**Deposition Critique 2**

Read and critique the passages below. The questioner was the plaintiff attorney. The first sentence of each passage is listed below. Click on the link to read the rest of the dialogue. The person being questioned was the expert witness for the defense. Determine where the expert went wrong. The answers are at the end. Names and dates have been changed, but otherwise these passages are quoted verbatim.

## Deposition Critique 2.1

Read and critique the passages below. The questioner was the plaintiff attorney. The person being questioned was the expert witness for the defense. Determine where the expert went wrong. The answers are at the end. Names and dates have been changed, but otherwise these are quoted verbatim.

1. Q: Did any of the laboratory test results factor into your opinion that the cardiac arrest preceded the respiratory arrest?
2. A: To me it doesn’t matter if the CPKs were elevated as you had indicated earlier. Somebody who has had a heart attack the CPKs would be elevated but that was not the issue at the time. The issue was did she stop breathing and that caused her cardiac arrest and that…
3. Q: Did you understand my question? My question was- did any of the laboratory results play a role in the formulation of your opinion that the cardiac arrest preceded the respiratory arrest- “yes” or “no”?
4. A: No
5. Q: No?
6. A: No.
7. Q: The answer is no?
8. A: I said it twice. The answer is no. I based my opinion…
9. Q: I didn’t ask you what you based your opinion on. I asked you if the laboratory studies were part of that opinion and the answer is “no”?
10. A: Okay.

### Where did the expert go wrong?

No matter how many times the expert is asked the same question, the answer should be provided in a courteous manner. This expert got testy at line 8. This behavior serves to inflame the opposing counsel. Contrary to the mild-mannered behavior of the attorney in [Critique 1](http://mlssew.com/skills/deposition-skills/deposition-critique-1/), the opposing counsel in the passages in Critique 2 responded differently, as you will see in the sections that follow.

## Deposition Critique 2.2

Read and critique the passages below. The questioner was the plaintiff attorney. The person being questioned was the expert witness for the defense. Determine where the expert went wrong. The answers are at the end. Names and dates have been changed, but otherwise these are quoted verbatim.

1. Q: Now, when doctors write orders are nurses supposed to follow them?
2. A: Yes.
3. Q: If they decide not to follow them what are they supposed to do?
4. A: If they decide not to follow them, what are they supposed to do?
5. Q: Yes.
6. A: They’re supposed to let the physician know what their concerns are.
7. Q: Is it a deviation from the accepted standards of nursing practice for a nurse to refuse to follow an order and not tell the doctor about it?
8. Defense attorney: Objection to the form of the question. You can answer it.
9. A: I am sorry. Could you restate the question?
10. Q: Is it a deviation from accepted standards of nursing practice for a nurse to refuse to follow a doctor’s order and not tell the doctor about her decision?
11. A: Yes.
12. Q: Was there an order for this patient to receive Xanax?
13. A: There was.
14. Q: Did the nurses refuse to give this patient Xanax on January 2nd?
15. A: The nurses appeared to make a clinical decision to withhold the medication.
16. Q: So they refused to give it?
17. A: They made a clinical judgment to withhold the medication.
18. A: Did they notify anyone of that decision?
19. A: There’s nothing written in the medical records indicating that they told someone.
20. Q: If they did not tell a physician would it have been a deviation from accepted standards of nursing practice for the nurses to withhold Xanax at 1600 hours on January 2nd, at 0600 hours on January 3rd, at 1800 hours on January 3rd, and at 2400 hours on January 3rd?
21. A: If there was absolutely no notification to the physician, yes.

### Where did the expert go wrong?

This expert has gotten herself into deep trouble. The expert wrote a report stating that the nurses did not deviate from the standard of care. Before the deposition, the defense attorney prepared her to deal with the allegations of the plaintiff expert, including the alleged deviation that withholding the Xanax and not informing the physician. Despite the preparation, the expert made an important and fatal concession. A better response would have been:

It was clinically appropriate to withhold Xanax. In my opinion, this did not warrant informing the physician as it was a minor change in the patient’s condition.

By leading the expert into other concessions of deviations, the attorney destroyed the expert’s credibility. See Critique 2.6 for the culmination of this line of attack.

## Deposition Critique 2.3

Read and critique the passages below. The questioner was the plaintiff attorney. The person being questioned was the expert witness for the defense. Determine where the expert went wrong. The answers are at the end. Names and dates have been changed, but otherwise these are quoted verbatim.

1. Q: Do you know why they withheld the medication?
2. A: It was indicated that the patient was sleepy or lethargic.
3. Q: Should the nurses who were attending to this patient have brought the lethargy to the attention of a doctor?
4. A: Should they have brought the lethargy? If there was a change in the patient’s status they would bring it to the attention of the physician.
5. Q: Is there nay evidence that Nurse Albert or Nurse Lister informed a physician on January 3rd that the woman was lethargic?
6. A: I don’t believe I read a note stating that they told a physician that.
7. Q: Would that be a deviation from accepted standards of nursing practice if they did not tell the physician that they observed that this patient was lethargic and had not previously appeared so?
8. A: Not telling the physician and not documenting it in the medical record that you had a conversation are two different things.
9. Q: I agree with that. I did not ask you that. I asked you if it would be a deviation from accepted standards of nursing practice for Nurse Albert and Nurse Lister not to tell a physician that they found that this patient was lethargic on January 3rd.
10. A: Yes. If there was a change in the patient’s condition.

### Where did the expert go wrong?

This expert has gotten herself into deeper trouble. Again, a better response would have been to reiterate:

It was clinically appropriate to withhold Xanax. In my opinion, this did not warrant informing the physician as it was a minor change in the patient’s condition.

## Deposition Critique 2.4

Read and critique the passages below. The questioner was the plaintiff attorney. The person being questioned was the expert witness for the defense. Determine where the expert went wrong. The answers are at the end. Names and dates have been changed, but otherwise these are quoted verbatim.

1. Q: Can lack of oxygen cause lethargy?
2. A: Can lack of oxygen cause lethargy? I would assume that…
3. Q: I don’t want you to assume.
4. A: Okay.
5. Q: Do you know? Do you have an opinion with reasonable nursing probability whether lack of oxygen can cause lethargy?
6. Defense attorney: Objection to form. You’re asking her if it’s possible, right?
7. Q: Yes. Can it?
8. Defense attorney: Yes. Can it?
9. A: If it’s possible? I would say, yes, it is possible.

### Where did the expert go wrong?

This expert has fallen into the trap of the use of the word “possible.” Refer to [38 Cross-examination strategies used by attorneys, and how to respond](http://mlssew.com/skills/deposition-skills/38-cross-examination-strategies-used-by-attorneys-and-how-to-respond), question 29, for a more effective way to respond to this question.

## Deposition Critique 2.5

Read and critique the passages below. The questioner was the plaintiff attorney. The person being questioned was the expert witness for the defense. Determine where the expert went wrong. The answers are at the end. Names and dates have been changed, but otherwise these are quoted verbatim.

1. Q: Is there any evidence that any physician saw this patient after 11 AM on the 2nd and up until the time of the arrest in the early morning hours of the 3rd of January that you see in the chart?
2. A: Right. I’m trying to think back at the nurse’s note. Let me look at it. I don’t recall the nurse’s note stating that a physician was at the bedside.
3. Plaintiff attorney: What are you looking for, Mr. Defense Attorney?
4. Defense attorney: The nurse’s notes for the 12th.
5. Plaintiff attorney: The typewritten ones?
6. Defense attorney: Yes.
7. A: Were there handwritten notes, too? I don’t remember. Do you recall if there were handwritten notes as well?
8. Q: That’s not how this system works.
9. Defense attorney: There are the notes for the 3rd.

### Where did the expert go wrong?

This expert has fallen into the trap of not being organized. No one except the expert should be expected to find documents within the expert’s file. In line 7, it looks like the expert is asking the plaintiff attorney for help in finding the paper. The plaintiff attorney was justified in rebuking the expert for seeking his assistance (line 8).

## Deposition Critique 2.6

Read and critique the passages below. The questioner was the plaintiff attorney. The person being questioned was the expert witness for the defense. Determine where the expert went wrong. The answers are at the end. Names and dates have been changed, but otherwise these are quoted verbatim.

1. Q: So let me just see if I understand your testimony. Accepted standards of nursing care required the nurse to notify a physician that they were withholding Xanax, correct?
2. A: Yes.
3. Q: There is no evidence that they did that, correct?
4. A: There’s no documentation that they did that.
5. Q: Did you review any nurse’s deposition where they said they did?
6. A: I believe she did not recall if she said anything or not.
7. Q: Then there is no evidence in the case that a physician was told that Xanax was withheld on four occasions on January 2nd, correct?
8. A: If we are going to assume that her having no recollection that it never happened, yes.
9. Q: That would be a deviation from accepted standards of nursing practice, wouldn’t it?
10. A: Yes.
11. Q: Oxygen levels were increased from forty to at least fifty percent on the 2nd and here’s no record that was communicated to a physician, either, correct?
12. A: Using the same methodology about the documentation that is correct.
13. Q: That would be a deviation from accepted standards of nursing practice, correct?
14. A: Correct, for the same reasons.
15. Q: In your report you say “After careful review of the material I believe that the care provided to Mrs. Walker met the standard and I can find no evidence to the contrary. You still stand by that?
16. A: Would you like me to explain what that meant?
17. Q: Did it mean something other than the fact that you found no evidence that the nurses deviated from accepted standards of nursing practice?
18. A: When we’re looking at the situation, to me the question was did they ignore signs and symptoms of what had happened for the entire day that caused her subsequent arrest. Is that accurate?
19. Q: I don’t know. I’m asking you what you meant and whether you’re going to stand by it. Apparently you are trying to explain to me what you meant.
20. A: Right. And I’m asking you. So you are not going to answer the question?
21. Q: No, I want an answer to the question I asked you.
22. Defense attorney to court reporter: Read the question back.
23. (It is read back.)
24. Q: You said you could find no evidence that the nurses deviated from the accepted standards of care and you just admitted that you found at least two, correct?
25. A: You’re correct.
26. Q: Do you want to change your report?
27. A: Do I want to change my report? Do I still think there was wrongdoing causing her death? No, I am not changing my report.
28. Q: I have no further questions.

### Where do the expert go wrong?

At line 17, the plaintiff attorney gave the defense nursing expert a chance to explain her thinking regarding the admissions she made that the nurses deviated from the standard of care. The expert failed to provide a strong rationale for her beliefs as to why the alleged deviations had no impact on the patient. At line 18, the expert attempted to rephrase the question and asked the plaintiff attorney to agree with the rephrasing. The attorney was under no obligation to rephrase the question to the expert’s liking, and seized the advantage by not doing so. The expert expected the defense attorney to ask her questions at the end of the deposition to repair the damage. The defense attorney was stunned and realized his expert had been destroyed by the concessions she made.

A better way to handle the situation is to avoid making any concessions that the nurses deviated, by pointing out that their actions had no impact on the patient. The expert had been prepared to deal with these issues by the defense attorney in the pre-deposition meeting, but did not follow through with any of the suggestions offered by the defense attorney.

See [Critique 1](http://mlssew.com/skills/deposition-skills/deposition-critique-2/deposition-critique-2) for another example of deposition testimony marked by problems.