

The Risks of Testifying

by Daniel J. Huff, Esq., Huff, Powell & Bailey, LLC

Like any medical treatment, giving testimony is not risk-free. Make sure that you are informed before you consent to testify in a legal proceeding. Physicians can be asked to interact with the legal system on both a voluntary and involuntary basis. Any physician who has been named in a medical malpractice lawsuit and has given a deposition in that lawsuit knows the anxiety and stress of testifying on one's own behalf. Those are certainly situations where preparation, concentration, and legal representation lead to effective testimony.

Unfortunately, there are other circumstances where testimony is provided without preparation, concentration, or legal representation which can have devastating consequences. For this reason, whenever your testimony is sought in a legal matter, it is critical that you consult with qualified legal counsel to advise you of the risks of giving testimony. This approach can certainly be criticized as overcautious. Physicians are frequently asked to give a deposition on behalf of a patient to provide simple factual information regarding the patient's care and treatment. But consider these questions: What if you are asked about the standard of care in a deposition as a treating physician? Do you know the legal definition of standard of care? Do you have to answer these questions as a treating physician? If you answer them, can they be used against you?

Attorneys have subpoena power to compel you to testify if necessary. A subpoena is often unnecessary because deposition testimony can be scheduled by agreement at a mutually-convenient time and place. This cooperation and collegiality can cause you to lower your guard during a deposition, and it can cause you to forget that, like a tattoo, any testimony you make under oath will stay with you forever.

Consider this scenario: You have had the unfortunate experience of being named as a defendant in a medical malpractice case. During the prosecution of the medical malpractice case, Georgia law allows the plaintiff to ask for any prior tes-

timony that you have given. Although there would be appropriate objections made to the scope of this request, O.C.G.A. § 9-11-26, which governs the scope of materials that can be obtained during a civil lawsuit, is extremely broad. The plaintiff can seek information from a defendant physician that is "relevant or reasonably calculated to lead to the discovery of admissible evidence." Prior testimony regarding issues of diagnosis and treatment is likely discoverable in any medical malpractice case. Even if you no longer have old deposition transcripts, information regarding the case where you testified, information about the attorneys or other identifying information is readily available and may be obtained by the plaintiff's attorney to be used against you.

A deposition that was given five years ago – where you were testifying as a treating physician concerning the appropriateness or inappropriateness of a diagnostic test – may be relevant and damaging in a subsequent medical malpractice case that involves the failure to obtain the same diagnostic test. Failing to prepare for your prior testimony may significantly jeopardize your defense in a subsequent medical malpractice case.

Realistically, many of these situations where you are testifying as a treating physician do not require you to have your own attorney present at the deposition. Nevertheless,

consultation with an attorney regarding the scope of your testimony is important. If you are asked an inappropriate or objectionable question during the deposition, and you do not have legal counsel present at the deposition, you are at the mercy of the attorneys, who are ethically required to zealously protect their client's interests. [Although not every deposition or testimonial event requires personal legal representation, it is always a good idea to discuss your testimony with legal counsel in advance.]

Here is another example: A colleague is being sued for medical malpractice, along with the hospital where you both see patients. You have not been named as a defendant in the case, but have been asked to provide a deposition regarding



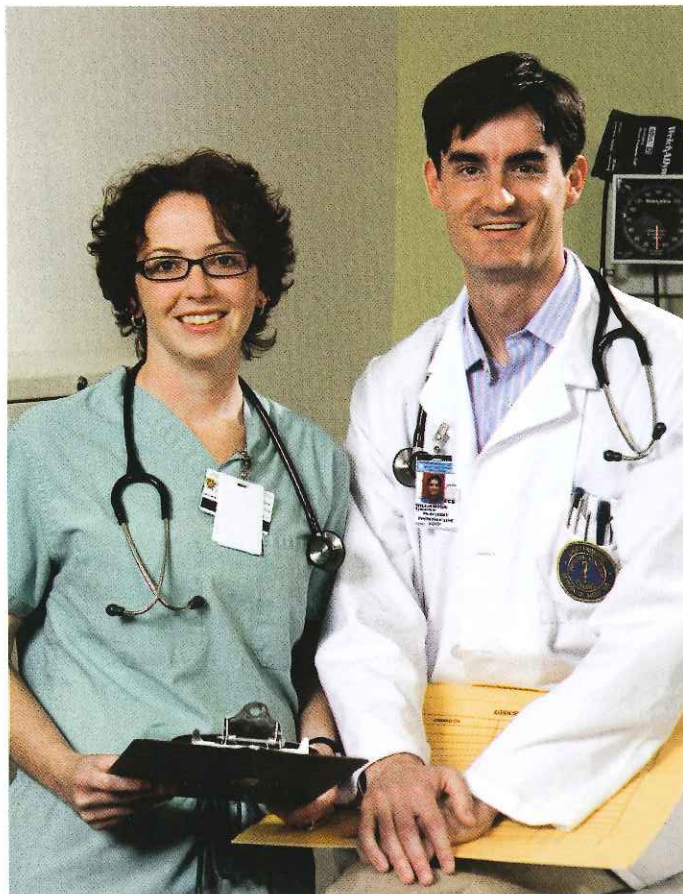
your role in the care and treatment of the patient. In addition to going on record about diagnosis and treatment decisions that could damage a future lawsuit, without legal consultation and representation you could inadvertently harm the defense of your colleague's case, inadvertently harm the defense of the hospital's case, and/or have yourself added to the case as a defendant. Many physicians are comfortable testifying in this situation if the deposition takes place more than two years after the alleged malpractice, believing that the statute of limitations has run its course and that they cannot be added to the case. Unfortunately, Georgia law provides numerous exceptions and tolling provisions to the two-year medical malpractice statute of limitations and there are indeed, numerous cases that allow the statute of limitations to be extended or tolled in particular factual situations. Additionally, whether you can be compelled to testify as an expert against other medical providers is a complicated evidentiary issue that can only be handled in the deposition by your own counsel.

In all cases involving testimony in a medical malpractice case, or interaction with attorneys representing parties to a medical malpractice case, legal representation is necessary. Most medical malpractice insurers will provide an attorney to

represent you during a deposition – particularly in a medical malpractice case – and possibly during a deposition as a treating physician, depending on the circumstances.

As the stakes in medical malpractice litigation and other forms of litigation continue to go up, the parties aren't going to spare any expenses in locating the prior testimony of physicians. You should expect that if you are named in a medical malpractice case the other side will have a copy of every deposition and trial testimony that you have given. Understanding this, you should avoid the casual approach to giving testimony and consult with your legal counsel before wading into the legal system.

Daniel Huff is one of the founding partners of Huff, Powell & Bailey, LLC, where he represents health care professionals, including physicians of all medical specialties in medical malpractice lawsuits and other legal actions. He regularly speaks to physicians and other attorneys regarding medical malpractice litigation. Huff can be contacted at dhuff@huffpowellbailey.com.



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