

What to Expect at Your Deposition

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Do You Need to Prepare for Your Deposition to Be Taken?

An attorney has just given notice that he wants to do your deposition and cross-examine you on a report you have written. What do you do? A deposition is part of the discovery procedures available to an attorney in a lawsuit. Among the purposes of discovery are: (1) to find evidence; (2) to avoid surprises; (3) to narrow the issues; and (4) to help the attorney prepare for trial. The attorney looks for the strengths and weakness in their case in order to assist in possible settlement of the case.

The attorney will be well aware that a deposition provides opportunities and dangers. The attorney is also aware that the deposition may be expensive. They will need to pay for your time; the cost of a court reporter; and later, for copies of a transcript of the deposition at about \$5.00 per page. Therefore, the total cost of a short deposition can be between \$1,000-\$2,000.

Was the Acupuncturist Designated as an Expert or Merely a Consultant?

An acupuncturist may often be identified as an expert consultant retained to provide an attorney information about the case, but not designated to testify as an expert at trial. In those cases, the acupuncturist's identity is not discoverable, and their deposition may not be taken (*South Tahoe Public Utility District v. Superior Court*, 1979, 90 Cal App. 3d135). However, if you are designated as an expert to testify at trial, your opinion is discoverable, and your identity, reports and opinions are discoverable per California Civil Code of Civil Procedure, sec. 2034 and *Brokopp v. Ford Motor Co.*, 1977, 71 Cal App. 3d841 and 857.

Beware of Attorney Techniques during the Deposition

The experienced attorney will know that the best way to handle a deposition is not to attack the expert like a machine gun "head-on," but to find subtle ways to chip away or gradually attempt to destroy the expert's opinion. The attorney preparing the expert to testify will most likely advise the expert to answer questions with a yes or no answer and not to volunteer additional information. However, sometimes it may be to your benefit to explain an answer. Per *McGuire v. Baird*, 1937, 9 C2d P2d 915, experts must be given an opportunity to explain yes or no answers.

There are two series of books that the expert may want to use in preparing for a deposition: *The American Jurisprudence Proof of Facts and Trials*. Both have impressive lists of questions an expert may be asked, as well as checklists and some recommended answers. The sections on carpal tunnel and related conditions are truly impressive. These books are available at most law libraries and can be an important resource for the acupuncturist.

Areas for Questioning

Areas for questioning the acupuncturist by the attorney may include:

1. Are the reports internally inconsistent? An expert may prepare an initial report on date, then

perform a second examination and issue a supplemental report. In comparing all of the documents, the attorney may note several inconsistencies. The attorney may be able to demonstrate that the expert has "flip-flopped" on the issues. Thus, substantial evidence would not support his opinion in view of the many contradictory opinions provided by the expert.

2. Does the expert properly address how long the condition was "lit up" and whether or not, with medication, the applicant could return to their preinjury status? The expert should specifically address the time period in which condition was "lit up" to determine periods of temporary disability of an applicant.
3. Does the expert have an accurate medical history? The expert may not realize the applicant had been hospitalized on prior occasions and may have no records of such hospitalizations. Such records might be needed for the expert to have accurate medical histories to form an opinion. In California, case law requires accurate histories in order to have a compensable injury under California's workers' compensation laws (*Pino v. WCAB*, 1992, 57 CCC 62). Medical opinion is no stronger than the facts on which it is based (*Owings v. IAC*, 1948, 31 C2d 689). If based on incorrect facts, an expert opinion does not constitute substantial evidence (*Los Angeles Unified School District v. WCAB*, 1981, 116 CA 3d 393 and *Place v. WCAB*, 1970, 35 CCC 525).
4. Are the applicant's work restrictions inconsistent with the applicant's current level of activity or current employment? Sometimes, an expert may place a work restriction of a "stress-free environment," but such restriction is inconsistent with the applicant's current level of employment wherein the applicant receive calls from upset customers; meets deadlines; and in other ways handles all aspects of their current position. An expert needs sufficient details of an applicant's current level of activity and employment in order to provide an accurate work restriction.
5. Is the expert's opinion based on sheer speculation and conjecture? California law provides in workers' compensation cases that an expert's opinion may not be based on speculation, conjecture or guess (*Hegglin v. WCAB*, 1971, 4C3d 162). Obviously, it is a difficult task for an expert to state precise figures on issues such as causation and apportionment. Nevertheless, the expert must make conclusions when faced with conflicting factual contentions made by the parties (*Liberty Mutual Ins. Co. v. Indus. Acc. Com*, 1948, 33 Cal 2d 89).
6. Is the expert's opinion inconsistent with other statements made by the expert in published articles or other medical reports? Section 780(h) of the California Evidence Code permits impeachment with inconsistent statements on the issue of the witness's credibility.

In conclusion, the acupuncturist must keep a cool head and not be intimidated by any techniques used by an attorney. Some final suggestions for the acupuncturist in preparing for a deposition are:

1. Request payment for your time in advance of the deposition. Essentially, if the attorney asks for your time, they must pay for it ahead of time if your deposition is being taken as an expert witness.
2. Review your reports and your file prior to the deposition. Be prepared for questions on the charges for your treatment; the nature of your treatment; your diagnosis; the basis of your opinion; and other related questions.
3. Review the medical literature to make sure your opinion is correct based on the current literature. In other words, look for any facts or new information that may have changed since your examination of the applicant.

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