Giving a Deposition:
Some Helpful Tips for
the Occupational
Therapy Practitioner

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Occupational therapy practitioners frequently are asked to testify at depositions. Some may be intimidated by the legal process and not know what to do when subpoenaed to appear at a deposition. This article describes the deposition process, explains how one should prepare for a deposition, and provides helpful suggestions on how to tackle the deposition itself. This information can make the experience less threatening to those professionals asked to testify.

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Occupational therapy practitioners will probably at one time or another become involved in the legal system. Often, these professionals are called to testify at a deposition. A deposition is a formal meeting at which attorneys representing the parties to a lawsuit will ask the witness, also known as the deponent, a series of questions. The deponent, who is under oath and sometimes accompanied by an attorney, must respond to the questions.

The deponent can act as a factual witness or an expert witness, or he or she can be an actual defendant in the lawsuit. Most frequently, occupational therapy practitioners are factual witnesses. Factual witnesses are not implicated in the lawsuit but have had some direct contact with persons associated with the lawsuit. Occupational therapy practitioners can be deposed for many reasons. For example, a practitioner can describe a patient's functional status or discuss a patient's treatment course and progression of function when the patient is involved in a personal injury case, medical malpractice action, or workers' compensation case. Practitioners also have been asked to discuss current and future therapy needs of pediatric patients to aid the court in determining child custody issues, for instance.

Because factual witnesses are not usually accompanied by an attorney to a deposition, or effectively counseled before attending a deposition, occupational therapy practitioners often are not properly prepared for the legal encounter. This article will describe the deposition process and provide helpful hints on how to prepare for a deposition if a practitioner is called to testify as a factual witness. If called as an expert witness or a defendant, the practitioner will need to follow additional guidelines, which are not discussed here.

What Is a Deposition?

A deposition is the most common method of discovery. Discovery is the process the attorneys for the plaintiff (the person initiating a lawsuit) and defendants (the persons accused of wrongdoing) use to find out as much information as they can about the lawsuit. Other methods of discovery include written interrogatories (i.e., itemized written questions that require a written response), production of documents, physical and mental examinations, and requests for admissions (i.e., formal requests for the opposing party to agree or admit to a factual element of the claim) (Fed. R. 26(a)(5)).

The deponent receives a subpoena that indicates the location and time of the deposition. If the deponent is unable to attend the deposition, he or she should try to make other arrangements with the attorney requesting
the deposition. Failure to appear at the deposition is considered contempt of court and can result in a penalty or fine (Fed. R. 37[b][1]; Henry, 1993). Usually, the attorneys are willing to accommodate a deponent's needs.

Most depositions are held in the offices of the attorney requesting the deposition. However, it is not uncommon to hold depositions on the premises of a health care facility to avoid disruption of health care services (Kliron, 1985).

The deposition procedure is simple. Once everyone is present and seated, the court reporter asks the deponent to raise his or her right hand and take the standard witness oath. The attorneys take turns asking questions. The court reporter records everything said by the attorneys and deponent, and these notes are later typed and bound into a book called a deposition transcript. After the deposition is completed, the court reporter asks the deponent whether he or she would like to waive reading the deposition transcript or would like to proofread it for accuracy after it is transcribed.

Depositions are relatively informal. The participants may drink coffee, take off their suit coats, and occasionally move around the room. The attorneys may trade side comments or wisecracks as well during the proceeding. Such informality can be misleading to a novice deponent; the information obtained at this proceeding is vitally important to a lawsuit, and the attorneys are very serious about their questions and the witness's answers.

What Is the Purpose of a Deposition?

Depositions serve many functions. First, the attorneys need to gather as much information as they can to sort out the facts of a case. Often, occupational therapy practitioners are called to testify at a deposition because the attorneys want to ascertain specific information about the occupational therapy intervention of a patient involved in the lawsuit. For example, if the plaintiff claims that he or she was injured due to a physician's medical malpractice, the attorneys will want to know everything about the plaintiff's past, current, and future care needs, or they may want to find out what documents exist and how to locate them.

Second, depositions can be used to preserve testimony for possible use during a trial in case the deponent is unable to testify in person. If a practitioner does not live in the jurisdiction of the court hearing the lawsuit, the deposition most probably will be videotaped so that the deponent will not need to travel in order to testify at the trial.

Third, depositions commit a witness to a version of facts from which he or she cannot later deviate. Thus, it is important for the deponent to know that testimony made at a deposition is given while under oath and that he or she will be held to any statements made during the deposition.

Finally, depositions allow the attorneys to evaluate the strengths and weaknesses of the case and the credibility of the deponent, which is important should the case go to trial. Case settlements are often reached because of information obtained and credibility evaluations made during a deposition (Yorke, 1994).

How Should the Deponent Prepare for the Deposition?

A deponent should never go to a deposition without first understanding who is requesting the deposition, why the deposition is being requested, and what information is being sought (Rosen, 1994). Therefore, the first thing the deponent must do is contact an in-house attorney, risk manager, or professional liability insurer. These persons will need to find out more about the case and determine whether the deponent will require legal representation at the deposition. For example, they may inquire whether the hospital, or other allied health care professionals employed by the hospital, is a defendant; whether the case involves a physician with admitting rights to the hospital; and whether the deponent can be implicated.

If the answers to these questions are yes, the deponent will need to be accompanied by an attorney at the deposition to protect himself or herself and the employer from liability. If there is a high probability of malpractice, the attorney most likely will educate the deponent about the deposition process and recommend strategies. However, if there is a marginal threat of malpractice liability, the deponent may receive minimal or last-minute guidance from an attorney.

If the answers to these questions are no, indicating no malpractice issues, the deponent will not need legal counsel at the deposition because his or her professional actions or the actions of the employer are not in question. The deponent falling within this latter scenario often receives no counseling from an attorney before a deposition unless he or she assertively seeks out such guidance.

In either case, the deponent should thoroughly review the patient's medical record in order to be thoroughly prepared for the deposition. If the deponent is not allowed to make copies of relevant documents in the record, he or she may take notes of all pertinent facts; however, these notes should not be brought to the deposition because the examining attorneys could request copies of them (Sullivan, 1995).

Ideally, the deponent should meet with the in-house attorney before the deposition to review the facts of the case and have the attorney explore potential questions the deposing counsel may pose (Hobbs, 1994; Yorke, 1994). The deponent should ask the attorney which doc-
Formats will be available during the deposition and to
which reports he or she may refer when testifying. For
example, a deponent should not refer to an incident
report unless specifically questioned about it (Sullivan,
1991) because this type of document is not a part of the
medical record and is used by the hospital for risk-
management purposes. In most jurisdictions, the informa-
tion in incident reports is considered to be a privileged
attorney–client communication and should not be released
without the express consent of the client or hospital.

Other health care professional communications may
be protected by state statute, and it is important for the
deponent to be aware of the laws that mandate such privi-
leges. For example, in Ohio, communications between
the patient and the physician, podiatrist, psychologist,
counselors, social workers, and social work assistants are
privileged and cannot be released without an express
waiver by the patient (Health Care Professional–Patient
and dates of treatment and communications to nonphysician health care providers, such as occupational
therapy practitioners, physical therapy practitioners, and
nurses, ordinarily are not privileged and can be released
by the hospital on receipt of a subpoena. In other words,
the patient’s consent or a court order are not necessary to
release this information. Thus, a practitioner can testify at
a deposition about his or her care and treatment of a patient
without the patient’s consent. Most facilities require a writ-
ten waiver by the patient before releasing these nonprivi-
leged documents in order to uphold ethical obligations to
maintain patient confidentiality. Arguably, a practitioner
may have to appear at a deposition when the documenta-
tion has not been released to the attorneys beforehand. In
that situation, the practitioner should review his or her
own documentation before attending the deposition and
answer the questions posed as he or she is able. Of course,
the practitioner should state that he or she does not know
or remember if unsure of an answer.

Ohio also mandates that if the patient is being or has
been treated or hospitalized for a mental illness (Hospital-
ization of Mentally Ill, 1991); is being treated for AIDS
or a related condition (Department of Health, 1990); or,
pursuant to federal law, is involved in an alcohol or drug
abuse treatment program (Comprehensive Alcohol Abuse
and Alcoholism Prevention, Treatment, and Rehabili-
tation Act of 1970, Drug Abuse Office and Treatment Act
of 1972), then all records kept in conjunction with the
abuse treatment program (Comprehensive Alcohol Abuse
and Alcoholism Prevention, Treatment, and Rehabili-
tation Act of 1972, Drug Abuse Office and Treatment Act
of 1972), then all records kept in conjunction with the
patient or through a court order (Scheutzow & Dan-
niels, 1990–1991). In this instance, records would include
the patient’s name, dates of treatment, and communications to nonphysician health professionals (i.e., occupa-
tional therapy practitioners) who are part of the treatment
team working with these patient populations. If the prac-
titioner is subpoenaed to testify at a deposition regarding
the occupational therapy intervention of these statutorily
protected patient populations, he or she will still need to
appear at the deposition but must not answer questions
about the patient’s identity, dates of treatment, or the
intervention without express patient consent or a specific
court order that releases this highly privileged information.

Finally, the deponent should be prepared to recall his
or her work and educational history and be able to list
professional associations to which he or she belongs. In
addition, the deponent may be asked to provide a home
address, even all previous addresses for a specified period
(e.g., 5 years or more).

Strategies to Use During a Deposition

Listen to and Understand the Question

Most attorneys begin a deposition by obtaining the fol-
lowing commitment from the deponent:

Mr./Ms. Witness, I’m going to be asking you some questions about
this matter. If you have any difficulty hearing my question, please
tell me. If my question is unclear, let me know, and I will clarify it
for you. If you answer my question, I’m going to assume that you
hear and understand me; is that agreeable?

Because agreeing with this statement is an acknowledg-
ment that the deponent heard and understood all ques-
tions asked at the deposition, the deponent should concen-
trate on every word of the question before answering
it. If the deponent misses a word because, for example,
someone coughs, he or she should ask the examiner to
repeat the question. If unsure of a meaning of a word,
the deponent should tell the examiner that he or she did
not understand the question and to please reword it.
The deponent should not offer all the possible interpre-
tations of the question because this will only help the
attorney explore other avenues that could lead to addi-
tional questioning or reveal legal issues not previously
identified (Davis, 1992).

Answer the Question

Pausing before answering a question allows the deponent
time to think through an answer (Gold, 1993). Another
good rule of thumb is to keep answers short and concise.
If the question begins with “who,” the answer should be
a name; if “where,” a place; if “when,” a date; and so on.
If the deponent cannot remember a specific fact, he
or she should say so and then keep quiet rather than vol-
unteering a reference to another person or document, for
example, “I can’t remember, but Steve will know” or “I
can’t remember but it’s written on my calendar,” because
the attorney will then depose Steve or ask to see the calendar. If the deponent does not know the answer, he or she should simply say that he or she does not remember or know. “I do not remember” means that at one time the deponent knew the answer but has forgotten it. “I do not know” means that the deponent never knew the answer (Smith & Griffin, 1988).

It is not uncommon to experience a period of silence after the deponent answers the question and before the attorney poses the next question. The attorney is either thinking about the next question or trying to make the deponent feel uncomfortable. Rather than filling in uncomfortable silence with chatter, the deponent should keep quiet and wait for the next question (Sullivan, 1991).

Always Tell the Truth

Being under oath requires that the deponent tell the truth. If an earlier answer was in error or incomplete, the deponent must correct or supplement that answer as soon as possible and make sure that these changes are recorded by the court reporter. Some attorneys like to ask the same question more than once to create doubt in the deponent’s mind about facts that he or she knows very well. The deponent should stick to the original answer if it was accurate.

Do Not Let the Examiner Misquote the Testimony

The deponent should listen carefully to the examining attorney’s summary of his or her testimony or set of facts because, commonly, the attorney will try to present the evidence in a manner that is most favorable to his or her case and wants the deponent to agree with or confirm his or her dissertation. Examples of phrases suggesting that the attorney is about to summarize information are: “Is it fair to say...?” or “Do you mean to say...?” (Davis, 1992).

Refer to the Medical Record

If asked specific questions about documentation or treatment that occurred some time ago, the deponent should use the medical record entries made by him or her to refresh his or her memory (Henry, 1993). In most cases, the attorneys will have copies of the medical record present at the deposition. When responding to questions regarding the documentation, the deponent should make clear reference to the date and title of the document as well as its various parts or sections (Klimon, 1985). For example, if referring to an initial occupational therapy evaluation, the deponent should state the title of the document, its date, and parts of the evaluation to which he or she is referring, such as the activities of daily living section, the assessment section, the goals, or the treatment plan. When asked to interpret a document written by another allied health care professional, the deponent should simply state that he or she is unable to interpret the record because he or she is not, for example, a nurse, or an anesthetist, or a physical therapist (Klimon, 1985).

Take Breaks, If Needed

Because depositions can take hours, the deponent has the right to ask the attorneys for a break. If the deponent is tired or for any reason, he or she can take as many breaks as needed (Clapp, 1989).

Speak Clearly and Dress Neatly

Speaking clearly and audibly during the deposition will make it easier for the court reporter to accurately record testimony. The deponent should also avoid the use of informal language that may convey a negative image; for example, “yes” sounds more professional than “yeah” (Sullivan, 1995).

Attorneys will appraise and judge how the deponent will impress a jury if the case goes to trial, so the deponent must dress neatly and conservatively. If deposed on hospital premises, the deponent may appear in uniform or work attire (Klimon, 1985).

Be Aware of Objections Made During the Deposition

Formal objections during a deposition preserve the right to have the question and response admitted into evidence at the time of trial. If a proper objection is not made at the time of the deposition, then that right is waived. Therefore, when a deponent who is accompanied by an attorney starts to answer the question and hears his or her attorney object to the question, the deponent should stop talking and allow counsel to make the statement. The deponent’s attorney will then let the deponent know whether he or she should finish answering the question. Most questions to which objections are raised can be answered except for those asking about privileged information. For example, the content of discussions between the deponent and his or her attorney is privileged and cannot be inquired into by any of the counsel present at the deposition (Fed. R. 30[d][1]; Henry, 1993; Proller, 1991).

Review the Deposition Transcript for Accuracy

In some locales, the deponent will be given a copy of the transcript of his or her testimony to review and sign, under the penalty of perjury, indicating that the content is truthful and accurate (Fed. R. 30[e]). If the deponent finds substantive errors in the transcript, he or she should contact his or her attorney who can make an errata sheet with corrections. However, before making any substantive
changes, the deponent should know that these could have an impact on his or her credibility at a later time (Henry, 1993).

Conclusion

Health professionals, including occupational therapy practitioners, need to go to depositions prepared. The strategies outlined in this article may make the deposition process less intimidating and frightening and allow the practitioner to proceed with confidence and, thus, help ensure a fair legal forum for everyone involved in the litigation.

References


Fed. R. of Civil Procedure, Rule 30(e).


