you want to rile the physician. You want to know if you can push his buttons. You want to know how easily it is to rankle his composure. If it's easy to do at deposition, your trial strategy toward this witness just got that much easier.

8. Find out about conversations the doctor had with the patient, family members and other doctors. Remember, conversations are rarely recorded in a hospital record. Make sure you ask the doctor to confirm or deny comments that your client has testified about. Most often, the doctor will claim they no longer recall the conversation. But, if your client does, it's much more possible that the conversation occurred. If the doctor denies making certain comments, then you know you have different facts about the same conversation, and a jury will have to ultimately decide who is telling the truth.

9. Ask whether the doctor has ever had his license to practice medicine suspended and/or revoked.

a. Ask whether their hospital privileges have ever been suspended or provoked.

b. Always ask whether the doctor has given testimony before.

i. Ask whether it was an expert for plaintiff or defendant

ii. Ask whether they were a treating physician

iii. Ask what type of case it was, and the name of the case

iv. Ask whether they were paid for their time in Court to testify in that matter

10. In New York, in a medical malpractice deposition, you must ask opinion questions. The doctor- as a defendant is required to answer "expert" questions and give answers about his medical opinions.

a. Do you have an opinion, with a reasonable degree of medical probability whether the treatment rendered to Mrs. X was appropriate and within the standard of care?

b. If you have an opinion, what is that opinion?

c. Confront the doctor with other opinions in the medical community that disagree with his school of thought and ask what he thinks of those opinions.

d. Ask the doctor to admit to certain facts- Here's an example:

i. Isn't it true the patient got Ex-lax at 10 p.m.?

ii. Isn't it true that patients with colon tumors shouldn't get ex-lax?

iii. Are there any circumstances when you would prescribe this medication for a patient who had this tumor?

iv. Would you agree that if the patient got ex-lax at 10 pm that would be a departure from good care?

v. Would you agree that the only reason the patient suffered injury was because she got ex-lax at 10 pm?

vi. Would you agree that had she not gotten the ex-lax at 10 pm, she wouldn't have suffered the bowel perforation?

11. Make sure you rule out other potential causes of injury besides the malpractice that you are claiming occurred here. The reason you do this is to learn the potential defense to your case. The defense will always come up with some explanation as to why your argument is not valid. Better you should learn it during the deposition than to head to trial without knowing what their defense will be.

12. Ask many open ended questions. Ask who/ what/ where/ when/ why/ how. By doing this, you will get the doctor to talk and explain. If the doctor's is going on and on without directly answering the question- and his attorney is letting him- that's ok. Let him keep talking; you might actually get some useful information. When he stops talking simply say "Maybe my question wasn't clear doctor. What I was looking for was...can you answer that question?" Always take the blame if the doctor says the question is not clear. Don't respond to him by asking "What didn't you understand about my English language question?"

13. Ask about medical definitions.

a. What is an endocervical curettage?

b. What is a myocardial infarction?

c. What is hypoxia?

d. Ask whether these definitions are commonly accepted within the medical community, or whether there are other schools of accepted definitions.

14. Ask whether they've reviewed any medical literature or textbooks prior to coming to the deposition.

a. Did you bring any with you?

b. Which ones did you review?

c. What did you learn from the article? Did it support your position here, or was it contrary to your position?

15. Finally, but not last, ask about credentials, schooling, licensing, board certification- but you should already have this information before your deposition when you research the defendant doctor. I always advocate doing a Google search on

the physician to see if they've authored anything or if there's anything out there online that's worthwhile knowing. I recently learned from an online search where the defendant doctor was fired from his residency and sued the chairman of his department. Needless to say, this information proved very useful at deposition.

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There have been many books written about how to conduct depositions. The most important factor about taking a doctor's deposition has, in my opinion, been the experience of the attorney doing the questioning. Anyone can read from a list of prepared questions. It takes an experienced attorney to listen to the answers and know where you want to go and then develop a strategy on how to get there while protecting your client's rights to the best of your ability.

For more information, please feel free to call me, 516-487-8207

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Gerry Oginski is an attorney with over 16 years of experience handling medical malpractice and injury cases involving car accidents, trip and falls, defective products and medication errors. His consultations are always free. He invites injured victims and their family members to call with any legal questions they may have about their injuries or their accident. The consultation is free, and there is never any pressure or obligation at any time. Call Mr. Oginski today and get the information you need to help you through the legal minefield; 516-487-8207, or visit his website at <http://www.oginski-law.com>