Preparing for a Deposition

Speakers
Michael Loughran, Mary Ryan

15 pages total

Whether a case goes to court or is settled before trial, the deposition is one of the most critical stages of litigation and can support or hinder a successful legal defense. A physical therapist who is called to give a deposition should be as prepared as if he or she was going to testify before a judge and jury. This session will provide a better understanding of what a deposition is, the deposition process, and how you can successfully prepare for a deposition.

Upon completion of this course, you'll be able to:

- Define what a deposition is
- Describe the deposition process
- Provide useful advice related to deposition preparation
- Offer specific examples through a "mock deposition"

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DAWNING OF A NEW DAY:

HPA IS CREATING A MOVEMENT
YOU ARE INVITED TO JOIN US

What: **HPA the Catalyst** Town Hall Meeting
When: Wednesday, January 23, 2013, 6-8 PM
Where: Hilton Bayfront, Cobalt 500 Room, San Diego, CA

Snacks and Surprises
Objectives

- Discuss civil litigation against physical therapists:
  - Describe the most common and most severe allegations and injuries alleged against physical therapists
  - Describe indemnity payments paid on behalf of physical therapists
- Discuss the definition of the term “negligence,” as it applies here
- Outline the steps in the litigation process, including:
  - Discovery
  - Deposition
- Discuss the importance of being prepared for a deposition
- Discuss the perils of not being prepared for a deposition
- Describe how to prepare for a deposition
- Discuss tips which lead to effective deposition testimony

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Who is HPSO?

- Healthcare Providers Service Organization (HPSO) provides professional liability insurance to healthcare professionals, to 80+ professions, including physical therapists & private practices.
- We insure over 59,000 individual PT customers with over 9,000 private practices (representing an additional approx. 35,000 PT & PTA’s).
- HPSO is committed to helping physical therapists better understand their liability risks in order to provide better patient outcomes and reduce the possibility of a suit.
- Legal case studies, risk management articles, newsletters as well as the HPSO/CNA claim reports.
What is Malpractice?

- **Definition:** Negligence or failure to provide the degree of care required of a professional under the scope of license resulting in injury, death or damage.

- Malpractice is a type of negligence that pertains to professionals.

- Physical Therapists and other professionals can be sued for malpractice.

How Does a Patient Define Malpractice?

- Perception of wrongdoing.

- If a patient perceives he or she has been injured as a result of the care you provided, or failed to provide, that patient could sue.

Deposition Representation – Coverage details

- Pays attorney fees as a result of your required appearance at a deposition that arises out of a covered claim for professional services.

- **Two sides to the coverage extension of your professional liability policy:**
  - Covers you if you are named in a lawsuit and receive a subpoena for deposition testimony
  - Covers you if you are a witness to an incident and receive a subpoena for deposition testimony.
Monetary Losses Involving Physical Therapy Litigation

The following loss information is based upon a CNA/HPSO claims analysis of 552 physical therapy closed claims during the period of 2001-2010.

- Over $44 million was paid in professional liability judgments and settlements on behalf of physical therapists during the study period, realizing an average total incurred of $103,111 per claim.

### Severity by Insurance Type

<table>
<thead>
<tr>
<th>Insurance Type</th>
<th>Percentage of closed claims</th>
<th>Total paid indemnity</th>
<th>Average paid indemnity</th>
</tr>
</thead>
<tbody>
<tr>
<td>PT Practice (PTs, PTAs and other professional designations)</td>
<td>63.0%</td>
<td>$29,297,441</td>
<td>$84,188</td>
</tr>
<tr>
<td>PT, individually insured</td>
<td>35.7%</td>
<td>$14,272,033</td>
<td>$72,447</td>
</tr>
<tr>
<td>PTA, individually insured</td>
<td>1.3%</td>
<td>$503,524</td>
<td>$71,932</td>
</tr>
<tr>
<td>Overall</td>
<td>100.0%</td>
<td>$44,072,998</td>
<td>$79,842</td>
</tr>
</tbody>
</table>

Chart Reflects Closed Claims with Paid Indemnity of ≥ $10,000

### Severity of Allegation by Category

<table>
<thead>
<tr>
<th>Allegation category</th>
<th>Percentage of closed claims</th>
<th>Total paid indemnity</th>
<th>Average paid indemnity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to properly test or treat</td>
<td>0.8%</td>
<td>$1,893,805</td>
<td>$473,451</td>
</tr>
<tr>
<td>Improper management over the course of treatment</td>
<td>11.3%</td>
<td>$6,459,346</td>
<td>$119,618</td>
</tr>
<tr>
<td>Environment of care</td>
<td>1.5%</td>
<td>$636,792</td>
<td>$90,970</td>
</tr>
<tr>
<td>Failure to monitor</td>
<td>15.9%</td>
<td>$6,508,342</td>
<td>$85,636</td>
</tr>
<tr>
<td>Improper performance using therapeutic exercise</td>
<td>26.6%</td>
<td>$10,600,774</td>
<td>$40,176</td>
</tr>
<tr>
<td>Improper performance of manual therapy</td>
<td>14.0%</td>
<td>$5,360,466</td>
<td>$38,007</td>
</tr>
<tr>
<td>Improper behavior by practitioner</td>
<td>5.7%</td>
<td>$1,537,018</td>
<td>$85,636</td>
</tr>
<tr>
<td>Equipment-related</td>
<td>6.7%</td>
<td>$1,576,538</td>
<td>$23,268</td>
</tr>
<tr>
<td>Improper performance using a physical agent</td>
<td>17.4%</td>
<td>$3,334,615</td>
<td>$19,076</td>
</tr>
<tr>
<td>Overall</td>
<td>100.0%</td>
<td>$37,907,696</td>
<td>$79,471</td>
</tr>
</tbody>
</table>

Chart Reflects Closed Claims with Paid Indemnity of ≥ $10,000

### Most Severe Physical Therapy-Related Allegations

Claims against physical therapists may be based upon a wide range of allegations, including:

Most severe allegations include:

- Failure to properly test or treat — e.g., using excessive weight when testing patient functional capacity.
- Improper management over the course of treatment.
- Environment of care — e.g., equipment not mounted properly on the wall.
Most Common Physical Therapy-Related Allegations

Most common allegations include:

- Improper performance using therapeutic exercise — e.g., injury during gait or stair training.
- Improper performance using a physical agent — e.g., hot packs or cold packs.
- Failure to supervise or monitor.

### Severity by Injury (Top 16)

<table>
<thead>
<tr>
<th>Injury</th>
<th>Percentage of closed claims</th>
<th>Total paid indemnity</th>
<th>Average paid indemnity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paralysis</td>
<td>0.4%</td>
<td>$1,300,000</td>
<td>$410,000</td>
</tr>
<tr>
<td>Physical injury resulting from abuse/assault</td>
<td>0.4%</td>
<td>$401,000</td>
<td>$200,500</td>
</tr>
<tr>
<td>Herniated disc</td>
<td>5.5%</td>
<td>$4,850,354</td>
<td>$178,973</td>
</tr>
<tr>
<td>Death</td>
<td>0.8%</td>
<td>$632,125</td>
<td>$158,031</td>
</tr>
<tr>
<td>Traumatic brain injury</td>
<td>1.0%</td>
<td>$648,288</td>
<td>$128,058</td>
</tr>
<tr>
<td>Loss of organ or organ function incl. hearing and sight</td>
<td>1.0%</td>
<td>$544,000</td>
<td>$108,800</td>
</tr>
<tr>
<td>Increase or exacerbation of injury/symptom</td>
<td>17.8%</td>
<td>$7,611,980</td>
<td>$410,000</td>
</tr>
<tr>
<td>Fracture</td>
<td>26.4%</td>
<td>$11,055,822</td>
<td>$410,000</td>
</tr>
<tr>
<td>Dislocation</td>
<td>2.5%</td>
<td>$925,250</td>
<td>$370,100</td>
</tr>
<tr>
<td>Neurological – peripheral and all other</td>
<td>0.6%</td>
<td>$347,500</td>
<td>$58,000</td>
</tr>
<tr>
<td>Muscle/ligament damage</td>
<td>9.0%</td>
<td>$3,255,236</td>
<td>$361,685</td>
</tr>
<tr>
<td>Amputation</td>
<td>1.8%</td>
<td>$344,482</td>
<td>$184,168</td>
</tr>
<tr>
<td>Infection/abscess/sepsis</td>
<td>0.9%</td>
<td>$272,500</td>
<td>$30,250</td>
</tr>
<tr>
<td>Loss of use of limb</td>
<td>3.1%</td>
<td>$1,009,000</td>
<td>$67,267</td>
</tr>
<tr>
<td>Bleeding/hemorrhage</td>
<td>0.2%</td>
<td>$50,000</td>
<td>$50,000</td>
</tr>
<tr>
<td>Burn</td>
<td>29.1%</td>
<td>$3,856,134</td>
<td>$46,168</td>
</tr>
</tbody>
</table>

Chart Reflects Closed Claims with Paid Indemnity of ≥ $10,000

Most Severe Physical Therapy-Related Injury Claims

The most severe injuries claimed against physical therapists include:

- Paralysis
- Physical Assault
- Herniated Disc
- Death

Most Common Physical Therapy-Related Injury Claims

The most common injuries claimed against physical therapists include:

- Fractures
- Burns
- Increase or exacerbation of injury/symptoms
Reportable Incidents – How do you know?

Spotting and reporting incidents – Act Early!
Incidents are specific events. Any error or omission in professional services that has resulted in a patient injury or complaint, and that you think may lead to a claim, such as:
• Statement from a client indicating that he/she may be considering filing a claim
• Signs of patient displeasure and/or a request for reimbursement
• Concerns such as adverse treatment results
• Letter of complaint
• A heated disagreement
• Repeated failure to keep appointments without adequate explanation

What is a claim?

A claim means a demand for money or services. A claim also means filing of a suit or the starting of arbitration proceedings naming you and alleging injury or damage. A claim could be any one of the following:
• Summons/complaint Letter
• Legal paperwork, or a demand for services or money
• Oral threat or complaint
• Notice of Arbitration

All alleging an act or omission in the rendering of professional services.

Establishing Negligence in a Malpractice Lawsuit

To establish a prima facie case of negligence against a health care professional, an injured party (the “plaintiff”) must plead and prove several elements:
• Duty of care
• Breach of the duty
• Causation—the health care professional’s breach of the duty of care (e.g. negligence) proximately caused the plaintiff’s injuries
• Damages—monetary value of the plaintiff’s injuries

Reportable Incidents – Examples

• Falls
• Treatment-related injuries such as burns
• Complaints of inappropriate touching
• Complaints about unexpected or unusual pain or discomfort
• Equipment-related injuries or events that have the potential for injuries such as a malfunctioning treadmill
The Litigation Trigger

The civil litigation process that may lead to a deposition begins when a patient who believes that he or she has been injured through a practitioner’s negligence seeks redress, and retains an attorney for professional assistance.

If after investigation, the attorney considers the patient’s claim meritorious, and the claim cannot be resolved “pre-suit,” the lawyer may initiate proceedings in a court of law, by filing a lawsuit.

The litigation process then follows a prescribed course.

Steps in the Civil Litigation Process

• **Complaint:** Typically, this is the first document filed with the court in a lawsuit. It sets forth the plaintiff’s allegations and theories of liability against the health care professional (the defendant), as well as the request(s) for relief.

• **Answer:** This document, which is filed with the court, sets forth the defendant’s response to the allegations of the Complaint, and may include affirmative defenses.

• **Discovery:** This is the litigation investigative process that takes place after the filing of the complaint, and before trial. It involves a structured exchange of evidence and statements between the opposing parties. There are several forms of discovery, including the deposition.

Steps in the Civil Litigation Process (continued)

• **Motion to Dismiss:** This is the legal procedure used to dismiss a lawsuit where the allegations are not one for which the law provides a remedy, even if one were to assume that all of the allegations were true.

• **Motion for Summary Judgment:** This is a legal procedure where one party seeks to have the judge resolve the lawsuit as a matter of law, without a trial, because there is no genuine issue of material fact for the jury to decide.

• **Settlement:** The process of resolving a lawsuit through an agreement by the parties. Note: 61% of medical malpractice lawsuits are settled out of court.

• **Trial:** The legal process by which a jury or judge (bench trial) consider the evidence of the parties, decide the facts of the case and then apply those facts to the law, by rendering a verdict.

*Harvard School of Public Health, 2006 Published Report, LawyerLocator.com*
The Deposition

Here is what you as a physical therapist must understand about the deposition process, and the steps involved in being deposed.

• The deposition is a formal legal proceeding for gathering information from a party to, or witness in, a lawsuit.
• You receive a court subpoena directing you to testify orally under oath.
• The deposition may take place in opposing lawyer’s office, and typically uses a Q&A format.
• Your statement is given under oath; recorded verbatim, stenographically by a court reporter; and may be videotaped.

The Deposition (continued)

• Your lawyer (the defense attorney or counsel) will be with you during the deposition, and may object if he/she thinks a question is inappropriate.
• The goal of the opposing lawyer (the plaintiff’s attorney or counsel) at your deposition is to restrict you to one story or set of sworn facts, so that you must adhere to the identical information when you are called to testify in a trial.
• The plaintiff’s attorney may try to trap you in an inconsistency — to trip you up, or rattle you, or undermine your credibility — while assessing your strengths and weaknesses as a potential witness.
• Your part — as a witness for the defense — is to answer only the questions directly asked of you, without explaining or volunteering anything.

The Importance of Depositions

The importance of giving a good deposition cannot be over-emphasized.

• Juries in medical malpractice cases are acutely interested in the stories told by defendant-caregivers and how they tell them.
• Jurors want to hear how a practitioner accused of negligence explains “what happened” during the care provided to a patient who is suing.
• There is a critical link between the deposition and the trial because the story that you tell while being deposed is — in every detail — the one to which you’ll be linked before the jury at trial.

The Importance of Depositions (continued)

• If you report to your deposition unprepared — and thus provide testimony that is confused, contradictory, or unnecessarily harmful to the defense — there is no going back.
• You cannot brush up on the case and develop a “better” story for the trial, because you’re already on the record with what you said while being deposed.
What Every Physical Therapist Needs to Know About Deposition Preparation

Going to the Deposition Unprepared

Despite the crucial importance of depositions, physical therapists and other medical professionals summoned to give sworn testimony actually do appear, at times, for a deposition with little or no preparation. In those instances,

- They have failed to review the medical record.
- They have not spoken in depth with their defense attorney.
- They have set themselves up for failure.

The Unprepared Witness

Scenario:

A physical therapist, accompanied by her defense attorney, arrives for her deposition. The physical therapist is expected to testify, under oath, as to the circumstances around an allegation of malpractice.

The deposition is taking place at the office of the plaintiff’s attorney.

Fact Pattern of the Case

- The Physical Therapist works in a private practice
- The practice has a free-standing physical therapy facility where services are provided
- The Physical Therapist has been licensed for 10 years
- The treating physician referred a 70 year old patient for treatment of a left knee sprain/strain
- The patient had undergone six (6) prior therapy sessions showing improvement with each session
- Patient was using a treadmill for the first time the day of the incident
- The patient, unassisted, stepped off the treadmill and fell
- A Physical Therapy Assistant had been working with the patient prior to the fall
How do you think she did?

Analysis: What Went Wrong?

• The Physical Therapist was not properly prepared for the deposition
• No advance consideration was given by the Physical Therapist to her own charting and the issues raised by the companies policies and procedures
• Other documentation, including her CV, had not been reviewed
• The Physical Therapist and her lawyer should have seen the red flags in the medical record and anticipated the line of questioning, if the chart note had been reviewed in advance.
• Reasonable and truthful explanations for why and when the chart entries were made would have been possible with proper advance preparation.
• Had the Physical Therapist prepared thoughtful answers to anticipated questions, she would not have reacted defensively.

Take 2

How do you think she did?
Analysis: What Went Right?

- The Physical Therapist was properly prepared for the deposition.
- Advance consideration was given by the Physical Therapist to her own charting and the issues raised by the companies policies and procedures.
- Other documentation, including her CV, had been reviewed.
- The Physical Therapist and her lawyer saw the red flags in the chart note and anticipated the line of questioning.
- Reasonable and truthful explanations for why and when the chart entries were made were provided as a result of advanced preparation.
- The Physical Therapist prepared thoughtful answers to anticipated questions and did not react emotionally.

Putting Things Right: Preparing for a Deposition

The main reason for failure in this case was a complete lack of preparation. Logically, then, getting oneself prepared can be counted on to produce better results.

With that in mind, what follows are some important markers along the road to preparing yourself for a deposition.

Act Early

As soon as you know that you have been subpoenaed for a deposition, act without delay.

- Check first with your PT practice’s owner Business Manager/ Administrator
- This leader may be able to:
  - Get you up to speed on the lawsuit
  - Urge you not to be alarmed
**Get the Facts**

One of the first things you’ll want to do in early meetings with your defense counsel is to learn about the details of the lawsuit.

- What specific allegations have been made?
- You will want to learn the particulars about who is being sued, and the nature of the allegations.
- You will need to thoroughly discuss the allegations with your lawyer.

**Do Your Homework**

Your attorney will have a copy of the medical record for you to review.

- Your “assignment” will be to dissect the record, examining every aspect — time sequences, physical therapists’ notes, treatment plan, and such — through the lens of the plaintiff’s allegations.
- Develop a timeline, if directed by your attorney to do so, showing the chronology of care that you provided for this patient.
- Compare the specifics of your care with the details of the allegations. How do they match up?

**Do Your Homework (continued)**

This phase of preparation requires time, as well as collaboration with your defense counsel. Based on the allegations and a review of the medical record:

- A “theory of defense” will be designed by you and your lawyer.
- Probable questions from opposition lawyers will be identified.
- Reasonable responses will be discussed.

**Stay on Track**

You and the defense lawyer will keep in contact as the date of your scheduled deposition draws closer:

- A review session is typically scheduled for about one month before you are to be deposed.
- You and your lawyer will meet ahead of time on the day of the deposition, typically at the offices of the plaintiff’s counsel. You and your attorney will discuss any last-minute concerns.
- Your lawyer will accompany you to the deposition and be present with you during the deposition process.
Tips for Being Deposed

In addition to thorough preparation, a good deposition outcome also can depend on your demeanor — that is, your attitude and bearing while you are being questioned by the opposing attorney. It is best to present yourself as confident and reasonable.

Here are some additional tips that can help while you are being deposed:

• Listen carefully.
• Think before you speak, and while speaking.
• Speak slowly and clearly.

Tips for Being Deposed (continued)

• Answer only the question that is asked. Don’t anticipate further questions, expand on your answer, or give information that wasn’t asked for.
• If you must consult the medical record, ask to do so.
• Likewise, if you need a break or a drink of water, ask for it.

The Importance of Good Documentation

• Medical records are legal documents
• Can provide evidence against miscommunication and misunderstanding
• May help guard against a lengthy litigation process
• No matter what we do or say we do, it is virtually impossible to prove unless it is clearly documented
• General rule: "Not documented, not done"
• A well documented record can
  - Demonstrate to the Licensing Board that you are a competent Physical Therapist
  - Keep you from being named in suit
  - Keep you out of court if you ARE named in suit.
  - Help you win if you do go to court.
Last Word

Today, we have discussed what you as a physical therapist ought to do if you are called to testify at a deposition. While the answer may not be easy, it is simple.

As a highly-trained professional, your approach to a deposition should be no different from your approach to any other duty you undertake as an expert clinician. That is, you investigate, you prepare … and then you prepare some more.