PLUNKETT COONEY

ATTORNEYS & COUNSELORS AT LAW

From Deposition to Verdict:

How to Prepare and Defend Yourself in a Medical Malpractice Action

Troy Marriott Hotel

5/31/2014

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Tab A

Deposition Preparation Tips

TIPS FOR A SUCCESSFUL DEPOSITION

A deposition is the taking and recording of testimony under oath, usually in an attorney's office. A court reporter is present to record everything either by stenographic or electronic means. The deposition may also be videotaped, and you should ask your attorney about the specific format.

The attorney requesting the deposition and all other attorneys involved in the case are present. All parties (including the plaintiff, defendant doctor and any other defendants) may also attend the deposition. In other words, the plaintiff may attend your deposition to hear you testify, and you have the right to attend the plaintiff's deposition. You should ask your attorney if he/she would encourage or recommend that you attend the plaintiff's deposition. You may also attend the deposition of any other party, witness or expert witness. Again, you should ask your attorney if he/she recommends you attend the deposition of any other witness.

As the person giving the testimony – the deponent – you are sworn to tell the truth, just as you would be in court and the same penalties for perjury apply. The attorney requesting the deposition is entitled to ask a broad range of questions, typically more expansive than may be allowed in court. This is allowed because the attorneys are engaged in the "discovery process." Seemingly irrelevant questions may be asked, because the response might lead to the discovery of matters that may be relevant. The other attorneys present at the deposition will also have the opportunity to ask questions.

Sometime after the deposition is over, the court reporter submits a written transcript which may be reviewed by you for accuracy. Any challenges to the accuracy of the transcript may be resolved by bringing a motion before the court. Otherwise, the document becomes the certified transcript of the deposition, and it may be used for all purposes allowed under the local court rules.

In addition to being part of the discovery process, the deposition may also be used to challenge or impeach your credibility if further testimony (such as during trial) is inconsistent with the testimony given at deposition. Finally, the deposition can be used in the place of live testimony at trial if you are unavailable due to death, illness, distance from the court or other reason accepted by the court.

If your deposition is being taken in a medical malpractice case, chances are that you are either a defendant in that case or you are a witness with relevant testimony, such as a physician who treated the plaintiff.

If you are a defendant being deposed by a plaintiff attorney, you should be mindful of his motives. First, the plaintiff attorney will assess your ability to testify at trial. You will be evaluated on your demeanor, medical knowledge and responsiveness to questions – all in an effort to determine your credibility before a jury.

The plaintiff attorney will want to hear your version of events in order to compare it to that of his client. He may attempt to lock you into specific testimony, which you will be unable to change at trial without jeopardizing your credibility. The plaintiff attorney may tests his theories of liability by posing hypothetical and leading questions. Your attorney will prepare you for these tactics.

As a witness (non-defendant), your testimony may be sought by either the plaintiff or the defendant as part of discovery or to bolster their theory of the case. You should be mindful that although you may only be a “witness” at the time of your deposition, your testimony may cause either the plaintiff or the defendant to add you as a party to the lawsuit. Therefore, you should prepare with your attorney and have him/her present at the deposition. Clearly, the motives and interests vary and the nature of your deposition will depend upon who is seeking your testimony.

Since the discovery process allows for broader questioning than is allowed in court, your attorney may object to some questions and then instruct you to proceed with an answer. This is done to allow for open discovery, while preserving objections for later determination by the court. On rare occasions, your attorney will instruct you not to respond to a question. Your attorney probably will not ask you any questions at your deposition unless there is a strong need to clarify earlier testimony.

In order to provide testimony that will leave the best possible impression, preparation is key. The most important aspect of your preparation is becoming thoroughly familiar with the relevant medical records. You should not be surprised at how well the attorney taking your deposition knows the medical records, nor should you be surprised at his/her knowledge of the medical issues at hand. If you do not know the records at least as well as the attorney asking the questions, you may be perceived as lacking the knowledge required to have treated the patient appropriately.

You should be thoroughly familiar with your own medical chart entries and you should have a clear knowledge of all other entries that might have influenced the care you provided. These may include laboratory results, nursing notes, other physicians’ progress notes and so forth. You should also review the time sequences involved in the care and treatment of the patient so you can appropriately address the chronology of events.

If you are referred to specific medical textbooks, journal articles or other literature, you should review that particular passage before commenting upon it. Be wary of identifying something as “reliable” or “authoritative.” Identifying something as reliable or authoritative allows for that piece of medical literature to be used to cross-examine you at deposition or at trial.

Your assigned attorney will help you prepare for deposition and one of the most important things you can do is listen to the advice given to you by your attorney. You should have as many pre-deposition conferences with your attorney as required for you to feel as comfortable as possible with the process. Since anything discussed between

you and your attorney is subject to the attorney/client privilege, you should not withhold any information. Only with full disclosure will your attorney be in the best position to advise and defend you.

You and your attorney will review the facts and the pertinent medical records concerning your care and treatment of the patient. Depending upon the timing of your deposition, you may have the benefit of reviewing the deposition transcripts of others who have testified before you in the case. Your attorney can give you an idea of the questions that might be asked of you, and your attorney may even engage you in a mock deposition, asking you questions as though he/she were the attorney taking your deposition. Your attorney may also provide insight about the questioning style of the attorney taking the deposition.

Preparation is only half the battle. Now, you must focus on effective delivery. At a minimum, your role at deposition is to testify truthfully and succinctly. It is not your role to educate, convince or argue with the attorney taking your deposition. Calm answers that respond directly to the questions are always best. Remember, the attorney asking the questions is engaged in a discovery process and the more information you provide, the more you open the door to additional questions.

If you are a defendant in a medical malpractice action, your deposition is a crucial aspect of the legal process. The plaintiff attorney will be evaluating your credibility, your medical knowledge and your responsiveness to questions. This is your opportunity to demonstrate your ability to testify in a credible and knowledgeable manner. If you are unresponsive, argumentative, arrogant or show anger, the attorney will know he/she can take advantage of this in front of a jury.

Despite the similarities, there is a major difference between your testimony at a deposition and your testimony at trial. While your demeanor during a deposition is important, greater importance is placed on what you actually say than how you say it. Unless the deposition is being videotaped, the deposition does not reflect demeanor. For example, a protracted pause my look awkward, but in a deposition the end result is a question and answer on a transcript.

Conversely, awkward pauses before providing answers at trial can cause you to look uncertain before jurors, who may, in turn, question your credibility. Rest assured, if the case goes to trial, your attorney will work with you on your trial presentation, both with respect to content and delivery, and your deposition will become the foundation upon which to build.

If you are testifying as a witness, your credibility may not be the focus of the deposition, however, that does not mean you should take the deposition lightly. You must remember that your testimony may convince either the plaintiff or the defendant to add you as a party to the lawsuit. As a witness, you should testify to the factual circumstances as you know them and avoid offering opinions. You may be asked your opinion concerning the care and treatment provided by another physician, but unless

you have been retained as an expert witness, your opinions are your own and you need not reveal them.

The date and time of your deposition should be convenient for you. Most attorneys are willing to accommodate the physician's schedule and your attorney should be able to estimate how long the deposition might last. Make sure you are fully rested; do not schedule a potentially lengthy deposition after a full day of seeing patients. During the deposition, you are entitled to take breaks and confer with your attorney.

On deposition day, there will usually be a pre-deposition conference with your attorney. This is your opportunity for last-minute review. If for any reason you feel the deposition should not proceed that day, you should immediately advise your attorney.

When the deposition begins, you will be sworn in by the court reporter and advised that the deposition is being taken under oath. The attorney requesting the deposition will then introduce himself/herself and ask you to identify yourself for the record. He/she will ask you a series of questions, usually beginning with your background, education and training and then moving on to the facts of the case.

Attorneys have different styles, ranging from friendly and conversational, to reserved and professional, to angrily accusatory. Regardless of their styles, you should remain, calm, direct and professional. It is inappropriate to attempt to "get the better of" the attorney asking questions. The attorney may be merely attempting to provoke you in order to learn how you might respond in court if the matter is tried. If you are being treated inappropriately, your attorney will object. Let your attorney do the arguing.

As simple as it sounds, one of the most important things you can do at your deposition is to listen carefully to each question. You should neither anticipate the question nor think about the answer before the question is complete. Take time to consider your answer before responding. If the question does not make sense or is unclear, request a clarification. Once the question is clear in your mind and you have formulated your response, you should provide your answer as precisely and concisely as possible.

Another reason to pause before answering each question is to allow your attorney time to state any objections. If your attorney objects, listen carefully to the objection and consider what was said. Your attorney may be trying within the scope of the rules of evidence to assist you in responding to a question. For example, if your attorney objects and states "asked and answered," the attorney is encouraging you to provide the same answer that you previously gave and not to be intimidated into changing your response.

If you cannot recall a specific situation or event, it is perfectly acceptable to respond, "I do not recall." For the most part, it may be years after an event at issue before a lawsuit is filed and you are deposed. It is perfectly acceptable to not recall certain events.

It is also perfectly acceptable to not know an answer, and if you do not know an answer to a specific question, you should respond accordingly. You should never guess or speculate.

If you are asked a question about a medical record or other document, you should request to have the document available to review before you respond.

You will also be allowed to testify about your routine, habit and customary practice. By way of example, if you cannot recall specifically the potential risks and complications that you may have discussed with a patient about a given operative procedure, you would be allowed to testify about what your routine, habit and customary practice is with respect to information you would provide a patient undergoing the same surgery.

Beware of leading questions – ones that seek only a "yes" or "no" response. These questions often begin with the phrase "isn't it fair to say that. . ." or end with the phrase, ". . .isn't that so?" Leading questions are permissible when asked by opposing counsel, but should be recognized as such and your response must be tailored accordingly. If a simple "yes" or "no" response is accurate under the circumstances, then answer appropriately. If you cannot answer the question with a "yes" or "no," say so and then give your complete answer. Again, if there is any argument to be made over this point, let your attorney do the arguing.

You should also be wary of compound sentences – one in which two or three questions are being asked. If you are asked a compound question, request that the question be broken down to clarify which question you are answering.

The importance of preparation cannot be overemphasized. If you are unprepared for your deposition, it may truly become an "ordeal" with serious repercussions. There is an old saying used, primarily by "veteran" attorneys, but the saying remains as true today as yesteryear and that is: "You cannot win a case at deposition, but you can lose it." The essence of that saying is built upon the time you put in to preparing for your deposition.

Top 10 Deposition Tip:

1. Preparation is the key to success. Review the records, make sure you understand the timeline and the allegations against you. Look at the plaintiff's Affidavit of Merit and answers to interrogatories you have provided. Make sure you are completely frank with your attorneys about any problematic areas in your background, including employment, credentialing or personal information. Appropriate responses can be planned in advance, but surprises can damage an otherwise defensible case.

2. Tell the truth. Recognize that the manner in which the facts are stated can make a difference.

3. Don’t guess, speculate or assume. It is fair and proper to say you don’t know or you don’t remember, where appropriate.

4. Ask for clarification if you don’t understand a question. It is opposing counsel’s job to ask proper questions. You are not required to answer a question you do not understand.

5. Never volunteer information or documents.

6. When confronted with documents, make sure you take an opportunity to review them prior to answering questions.

7. Listen to your attorney’s objections because they will provide you with cues about problems with the question.

8. Opposing counsel is not your friend, no matter how congenial he/she seems during your deposition. Be on guard, especially where he/she asks you to agree with a “fact” or proposition.

9. Demeanor is paramount. You must not appear indifferent, arrogant, irreverent or angry. Opposing counsel will use casual remarks to make you look bad to a jury. Therefore, your language, dress and attitude must reflect the fact that you are professional, serious and concerned.

10. You will be asked for opinions on a number of issues. You are not required to provide opinions, and should avoid doing so if your opinion may harm your case or that of a codefendant. Beware of the hypothetical question that does not accurately reflect the facts of the case.

Tab B

Overview of Daubert

A DAUBERT HEARING: CHALLENGING THE MEDICINE

During the mock trial, defense counsel asked the court for a Daubert hearing. This is a request that the court conduct what is essentially an evidentiary hearing, prior to trial, whereby a theory of medicine that is being advanced is scrutinized as to whether it is scientifically reliable. In lay person's terms, juries are not supposed to be subjected to "junk science."

Michigan Rules of Evidence, statutory authority and case law dictate that the judge is to serve in a "gatekeeper role" with respect to reviewing what may be unsound medicine and to dismiss those matters that do not meet the threshold of being founded on reliable science.

I. MRE 702 Governs the Admissibility of Expert Testimony

The Michigan Rule of Evidence that addresses this principle is MRE 702 which states:

If the court determines that scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise if:

1. The testimony is based on sufficient facts or data;

2. The testimony is the product of reliable principles and methods; and

3. The witness has applied the principles and methods reliably.

II. MCL 600.2955 Tort Actions; expert scientific opinion, admissibility; court determination, factors; novel scientific evidence; medical malpractice actions

The statutory authority that addresses this principle is MCL 600.2955 which states:

MCL 600.2955 requires the court consider the following factors:

a. Whether the opinion and its basis have been subjected to scientific testing and replication;

b. Whether the opinion and its basis have been subjected to peer review publication;

c. The existence and maintenance of generally accepted standards governing the application and interpretation of methodology or technique and whether the opinion and its basis are consistent with those standards;

d. The known or potential error rate of the opinion and its basis;

e. The degree to which the opinion and its basis are generally accepted with the relevant scientific community. As used in this subdivision, "relevant scientific community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market;

f. Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered; and

g. Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.

In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in section 2169.

III. United States Supreme Court weighs in on the issue of "reliable scientific evidence"

Not surprisingly, requests for a "Daubert hearing" arose from the U.S. Supreme Court case of *Daubert v Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).

Daubert, *supra*, involved a claim filed by infants and their guardians against Merrell Pharmaceuticals for limb reduction birth defects allegedly sustained as a result of their mothers' ingestion of the antinausea drug Benedectin. In analyzing the issues before it, the Supreme Court held, in pertinent part, that the trial judge is assigned the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.

Daubert, supra, also defined what the words "recognized," "scientific" and "knowledge" mean in this setting:

- "Recognized" connotes a general acknowledgement of the existence, validity, authority or genuineness of a fact, claim or concept;

- "Scientific" connotes a ground in the principles, procedures and methods of science;
- "Knowledge" connotes more than a subjective belief or unsupported speculation.

IV. Decisions from the Michigan Supreme Court and Michigan Court of Appeals that have followed the rationale of *Daubert* include:

Gilbert v Daimler Chrysler, 470 Mich 749 (2003) which held: 1) the trial court has an obligation to ensure that expert testimony admitted at trial is reliable and 2) careful vetting of all aspects of expert testimony is especially important when an expert provides testimony about causation.

Greathouse v Rhodes, 242 Mich App 221 (2000), rev'd on other grounds, 636 NW2d 138 (2001) which stands for the general principle that the Michigan Legislature enacted MCL 600.2955 in an attempt to screen "junk science" from "legitimate/tested science."

Nelson v American Sterilizer Company, 223 Mich App 485 (1997) where the court concluded that "in order to be admissible, proposed expert testimony must be supported by appropriate objective independent validation based on what is known; e.g., scientific and medical literature."

In *Tobin v Providence Hospital*, 244 Mich App 626 (2001), the trial court allowed the plaintiff's expert to testify that contaminated blood would change color within days after it was obtained from the donor. The Michigan Court of Appeals reversed, holding that the expert's testimony did not establish the "evidentiary reliability and trustworthiness of the facts and data that underlay his testimony."

The appellate court's reasoning in *Tobin, supra* summarizes the principles set forth in MRE 702, MCL 600.2955 and decisions referred to above:

> "Given the serious problems with this testimony, as admitted by Dr. Brecher [plaintiff's expert], defendants challenged the reliability of Dr. Brecher's conclusions – including as it did affidavits from other scientists and opposing journal articles – should have caused the trial court to follow the dictates of *Nelson* and conduct a hearing "to determine the evidentiary reliability or trustworthiness of the facts and data underlying the expert's testimony before that testimony may be admitted." Plaintiff's claim that defendant failed to present an expert witness to contest the reliability of Dr. Brecher's opinions during trial is without merit. **The reliability of the expert's testimony is to be determined by the judge in advance of its admission – not by the jury at the conclusion of the trial by evaluating the testimony of competing expert witnesses.** *Nelson, supra* at 489. Dr. Brecher's testimony does not establish the evidentiary reliability and

trustworthiness of his scientific conclusions or demonstrate that they constitute “recognized scientific knowledge.” The trial court therefore abused its discretion by permitting Dr. Brecher to testify that a detectable color change would have occurred in the contaminated bag of allogeneic blood. If plaintiff seeks at the retrial to present the testimony of Dr. Brecher, the trial court should conduct a hearing under MRE 702 and *Nelson, supra* to determine whether his testimony concerning the alleged detectable color change constitutes recognized scientific knowledge as of November 12, 1993.”

Tobin, supra at p. 651 (emphasis added)

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