

MINNESOTA

# Defense

WINTER 2023



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# TELLING YOUR STORY: USING THE DOCTOR DEPOSITION OFFENSIVELY

BY KEVIN MCCARTHY

Historically, depositions of defendant medical providers have been an exercise in defensive maneuvers. The mantra of “less is more” has been the guiding principle in these depositions. Attorneys train their medical provider to answer the question, and only answer the question, offering as few details as possible while remaining truthful. This approach certainly has benefits. The less a provider says, the less opportunity for follow-up questions or for a plaintiff’s attorney to be educated on the medicine. The “less is more” approach also offers medical providers an easy escape rope when wrangling with answers to the ill-defined hypothetical questions they all face during depositions in malpractice litigation.

But depositions of medical providers have changed in the last decade. Minnesota Rule of Civil Procedure 32.01 states that the “deposition of a party . . . may be used by an adverse party for any purpose.” Minn. R. Civ. P. 32.01(b). Moreover, Rule. 32.05 provides, “[v]ideo depositions may be used in court proceedings to the same extent as stenographically recorded depositions.” Minn. R. Civ. P. 32.05. Although Minnesota district courts continue to state a preference for live testimony, the use of video depositions as substantive testimony, and not simply for impeachment purposes, has grown significantly, irrespective of the availability of the defendant medical provider.

Indeed, plaintiffs’ attorneys are regularly approaching depositions of medical providers as a first attempt at trial cross examination rather than a discovery mechanism. More

importantly, those attorneys are using the traditional defense deposition strategy of “less is more” advantageously. They use snippets of the video deposition to present the testifying provider as evasive, afraid to answer questions about his or her care, or failing to have adequate knowledge of the medicine.

In this article, we propose a more affirmative approach to the medical provider deposition, using early development of defense themes and image messages to testify offensively, rather than defensively, in those depositions. To be clear, we are not advocating for a complete retirement of the “less is more” approach in the appropriate scenario. It certainly has benefits for limiting follow-up questions and prevents medical provider deponents from testifying outside of their respective scopes of expertise. Rather, we are proposing that we work with our medical provider clients to find appropriate opportunities during the deposition to explain the care provided, and more importantly why it was appropriate, through the lens of developed themes and image messages.

## THE “GESTALT” OF LITIGATION

Dr. Melissa Gomez, a psychologist and jury consultant from Philadelphia, has published on a theory that she refers to as the “gestalt” of trial. Melissa M. Gomez, Ph.D., *Jury Trials Outside In: Leveraging Psychology from Discovery to Decision*, pp. 1-4 (2016). In her book, Dr. Gomez discusses Gestalt psychology, which is the study of “the human

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*Kevin McCarthy focuses his practice in the areas of professional liability, product liability, and catastrophic personal injury, as well as insurance matters, such as coverage disputes and claims of bad faith. Kevin holds leadership roles in both the Minnesota Defense Lawyers Association, where he serves on the Events Committee, and in the Defense Research Institute, where he is the acting Chair of the Young Lawyers Seminar Planning Subcommittee.*

response to the entirety of an experience.” *Id.* Dr. Gomez uses the example of a song to explain Gestalt psychology, explaining that humans, when listening to a song, do not hear separate instruments or vocal sounds, but instead hear the collection of those individual sounds as one piece of music. *Id.* She then extends this theory to litigation, stating that successful litigators tell one “consistent” story at trial to build credibility with the jurors. *Id.* Dr. Gomez explains that a consistent story is built by ensuring that all of the separate parts—arguments, behaviors, demeanor, and tactics by attorneys, clients and witnesses—are all aligned.

A primary goal in any medical malpractice litigation is to show that the medical provider defendant is competent in his or her field, thorough in practice, and cares for patients. Conversely, the plaintiff wants the jury to perceive the defendant as incompetent, complacent, uncaring, arrogant, or any other number of adjectives that portray the medical provider in a negative light. Dr. Gomez refers to these critical, but non-substantive, witness messages as “image messages.”

The first real opportunity to demonstrate positive image messages of competency and compassion, and for the plaintiff to attack those images, comes during the medical provider’s deposition. Unlike written discovery, during the deposition the provider is directly faced with questions and must answer those questions without his or her attorney’s assistance, other than to state objections.

The portrayal of the defense images, and the rebuttal of those images by plaintiff, is case specific, and the strategy for presenting the images will depend upon the medical facts and provider in each case. What is not case specific, however, is that the medical provider’s behaviors and demeanor, and the litigation tactics employed by counsel, should be consistent with the desired image messages of a competent, compassionate, and caring provider.

#### EARLY DEVELOPMENT OF IMAGE MESSAGES AND DEFENSE THEMES

Successful presentation of defense themes and images in medical defendant depositions requires early work with our clients, and to a lesser degree our experts, to develop those themes and images. In other words, it requires that we collaborate early in litigation with our clients and experts to develop both themes and accompanying image messages based upon the medical evidence and decision-making, the claims being asserted against our clients, and, importantly, our clients’ own respective personalities.

#### IMAGES AND THEMES MUST BE CONSISTENT WITH THE PROVIDER’S PERSONALITY

It is not novel that humans are different. Each of us has a unique personality, a unique way of problem-solving, and a unique form of communication. Medical professionals are no different. Dr. Gomez has seen this in the witnesses she works with and has concluded, “witnesses too will resort to what has made them successful in the past and apply that to the manner in which they navigate their testimony.” Gomez, *supra*, p. 95. Dr. Gomez bases this upon psychological research on core personality traits performed in 1994 by Dr. David Buss, from which Dr. Buss concluded that an individual’s personality remains stable because “people, over time, develop psychological mechanisms or patterns of interactions to adapt to life situations or solve problems.” *Id.* (citing David M. Buss, *Personality Evoked: The Evolutionary Psychology of Stability and Change*, in *CAN PERSONALITY CHANGE?* (T.F. Heatherton & J.L. Weinberger eds. 1994)).

Based upon this research, and her own experiences, Dr. Gomez explains that the themes developed by trial counsel are often wholly incompatible with who the defendant is in terms of core personality traits. Gomez, *supra*, pp. 95-96. Dr. Gomez provides an example of a hyper-intelligent physician she worked with in a malpractice suit. *Id.* at 101. The physician provided excellent answers in support of his care, but his demeanor indicated that he was nervous, constantly fidgeting in his seat and whispering his answers. *Id.* Dr. Gomez had a blunt conversation with the physician about the source of his nerves, during which she discovered two important pieces of information: (1) the physician was dyslexic and worried about looking unintelligent if he mixed up words; and (2) he had a prostate condition and was worried that jurors would think his frequent breaks were intended to obtain answers to difficult questions. *Id.* at 101-02. Using these traits, which were unique to this physician, the defense decided that the physician would advise the opposing attorneys and the court of his conditions up front to avoid any misperception, and that the defense would not hide, but instead highlight the physician’s dyslexia to emphasize that he was able to attain tremendous academic and professional achievements despite his learning disability. *Id.* at 102.

Likely, all of us have been in a similar circumstance. Our medical provider client is intelligent and provides thoughtful answers when discussing the care at issue. But when confronted with confrontational mock deposition questions, the provider loses that clear thought process and testifies in a way that is wholly inconsistent with the thoughtful answers provided during general discussion of the care.



To be successful in the medical provider deposition, we should meet with our clients not only to discuss their care and the issues in the case, but to also understand the provider's personality and natural response to confrontation. Discussion of how the provider's natural tendencies mesh with our overall defense themes and image messages will put potential issues on the table before they are on the record. If the case theme we, as counsel, have developed is inconsistent with a provider's personality or understanding of the case, open dialogue is needed to come to a common understanding. What we, as attorneys, must keep in mind is that it is not always the medical provider who must make a change. We must be willing to listen and account for what we hear from our client as well. Development of themes or image messages that are inconsistent with the provider's personality will feel unnatural for the provider and will make it difficult for them to testify clearly and effectively during the deposition.

#### **DEVELOPMENT OF IMAGE MESSAGES**

Dr. Gomez refers to image messages throughout her book. Again, these are the images that the medical provider defendant and defense counsel want the jury to perceive of the defendant. *Id.* at 1-4, 98. Image messages, she explains, must be associated with the witness' substantive or "content messages." To develop content messages aligned with the desired image messages, Dr. Gomez recommends starting deposition preparation by asking the provider, "If I were a juror in your case, what are the three main concepts or ideas I need to learn *from you and your testimony.*" *Id.* at 98. The answers may be about the medicine, or they may not. They may be consistent with the themes developed by defense counsel, or they may be different. However, it is an important starting point to understand what the defendant medical provider wants the jury to know.

From here, Dr. Gomez recommends that defense counsel work with the provider to reduce the broader content messages to their key points. *Id.* For instance, we recently defended a case involving an allegation that the physician missed the appropriate diagnosis for the patient, leading to injury. One of Plaintiff's arguments was that the provider relied solely on the patient's history of similar symptoms, which resulted from a benign condition, and did not perform an adequate examination to determine if something more serious was occurring. Using the information provided by the client, we developed a core image message that the physician valued the physician-patient relationship and listening to the patient's report was, to him, an important part of the evaluation. The patient report was not the end of the evaluation, but it provided important evidence that helped guide his objective examination, consideration of diagnostic testing, and differential diagnostic process.

Equally important to the development of these core content messages is discussing the limitations of those messages. *Id.*

This is particularly important in cases involving medical professionals. These witnesses are different than typical fact witness because they have experience in the subject area of medicine. As a result, their testimony has a tendency to bleed into expert testimony. This exposes the defendant medical provider to additional cross examination on issues that may be at the periphery of the provider's direct knowledge and are better left to experts. Dr. Gomez highlights another potential area of danger specific to medical professionals—intentionally or unintentionally pointing the finger at other providers. *Id.* at 99. Irrespective of what the medical evidence suggests, such testimony plays directly into the images that plaintiffs' attorneys seek to portray of physicians—arrogant, selfish, unaccountable. Again, it is testimony better left to experts.

Developing core content messages with a medical provider defendant, and establishing the limits of those messages, is key to the provider's success in a medical malpractice deposition. Having the foundation of these messages allows the medical provider to understand how his or her testimony fits into the overall structure of the case. *Id.* Dr. Gomez explains that humans naturally organize the information they receive as a mechanism to remember the information. *Id.* Working with medical provider defendants to develop core messages allows them to organize the plethora of medical facts that support their care, as they will understand which facts support each message, and allows those providers to offer clear testimony in support of their medical decision-making. *Id.* It not only helps the provider navigate cross examination, but also allows the provider to offer clear explanations to the jury.

#### **DEPOSITIONS: BALANCE IS KEY**

There are two ends to the spectrum of testimony that can be offered in a deposition: offering as little information as possible and offering too much information. Offering little to nothing in response to questions allows the attorney to control the substance of the deposition. Gomez, *supra*, p. 103. Stated differently, the only substance in the deposition transcript is the question asked by the plaintiff's attorney followed by a "yes," "no," or non-answer from the medical provider defendant. Additionally, providing these short answers does not reflect the image of a detailed and competent physician that we want our clients to project. Finally, medical providers are often uneasy when instructed to answer deposition questions with curt responses, as they often feel that they are not providing important information that supports their care. That discomfort can shine through in their expressions and body language. Especially in video depositions, image messages may be negatively impacted even further.

On the other end of the spectrum, witnesses can provide long-winded answers that ramble and do not provide clear messages that will eventually be heard by the jury at

trial. Providing these long explanations can also educate opposing counsel on the defense theory of the case and open up additional lines of questions.

As Dr. Gomez recommends in her book, the key is to find balance between those two extremes. *Id.* at 103-06. She offers three points to help witnesses achieve this balance when facing cross examination: (1) understand the difference between answering versus explaining; (2) make sure the witness understands that certain rules discussed in preparation are meant to be broken; and (3) work with the provider so he or she knows which battles to pick.

#### PROVIDING CONTEXT VERSUS PROVIDING AN EXPLANATION

On cross examination, there is a difference between providing context to an answer and providing an explanation rather than an answer. Providing context means providing a direct answer to the question asked, but with context around the answer based upon the image messages developed with the provider and the medical facts that support the provider's care. For example, imagine the following exchange in a case involving a claim of intrapartum hypoxic ischemic injury:

**Question:** Would you agree with me that the presence of late decelerations during X's labor were a sign of fetal intolerance to labor?

**Explanation:** Well, there are many things that we look at when evaluating a fetal heart strip. You need to look at the strip in its entirety and look at all the evidence of fetal status. Reactivity in the heart rate, like good heart rate variability and accelerations, show us that the baby is well-oxygenated and is handling labor well. When you see those signs on the fetal heart strip, it reassures us that the baby is getting adequate oxygen even if there are decelerations . . . (continue the general discussion of fetal heart rate interpretation that does not answer the specific question).

**Answer (with context):** I disagree. When I look at the strip as a whole, I see that X recovered from the decelerations, had good heart rate variability and intermittent accelerations throughout. That tells me X was receiving adequate oxygen and was not in distress.

Both the "explanation" and the "answer with context" include the same content message that the presence of late decelerations, alone, is not a sign of fetal intolerance to labor when there are other reassuring signs on the fetal heart strip. However, the explanation wanders into generalized discussion of fetal heart strip interpretation, whereas the answer with context provides a direct and concise answer to the question with context included to support the answer.

The same strategy can be employed in response to the broad hypothetical questions that medical providers face during depositions. After being asked the same hypothetical several

times, many providers are uncomfortable offering the same answer of, "it depends upon the clinical circumstances." In some instances, the plaintiff's attorney will ask the doctor to explain what they mean by "it depends on the clinical circumstances." In these situations, an answer with context based upon the core image messages can be helpful. For instance, put the above example into a hypothetical context:

**Question:** Would you agree that late decelerations are a sign of fetal intolerance to labor?

**Answer (with context):** Not necessarily. If there is good heart rate reactivity with moderate variability and accelerations, then the presence of some late decelerations would not be a sign of fetal distress.

In the context of a medical malpractice deposition, the answer with context allows the provider defendant to offer support for his or her care, and avoid feeling or looking evasive, without over-educating the opposing attorney on defenses and defense themes. If the plaintiff chooses to play the deposition for the jury at trial, the answer provides the jury with a clear and concise explanation of the provider's medical reasoning, which helps the jury understand the provider's position before the provider is able to further explain on direct examination.

#### RULES ARE MEANT TO BE BROKEN

We have all provided clients with advice or best practices for depositions, and we have all had clients follow those rules to the extreme. Dr. Gomez's second point of advice for finding appropriate balance in a witness' deposition testimony is "helping witnesses use their own good judgment about when to use a strategy [rule] and when to let it go." Gomez, *supra*, at 105-06 (bracketed language added). With adequate practice, medical provider defendants are usually able to navigate when best practices apply, and when they do not. They exercise this type of judgment every day in medical practice when evaluating patient symptoms and comparing them to the potential diagnoses.

Practicing and developing this judgment is particularly important within medical malpractice cases, as it will assist medical providers in determining appropriate questions for providing additional context. For example, in response to the broad hypothetical questions, the correct response is often that the answer depends upon the clinical presentation and circumstances. Medical providers simply cannot answer those overbroad questions without additional clinical information about the hypothetical patient such as medical history, vital signs, examination findings, and other clinical evidence obtained by medical professionals in everyday practice. However, as discussed in the preceding section, there may be opportunities for the provider to offer helpful context with his or her answer when the provider is faced with repetitive hypothetical questions.

The key to medical providers' successfully exercising this judgment is practice. Mock deposition questions in advance of the actual deposition help the providers determine when the general rules and best practices are meant to be broken.

#### **PICK YOUR BATTLES**

Dr. Gomez's final point to help witnesses succeed is that witnesses should understand how to pick their battles during cross examination. Gomez, *supra*, at 106. To do this, Dr. Gomez recommends that the attorneys have open dialogue with the witness such that the witness can gain "a better understanding of the lawsuit and [his or her] place in it." *Id.* (bracketed language added). With this foundation, witnesses are able to understand which cross examination questions are relevant to the subject matter of the litigation and which are not. It also helps witnesses understand their role with respect to the issues in the case, and thus helps the witness navigate cross examination questions based upon their involvement in the case, knowing what to concede and what not to concede.

Establishing this foundation in advance of the deposition is vital for success in a medical provider defendant's deposition. As discussed *supra*, medical providers are different than many fact witnesses in that medical providers often have some level of expertise and experience in the subject matter of the case. If not adequately prepared, a provider's testimony can trend toward expert testimony or into other areas of medicine on the periphery of the provider's practice. This is avoided by meeting with the medical provider early and often to discuss the issues in the case, the arguments being made by both sides, and how the provider fits into those arguments.

When the provider understands the medical issues involved in the case, and how their care relates to those issues, the provider is better able to determine which cross examination questions allow for an answer with context.

#### **CONCLUSION**

With depositions of medical providers being used more commonly as a first attempt at trial cross examination, medical provider defendants should be prepared to testify more offensively during depositions in defense of their care. The mantra of "less is more" still has value, certainly, but it should be appropriately balanced with answers that provide context for the provider's care and medical decision-making. Providing answers with context allows the provider to offer clear testimony to support defense themes and image messages.

To successfully achieve this balance, attorneys should meet with their medical provider clients early and often in litigation. Through these meetings, attorneys should work with their clients to develop defense themes and image messages consistent with the medical care involved and the provider's own personality traits. Once this foundation is established, attorneys should practice mock deposition questions with their medical provider clients to help them exercise judgment and determine when it is appropriate to offer context with answers and when it is not. This preparation gives providers the foundation to testify in support of defense themes and images and frustrates the opposing attorney's attempts to portray the provider as evasive, arrogant, or unknowledgeable on camera.

I would like to give special thanks to Dr. Melissa Gomez for providing input and feedback on this article. Dr. Gomez can be contacted through her business, MMG Jury Consulting, LLC.