
The National Society of Dental Practitioners and the Dentist's Advantage Insurance Program for Dentists

RISK MANAGEMENT ARTICLE

Receiving Notice for a Deposition: What it Means and How to Prepare

One of the rolls we play at Intercare Insurance Services is to assist our insured doctors through the sometimes confusing legal process. As the claims administrator for Dentist's Advantage, we receive calls regularly from member dentists seeking guidance after receiving either a Notice or Subpoena for Deposition¹.

What is a deposition?

For those dentists who have never been involved in a lawsuit, or happen to have close friends or family who are attorneys, the entire process of a deposition is a complete unknown. In short, a deposition is the recorded sworn testimony of a witness.

Although every state is different as to the specifics of how a lawsuit proceeds from beginning to end, one common denominator is what is called the "discovery period." When a lawsuit is filed, unless it is in a small court of limited jurisdiction, such as Small Claims Court, there is a period of time before the trial in which both parties exchange information relevant to the lawsuit. This exchange includes physical documents as well as information held by the opposing party or of other persons who are not a party to the lawsuit. One way to gather this information is to get a verbal statement, or testimony, from an individual by asking a set of questions in the presence of a court reporter who transcribes the questions and answers. The testimony given by the witness is given under oath, similar to being in a court room.

Why would a party seek a dentist's deposition?

In his or her capacity as a dentist, the doctor may be called to provide deposition testimony in one of three situations: (1) the dentist is a party to a lawsuit; (2) the dentist provided treatment to an individual who is a party to a lawsuit; or (3) the dentist is providing expert opinions regarding the treatment by a fellow dentist. Ultimately, the purpose of the deposition is to find out what the dentist knows regarding the treatment at issue in the lawsuit and how the dentist will testify at the trial.

How to respond after receiving a Notice for Deposition?

In cases where the dentist is a party to a lawsuit or is acting as an expert witness, the Notice will generally be sent directly to the defense attorney who will respond appropriately for the dentist. However, if a dentist receives a Notice for Deposition sent directly to him or her, most of the time, an attorney is seeking information relative to the treatment provided to a patient who is bringing a lawsuit against another dentist. When this is the case, we recommend the dentist contact **Intercare** as soon as possible to report receipt of the Notice.

Although receipt of a Notice of Deposition is not necessarily a claim against the dentist, a Claims Specialist at Intercare can review the Notice and discuss with the dentist his or her options. Generally, the primary decision to be made is whether the dentist wants to retain an attorney to assist him or her with preparing for the deposition and to represent the dentist during the process.

In the event the dentist decides to retain an attorney, an Intercare Claims Specialist can recommend a local attorney who has experience specific to representing dentists in lawsuits. Although the professional liability policy does not provide coverage for the attorney fees, many times the dentist will find that it is well worth paying the legal fees to have an attorney assist him or her through this process.

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An important thing to consider when deciding whether to retain an attorney is that an attorney will not only guide the dentist through the deposition process, but can quite often help the dentist from becoming drawn into the lawsuit beyond the deposition. In other words, an attorney may help prevent the dentist from becoming a new or additional target in the lawsuit.

How to prepare for the Deposition?

In the event the dentist decides to retain an attorney, the dentist can expect the attorney will request the dentist send a copy of the patient chart to the attorney's office and will schedule a pre-deposition meeting. During that meeting the attorney will review with the dentist his or her treatment and thoroughly review the patient chart with the dentist. The attorney will also advise the dentist on whether there are any additional materials outside of the patient chart that the dentist should review prior to the deposition. The attorney will also know whether you can request payment for your time at the deposition.²

The attorney will also advise the dentist of what questions he or she can expect during the deposition, and how to appropriately respond. This is not to say the attorney will give the dentist "canned" answers, but he or she will guide the dentist how to approach a question. The attorney will also explain the logistics of the deposition, including how the dentist will be sworn in at the outset of the deposition and that the initial questions by the other attorney usually are identifying questions such as asking the dentist's name and possibly his or her educational background. The dentist should expect his or her attorney may object to some of the questions the other attorney is asking; the attorney will prepare the dentist on how to respond if this should occur.

Depending upon the circumstances, a dentist may choose to forego legal representation for the deposition. In that case, the following are a few pointers that may be helpful:

- Contact the attorney who sent the Notice to confirm the time and place of the deposition. If the time or place indicated on the Notice is inconvenient, request it be changed. You can even request the deposition be taken in your office if you have a private office with enough room for 4 to 6 people
- Do not attempt to discuss your upcoming deposition with either the patient or any other provider, including the one who is being sued
- Dress appropriately; business casual is best
- Bring a copy of your patient chart with you, but be prepared to share this copy with the attorney; leave your original chart at your office
- Thoroughly review your patient chart before the deposition and be prepared to answer questions as to any entry in the chart; also be prepared to answer questions as to why you included any information contained in your chart
- Be prepared to answer any questions regarding any independent memory you have of the patient that may not be included in the patient chart
- Listen to each question carefully and answer to the best of your knowledge; often the practice of taking a full breath before answering each question is helpful

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- Always allow the attorney to complete his or her question before offering your answer
- Do not assume you know what answer the attorney is looking for
- Never speculate; if you do not know the answer to a question, "I don't know" or "I don't remember" are perfectly acceptable answers
- It is acceptable and expected that you take breaks, do not be afraid to ask for one if you need it
- Be aware that if you offer up opinions regarding the "negligence" or "competence" of another dentist, you are more likely to be called to testify later at the trial

After the Deposition is over:

When the deposition is concluded the attorney asking the questions may advise you whether you can expect any further involvement in the lawsuit; however, this is not always the case. Some attorneys will be more forthright and share his or her thoughts on your involvement and/or importance to the case. Be aware, however, that often it is not until long after the deposition is taken (and the transcript reviewed) that the attorney will decide whether it will be necessary to bring you back to testify at trial.

In summary, there are many reasons an attorney will take the deposition testimony of a dentist who is not a party to a lawsuit. The attorney could be trying to determine a patient's dental condition before he or she was treated by the defendant dentist who is being sued; similarly, the attorney may be trying to determine what damage was done by the defendant dentist if you happen to be the dentist who treated the patient subsequently to the dental treatment at issue in the lawsuit. Or, worst case, the attorney could be attempting to discover which dental provider actually caused the alleged damage to the patient. Never assume you know the purpose of the deposition, and do not expect the attorney to tell you. Based upon the type of questions asked, many defense attorneys will be able to surmise the other attorney's legal theory and give you an idea of whether you may become a target in the lawsuit. Again, although not absolutely necessary, because of the reasons set forth above, we generally recommend dentists retain an attorney to represent him or her for the deposition.

¹Whether the legal document is called a Notice or a Subpoena depends upon the specific state where the matter is being litigated.

²Each state is different as to the statutory fees a non-party witness may demand for deposition time.

Intercare Insurance Services is the full service claims administrator for matters covered under your Dentist's Advantage Professional Liability Insurance Policy. Your policy requires that you give prompt notification as soon as practicable after you learn of an occurrence or incident that might result in a claim or lawsuit against you. If you become aware of an incident, or if a claim or lawsuit is brought against you, please contact Intercare Insurance Services at the following Toll Free telephone number: 1-800-848-2686.

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