

CHAPTER 24

DEPOSITION GUIDANCE FOR NURSES

I. INTRODUCTION

With the number of personal injury and healthcare-related lawsuits increasing each year, at some time in your professional career as a nurse, you will receive a subpoena requiring you to give an oral statement at a deposition. Having your deposition taken can be a stressful or even a scary experience. Following the few simple tips set forth in this chapter can make your deposition experience less stressful and hopefully relieve your feelings of anxiety.

II. WHAT IS A DEPOSITION?

In short, a deposition is an oral statement, given under oath, before a court reporter, in which you are subjected to questioning by each attorney involved in the case. Present at the deposition will be attorneys representing all of the parties and a court reporter. The oral statement you give represents your testimony. Following the deposition, the court reporter transcribes the testimony and places it in a booklet.

After the initial pleadings (Complaint and Answer) are filed in a lawsuit, the attorneys begin the "discovery phase" of the lawsuit. The discovery phase allows attorneys to "discover" the facts and circumstances that have led to the lawsuit. Attorneys use discovery "tools" before trial in an attempt to find out the facts of the case from people that may be opposing parties or individuals that may not be parties to the lawsuit at all. Ultimately, the facts they discover will aid their clients in the defense or the prosecution of their case.

Depositions are discovery tools that permit attorneys to question a party or a witness in a lawsuit, under oath, prior to trial. At the beginning of the deposition, the court reporter places the person being examined under oath; this person becomes the "deponent." That deponent has sworn to tell the truth, and must do so.

There are several reasons an attorney would depose a nurse in a lawsuit. If you receive a subpoena for a deposition, do not assume this represents that you departed in the appropriate patient care. Often nurses are deposed in an attempt to gather factual information regarding information they have on a certain patient.

III. DOCUMENTATION IS A NURSE'S BEST DEFENSE

The law treats medical record or chart as a legal document. This means that the medical record or chart may be admitted into evidence at trial without your testimony. Keeping neat, concise, accurate records and charts provides the best way to avoid becoming a deponent or appearing in a trial. Use a common sense approach of writing legibly, taking an accurate patient history and documenting in detail all notes on the patient's chart. Additionally, do not omit, abbreviate, or "scratch out" any information on a chart, unless you do so per your employer's specifications. To learn more on the legal aspects of documentation, please see Chapter 24, Legal Aspects of Documentation.

IV. WHAT TO DO IF YOU RECEIVE A SUBPOENA

If you receive a subpoena by an attorney to appear to be deposed in a lawsuit, you should immediately consult with your own healthcare attorney, or your employer's attorney, to determine your role in the lawsuit. If you have nursing liability insurance or if you are covered by your employer's insurance policy (e.g., a nurse or ARNP may be covered under her employing physician's or medical group's policy), you should notify the insurer and request that the insurance company appoint or authorize a separate attorney to represent you. You may not have any useful information in the case. However, even if this is the case, it is imperative that you are aware of your role in the lawsuit so you may properly prepare for the deposition.

It is important to remember that the attorney representing your employer will be protecting the interests of that party; this may not always result in the protection of your interests. Unfortunately, there are many cases where the nurse has been improperly blamed or made a "scapegoat" by the doctors, the hospital or the administrator, especially if a nurse is no longer employed by the employer or is an agency nurse. Therefore, it is crucial to consult with an independent attorney to determine if there is a conflict of interest with others being represented by one attorney. If you have insurance that pays your attorneys fees, as a general rule, you should always request separate counsel. Even if your employer's insurance provides coverage for you, your employer's insurance company must pay for a separate attorney for you if there is a conflict of interest.

V. THE NURSE AS THE "DEPONENT"

By following the tips set forth below you will alleviate anxiety, learn the proper conduct and make the deposition less stressful.

A. BEFORE THE DEPOSITION

1. Be Prepared

You should prepare yourself for your deposition by familiarizing yourself with the chart or other medical records at issue in the lawsuit, unless your attorney instructs you otherwise. You should be prepared to answer general knowledge questions regarding the issues involved in the lawsuit. The examining attorney does not expect an in depth medical response; however, using some medical terminology may add to your credibility as a professional. Again, it is imperative that you realize your role in the case prior to deposition in order to assist in your preparation. If you have used certain medical terms in your nurse's notes or medical record be sure you know exactly what they mean. If you used an abbreviation, be sure you know what it means.

2. Contact Your Attorney and Demand a Preparation Meeting

If you work in a hospital, you can probably expect the hospital's attorney to conduct a pre-deposition conference to familiarize you with the plaintiff's theory of the case when a hospital is being sued as an employer. Keep in mind that this attorney is not your attorney, but is your employer's attorney; therefore, you may wish to retain a board certified healthcare attorney or a litigation attorney to be "on your side" for the deposition.

If you are not contacted several weeks prior to your deposition regarding preparation for it, call your attorney and demand an appointment no later than one week prior to the deposition. This will give you time to meet with the attorney, learn about the issues involved in the suit, learn more about your role in the lawsuit, time to reschedule the meeting or have a follow-up meeting and time to relax before your deposition. Ask your attorney if he or she has a videotape of other depositions (from a different case) or a training videotape for you to watch. A training videotape can be particularly useful if you have never been deposed before.

If your attorney does not conduct a pre-deposition conference with you, you are not receiving proper legal representation. Ask for a new attorney who has the time to properly prepare you for your deposition.

3. Ask If You Can Sit in on Other Depositions Before Yours

Although this may not be permitted in some cases, in many cases it will be. Consult with your attorney.

4. Do Not Discuss the Case With Others

Never discuss the case with others, unless your attorney is present or advises you it is ok to do this. If anyone tries to talk to you about the case, do not. If anyone asks you questions about the case, immediately advise them you have an attorney and that person should speak with your attorney.

5. Visit the Location of the Deposition

Unless the deposition will be held in your hospital or office, drive to the location where it will be held ahead of time and check out the parking situation. If you do this, you will not be rushed or late on the day of the deposition.

6. Pick Out Your Deposition Clothes

Pick out and prepare your deposition clothes prior to the deposition.

7. Obtain and Review Your Employer's Medical Abbreviations List

If you work for a hospital, facility or group that has a “standard medical abbreviations list,” obtain it and review it. Check the records you wrote (after consulting with your attorney) to see if you used any incorrectly; if you did use an abbreviation incorrectly, be prepared to explain what you meant and why you used the abbreviation.

B. AT THE DEPOSITION

1. Dress Professionally

As a general rule, unless your attorney advises you that it is okay to wear a nursing uniform, wear your best professional suit or “church clothes.” Regardless, be sure that your clothes are freshly cleaned and not in need of tailoring or repair. If in doubt, take what you plan to wear to your pre-deposition meeting with your attorney and ask her.

2. Do Not Be Intimidated

In some cases, an examining attorney will attempt to harass or intimidate a deponent during a deposition. If you have your own attorney present, she or he will attempt to curtail these types of tactics. If you begin to feel pressured, pause and take a breath before you begin your answer. Answers that are not thought out are the answers that the examining attorney will use to destroy your credibility as a witness.

3. Tell the Truth

When being deposed, you are under a sworn oath to tell the truth. Therefore, it is of the utmost importance that you give only truthful information to the deposing attorney. The truth is the easiest to remember and will help you deal with any psychological intimidation or other tactics that a hostile interrogating attorney might use. Harassment usually occurs when the attorney thinks that the witness is deliberately misstating or withholding relevant facts. Keeping your answers truthful may help reduce this type of behavior by the examining attorney.

4. Give Direct Answers

Give direct, straightforward responses without rambling or exaggerating and without volunteering information that was not requested. It is easy to be misled into "telling all" by a friendly opposing attorney. Keep in mind that the deponent is only required to give knowledge that he or she personally has. If you do not know the answer to the question, you should state that you do not have personal knowledge of the information being asked.

Remember, when an attorney for the other side is asking questions, the best answer is the shortest truthful answer. The best answer will usually be: "Yes," "No," "I don't know," or "I don't recall." If one of these answers applies, use it. Do not volunteer information.

Additionally, do not guess the answer to the question. Similarly, do not state your opinion; give only facts of which you have personal knowledge. Keep your answers honest, straightforward and direct.

5. Listen Carefully

It is important that the deponent listen very carefully to the question asked by the attorney. Many times, attorneys do not prepare questions or rehearse questions in preparation for a deposition. As a result, some of the questions asked by the deposing attorney may be poorly worded, confusing or may be asked in many parts. Give only the answer to the question asked.

6. Ask the Attorney to Rephrase or Reask the Question

The questions asked should be completely understood. If you have listened carefully and you are asked a question that you do not understand, it is proper and appropriate to request that the attorney rephrase the question. You should not feel anxious or embarrassed to request that the question be rephrased.

7. Only Answer Questions Within Your Scope of Work

In some cases, you may be asked medical questions that are outside your knowledge or scope of practice. It is certainly appropriate for you to say that you do not know the answer to the question or that

the information is beyond your knowledge as a nurse. You should not answer questions involving subjects about which you are not knowledgeable. It is also proper to state if you do not remember the answer to a question.

8. Stay Calm

While being deposed, attempt to stay calm, relaxed and composed throughout the deposition. This type of behavior will enhance your credibility as a witness. You should not be concerned with how your answers will affect others involved in the lawsuit. Be sure to take your time in answering the questions asked. You should not feel rushed to answer the questions; after all, the attorney deposing you subpoenaed you for the deposition.

9. Speak Clearly

Speaking clearly will also aid you in the deposition. A court reporter is recording everything you are saying. Therefore, you must orally answer every question. It will also assist to curtail rambling if you remember that a court reporter is recording every word you speak.

10. Be Polite

Being polite and cooperative can only help your position. Even though an attorney may attempt to intimidate you, being polite and cooperative will hinder his ability to make you feel uncomfortable.

11. Never Lose Your Temper

Never lose your temper or allow yourself to lose control. Some attorneys will try to get you to do this so you will say something without thinking.

12. No Joking

Do not laugh or joke around immediately before, during or after a deposition. This is a serious matter. Treat it seriously. Never relax your guard around the opposing attorney. He is not your friend.

13. Pause Before Answering

Pause two seconds before you answer each question. This will give you time to think. This will also give your attorney time to object if the question is improper.

14. Stop Immediately if Someone Else Speaks

If anyone else starts to speak, stop talking immediately. If your attorney objects, listen very carefully to the objection. Your attorney may be trying to tell you something.

C. AFTER YOUR DEPOSITION

After being deposed, if you made any mistakes in your deposition or later remember an answer, notify your attorney immediately. It is probably not too late to correct it.

You have the right to obtain a copy, check and change any errors or mistakes (even ones you made) in the typed transcript of the deposition. Never waive your right to obtain a copy and read the deposition transcript (unless your attorney has advised you of a good reason to do this before the deposition). Demand that you receive a copy of the transcript so you can review it prior to your later testimony at the trial (which may be years later). Always demand a copy of the transcript with all of the exhibits attached to it.

You have the right to review the entire transcript, correct any typographical errors or any erroneous statements you may have made and file these corrections with the transcript. You can only do this if you exercise your right as a deponent to “read and sign the transcript.” This is very important. Never agree to waive “reading and signing” unless you have discussed it with your attorney before the deposition and you have received a good reason you should do this.

If you will be called as a witness at the trial or in a related case, always review the transcript of your deposition twice, once approximately one week before and again the night before you testify.

Again, until the entire case is over and finalized (only your attorney can tell you when this is), do not discuss the case with anyone else.

VI. CONCLUSION

As nursing gains greater accountability as a profession, nurses will be called upon to give depositions in increasing numbers in personal injury cases as well as other types of healthcare cases. In most instances, the purpose of taking a nurse's deposition in a lawsuit is not to implicate that nurse; the deposition is primarily used to gather information about the case.

Remember that it is neither your job nor your responsibility to try to win the case. Your only responsibility is to tell the truth. The case will be won or lost based on matters completely outside your control. So do not worry about anything other than telling the truth.

If you view your deposition as a tool used to accumulate information in preparation for trial, much of the natural anxiety and stress which this situation causes will evaporate.

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