

DEPOSITION PREPARATION:

Beat The Defense At Their Own Game

Kathleen L. Nastri


Koskoff, Koskoff & Bieder

knastri@Koskoff.com


Your expert...




Who is this guy? And what happened to that great expert who told me my case was a slam dunk?



The problem is not that the doctor changed his opinions, it is that he thinks differently than you do and he speaks a different language.



The effective expert understands how lawyers think and learns our language.



Unfortunately, by the time an expert figures this out, he has testified too much to be credible.

Deposition Preparation...

The key to preparing an expert for deposition or for taking the defense expert's deposition is to address these differences.

Pre-deposition Meeting

- General to specific
 - What is the theme?
 - What is the defense theme?
 - What did the defendant do wrong?
 - What are the facts that support the opinions?

Plaintiffs' Themes

- Not paying attention
- Failure to follow-up
- Failure to communicate
- Technical errors

Defense Themes

- Risk of the procedure
- Medical judgment
- Personal responsibility

Review allegations in Complaint

- Who is the target
- Are there settled parties that you don't want to talk about
- Standard of care or causation
- May not agree with all of the allegations

Review the expert's disclosure

- Does he agree with content?
- Is it complete?
- Need to amend prior to deposition?

List of departures

- Helps the witness remember all of the departures
- Facilitates orderly presentation
- Often used by defense as outline for questions

Review medical records

- Some experts need to be spoon-fed the facts
- OK to highlight or use post-it notes
- Ok to make factual notes
- If concerned, prepare detailed chronology to be used as a guide



Review medical records

- Be sure to cover all parts of records
- Discuss how the facts support opinions
- Discuss how to handle inconsistent facts

Review key deposition testimony

- Information that supplements the records
- Information that contradicts the records
- Defendant's explanation for treatment
- Avoid relying on plaintiff's testimony

Opinions of plaintiffs' other experts

- Other experts on same subjects – No
- Foundational experts – Yes

Medical literature

- Recognition of “standard authorities”
- Use of medical literature that is not standard authority
- Daubert issues

Terms of art

- Reasonable medical probability
- Standard of care
- Standard authority
- Medical judgment
- Risk of the procedure
- Criticisms

Avoid weak language

- I think...
- Judgment call
- Possibly
- Hard to say...

Standard defense questions

- You knew the outcome before formulating opinions on standard of care
- You didn't have all the information when you formulated opinions
- Defendant in a better position to assess situation than you are

Standard defense questions

- There were risks to course of action you say was required
- Defendant required to exercise professional judgment
- You make more money as an expert than practicing medicine

Logistics

- When to prepare
- Where to prepare
- Place of deposition
- Time of deposition
- Plan to finish if possible

Plaintiff's expert's file

- Complete records
- Relevant depositions
- Medical literature
- Notes
- Correspondence
- Lists of other cases
- CV

Logistics

- Request for production
- Videotape
- videoconference

Handling defense lawyer tactics

- Videotape
- Set boundaries early
- Three strikes - you're out
- Baseless objections to form
- Maintain the high ground
- Create and share the book on repeat offenders