Medical Economics

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If you are an expert witness, consider these pointers

Many articles have been written about depositions of medical expert witnesses because the subject is complicated and multifaceted.

If you're like most physicians, you don't devote significant time to providing expert testimony. And even if you recognize the importance of expert testimony, you may not be accustomed to the adversarial nature of the proceedings or the need not only to make a case but also to make it persuasively.

Your authority (at least since your residency) usually stems from wearing a white coat, not marshaling evidence. Further, the English language is elastic. Even medical terms that give that aura of precision may need clarification in a courtroom. Additionally, rules and guidelines applicable to depositions may seem artificial, although they are important.

Deposition testimony usually is addressed to specific medical issues. For instance, was the dosage of medication sufficient? Were the amounts of fluids given reasonable? Was surgery indicated? Should an impending myocardial infarction have been higher on the differential?

Some guidelines apply to all depositions, however, so if you're called on to provide expert testimony, consider these points:

Substance. The substance of the testimony is one of the overriding features of depositions. It usually involves determining whether treatment was proper and met the legal standard of care or whether an act or omission caused or contributed to an adverse outcome.

Defining the standard may be difficult, however. Many physicians have heard of the standard of care, but this term often is defined in an abstract way. Some doctors view the standard of care as adherence to a guideline, although most guidelines state that they are not standards of care. Some physicians view the standard of care as a uniform approach to a problem, although problems may be addressed by different yet equally successful approaches.

The legal definition of standard of care, alas, is defined by another concept, that is, "care that is reasonable under the circumstances of the case." This concept, as is the standard of care definition, is derived from various cases that define proper care. Although vague, the legal definition nevertheless will be an easier one for you to use as an expert witness, because you simply have to determine the reasons for or against some course of treatment.

Credibility. The credibility of the testimony is the other overriding feature of depositions. If you, as an expert witness, are sloppy, do not have all the pertinent facts, do not know the facts well, or lack attention to detail, you may not be capable of persuading a jury to reach a particular result.

Standard types of deposition questions may require different types of responses. Perhaps you assume that all questions call for an answer of "yes," "no," or "I don't know." You can answer some questions in one of those ways, but many questions—for instance, those seeking the reasons for a diagnosis, the reasons that conditions were included in a differential diagnosis, the reasons that a specific treatment was recommended, or the reasons that adverse results occurred—obviously require explanations. Anticipate such questions so you can formulate complete but concisely phrased explanations.

Strength of opinions. Another common issue related to the deposition of expert witnesses involves the strength of opinions. In this regard, rules of evidence make a simple but important distinction between "probable" and "possible."

The difficulty with this distinction is that many shades of gray exist. Some people say that something is "very possible," meaning likely. Others use terms such as "probable but not definite," thereby diluting the meaning of the word probable.

In general, if something is "possible," judges are likely to view those facts or opinions as speculative and not admissible in evidence. Opinions or facts that are "probable," however, are likely to be admissible into evidence, even if some lack of certainty or room for doubt exists.

TECHNICAL RULES, GUIDELINES

Other technical rules and guidelines facilitate depositions. Thus, it is helpful to have a list of documents reviewed, usually divided by category—for instance, pleadings (complaint, answer), hospital records, medical records, depositions listed by witness, expert disclosures, medical literature relied on for a particular case, notes prepared, if any, and billing records. In some cases, an actual table of contents is very helpful although not required.

Reports. It also will be helpful for you to know whether additional records or depositions were not given to you, and if not, why. For instance, if you are a surgeon evaluating the standard of care, you may not need the depositions of experts who are testifying about life expectancy or other unrelated issues. On the other hand, if you are unaware of these items, you may be depicted as lacking potentially necessary information.

You may be advised that reports are unnecessary because the issues and evidence that will be important as a case evolves often are difficult to anticipate. Some types of reports are acceptable or even necessary, however. For example, a technical opinion not otherwise available in the medical records may have to be articulated in a report. Thus, interpretation of pathology slides or radiologic studies, which may be the underpinning of other opinions, may need to be memorialized. In such cases, a report helps ensure that counsel has the precise wording of a technical opinion.

Chronologies of treatment. Some experts prepare chronologies of treatment. Such documents lack the problems associated with general reports insofar as they are unlikely to express opinions that may be the subject of later attack for being incomplete or even incorrect. Meanwhile, chronologies are helpful in memorializing complex situations in a straightforward, factual manner to facilitate later testimony and avoid the need for detailed reviews of extensive records.

Notes. Some witnesses are accustomed to annotating documents reviewed. The problem with "notes" is that they invariably elicit questions from opposing counsel as to the reason for each note, the significance of the annotated information, the reason that other notes were not made, and other such questions that may distract from the central opinion.

Disclosures. Expert testimony usually is summarized in so-called expert disclosures. You obviously need to have approved your own disclosure. You also may find it helpful to review the disclosures of other experts to understand the likely claims and/or defenses.

Medical literature. You may be asked to produce copies of the medical literature that you reviewed and/or relied on in connection with a case. Defining such a request is tricky because it potentially implicates a vast amount of literature. The scope of the request, however, usually is limited to documents "specifically" reviewed as opposed to reviewed "at some point." Even adhering to this limited definition can be tricky, however. On the one hand, supporting literature bolsters an opinion. On the other hand, articles may lack the certainty or conviction of an opinion and may include cases that can be distinguished from the particular case that is the focus of the legal action, thereby diluting their impact.

Correspondence. You may be asked to provide copies of correspondence between you and counsel. In such instances, correspondence usually refers to cover letters with enclosed records or depositions. In some cases, letters may include substantive information. In some cases, attorneys write detailed outlines of cases, although such outlines frequently are subject to impeaching as new facts arise and issues evolve.

The request for correspondence often includes a request for email messages, but such a request should not cause you to think that you must save all emails. As the volume of email traffic has expanded exponentially, email messages frequently are deleted. Further, such messages often are nonsubstantive, that is, they are mere transmissions of documents or confirmation of dates of depositions.

Billing records. Billing records are sought to determine how much time you have spent on a case and the amount of money you have received for your testimony. In some cases, opposing counsel can obtain a statement of total amounts of compensation from a particular firm for a specified time period—for instance, 5 years—although being able to do so usually involves special circumstances (for instance, a motion and a court order).

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