The Case for Not Taking Defense Expert Depositions

by William A. Cirignani

Introduction

During a medical malpractice trial a few years ago the trial judge barred me from asking open-ended questions about tort reform during *voir dire* on the grounds that they might trigger "bad" answers—whatever those are—and "poison the jury pool." Despite my attempts to explain that the poison-well theory was debunked a decade or more ago, he steadfastly held onto his belief. Old habits are hard to break, especially for trial lawyers and judges for whom fear of the unknown is paralyzing and seemingly outweighs the elusive benefits of venturing out. Yet, venturing out is exactly what I am calling you to do because the advantages of forgoing defense expert depositions are very much worth the anxiety you'll feel. But first, let me state clearly what I mean by defense expert deposition.

What is a Defense Expert Deposition?

When I speak of a defense expert deposition I mean a deposition designed to actually expose defense weakness and not one designed to just "get opinions tied down." While many gifted lawyers take expert depositions for this latter purpose, in my view this makes little sense and is actually counterproductive in a disclosure state like Illinois. This is because Supreme Court Rule 213 requires the defense to disclose *all* expert opinions and their bases in interrogatory form, with "all" being the important word. Yet, the defense almost never does. (Neither do most plaintiffs, from my observation). This disclosure failure is a tactical advantage for plaintiffs because any opinion or basis not disclosed cannot be used at trial. Indeed, sometimes these disclosure gaps are so significant that whole defenses can be barred, but even less serious gaps still provide great cross-examination fodder. Nonetheless, plaintiff's lawyers routinely toss away this advantage with "tie-down" depositions that fill in the holes. The irony is that often neither the defense attorney nor defense expert knew of the disclosure problems until the smarter plaintiff's lawyer pointed them out during deposition.

The most frequent reason I hear for doing this clean-up work is that the trial judge will let the opinions in anyway. This is the tail wagging the dog. Sure, judges occasionally err but it is madness to voluntarily help the defendant on the *assumption* of judicial error. In my experience the vast majority of judges take Rule 213 seriously and routinely bar undisclosed material.[2] One way to ensure that Rule 213 is enforced at trial is to tell the defense *in writing* and *before their disclosures* that you frequently forego expert depositions and advise them to make their disclosures complete. This is typically enough to ameliorate any sympathy a trial judge may have about inadequate disclosures.[3]

Another prevalent excuse I hear for taking depositions in the face of inadequate disclosures is the defendant's threat to take the expert's deposition themselves. Of course, unless it is designated as an *evidence* deposition the rules do *not* provide for this kind of deposition since the defendant has no need to "discover" the testimony of his own witness.[4] Such depositions are nothing more than elaborate, transcribed *supplements* of 213 interrogatory answers, and I treat them as such.

One option is to ask the judge to bar the deposition as not allowed by the rules. If the defense had previously gotten notice about your practice to not depose experts, you'll usually get a pretty good hearing. Then again, you may not want to bar this deposition as a matter of strategy. When the defense takes their own expert's deposition they are giving you a preview of their trial approach. In either case, if the deposition happens, you should consider not attending. Because these kinds of depositions are nothing more than supplements to interrogatory answers, my presence is an unnecessary waste of time, and paying for a copy of the transcript a waste of money. In any event, the decision to object or not attend is still a function of weighing the risk-benefits of taking the deposition in the first place. Under such an analysis, the risks far outweigh the benefits.

The Strategic Cost of Taking Expert Depositions

The goals of cross-examination are simple: to get helpful admissions and destroy credibility, and the decision to take or not take an expert deposition should be based solely on how best to advance these goals. An FBI friend of mine once told me that an inalienable tenet of assaulting an enemy is surprise, and the author of the ancient treatise, *The Art of War,* said the same thing but even more bluntly: "[t]hose who are skilled in producing surprises will win." Although trials are presumably less

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violent than either of these examples, I believe the element of surprise remains the single greatest tactic for getting what you want in cross-examination. It is surprise that makes witnesses say helpful things because they are ill-prepared (i.e., surprised) and must answer from the truth they know rather than the strategy they're given, and it is surprise that triggers the body language of double-mindedness: hesitations, stutters, shifting, looks away, coughs or a whole host of nonverbal cues that show, at worst, that they are fighting against the truth or, at best, that they are uninformed.[5]

When it comes to defense experts, the best way to surprise them is to not depose them. When a plaintiff's lawyer deposes a defense expert he is—*literally*—giving the expert a dress rehearsal of what will happen at trial. In fact, no one prepares a defense expert better for cross-examination than his opponent. No matter how good the defense team, no one sees the case from plaintiff's eyes better than the plaintiff, and when the plaintiff deposes the defense expert she always reveals her view of the case. Always. No one can do an effective cross-examination without revealing strategy. It is impossible. If strategy isn't exposed then the cross is either not effective, or it's a "tie-down" cross.

When deciding whether to depose a defense expert, the only legitimate question, then, is whether losing the element of surprise is offset by any useful gains. The most common reason for taking expert depositions is that they provide concessions or admissions. While this is truer for the academic expert than the crusader, regardless of the expert's personality and regardless of whether you cross-examine him at deposition or at trial, the key to getting devastating admissions from an expert is still surprise.[6] When elicited at deposition, however, no one who matters is there to see it.[7] Yes, you may be able to use the admissions as impeachment, but this is very difficult to do effectively—that is, meaningfully—once the expert knows that it is coming. She and the defense lawyers are not stupid. They will prepare answers that either credibly undo the deposition admission, or they will prepare muddled answers that no one will understand and your point will get lost in the impeachment process. Worse, because they are prepared for your best shot, irrespective of *what* they say, *how* they say it will be practiced, smooth, and confident and thus very persuasive even if it is baldly untrue.

On the other hand, if you question the expert for the first time at trial he won't know you, your style, your questions, or the gaps and weaknesses in his own testimony, and not knowing these things will make him nervous and make it impossible for him to hide his advocacy or inadequacies.[8] Indeed, this is the *essence* of cross-examination. In such a circumstance, you will leverage surprise on your opponent for everything it is worth.

"But," comes the objection,

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"there's no risk in reaching for admissions and failing during a deposition, but a big risk if it happens at trial." This criticism is, of course, just a restatement of Irving Younger's fourth commandment on cross-examination: do not ask a question you don't know the answer to.[9] While this truism is true some of the time, I think it is wrong most of the time, and is above all else dangerous advice in a world where jury attitudes and values stack the odds against plaintiffs. Medical defendants begin trial as the credible party, and we do not. If we do not reverse this impression we lose. Making defense experts squirm is a very important part of doing this, and surprise—asking questions the experts don't expect even when it means not knowing the precise answer—is the thorn that starts their hips-a-wiggling.[10] It must also be observed that even without an expert's deposition, a plaintiff still has plenty of weapons at her disposal to use in controlling an expert during a cold cross-examination at trial.

Take Small Steps and Use Everything You've Got

Generally speaking, when we cross-examine experts at trial we are seeking favorable admissions from them about the medicine, the facts, the conduct of the defendant, and the expert's own bias (or testimonial incompetence). There are ways of doing this at trial effectively without taking a deposition and giving up surprise.

First, take small steps. I know this is cross-examination 101 and some of you are rolling your eyes. Fair enough, but sometimes reviewing the fundamentals is the most important thing we can do to perform well. I literally say this rule out loud whenever I sit down to prepare a cross. When I say take small steps, I mean establish one fact or principle at a time to build toward your ultimate point. For example, a key medical principle in pediatric bacterial meningitis cases is that fast treatment is absolutely necessary. Thus, a cold cross of the defense expert may go like this:

Q. What is bacterial meningitis?

Q. Is bacterial meningitis a serious medical condition?

Q. Why?

Q. If we looked at all cases of bacterial meningitis as a whole, you'd agree that the vast majority of patients die if their bacterial meningitis is not treated; correct?

Q. Conversely, if we looked at all cases of bacterial meningitis as a whole, you'd agree that the vast majority of patients who receive treatment recover from the bacterial meningitis; correct?

Q. In general, the best way to treat bacterial infections like bacterial meningitis is with antibiotics; correct?

Q. How do antibiotics work?

Q. You'd agree that in general antibiotics work better when they have

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fewer bugs to kill; correct?

Q. For example, it is easier to exterminate termites from a house when there's only a few termites in one room as opposed to when they've spread through the entire house; right?

Q. Generally speaking, dangerous bacterial infections like bacterial meningitis get worse the longer they go untreated by antibiotics; true?

Q. This is why the medical literature recommends treatment as soon as possible; correct?

Initially, note that much of this cross is just *common sense.*[11] I cannot stress enough the importance of this. A medical expert's nature as a scientist makes it difficult to deny the obvious, and if they do so they lose credibility (a primary goal of cross-examination). For example, what expert can credibly deny that antibiotics work better when there are less bugs to kill? What parent doesn't already know that intuitively? Is there a *possibility* that the expert will fight you on this question? Sure, but by taking small steps you can either back up safely to another line of questions without much damage, or better, you can refine your questions to fit the witness' thought process and still get where you want to go.

You may have also observed that the hypothetical cross contains several open-ended questions. This is not strictly necessary, certainly, but consider the advantages: direct questions make you more credible and more importantly often combine with the expert's ego to produce unexpected but very favorable testimony.[12] Moreover, an open question like, "what is bacterial meningitis?" is essentially risk-free since the jury would have already heard the answer from plaintiff's expert and treaters, and any serious deviation will impact his credibility.

In addition to taking small steps, there is a large cache of written material that can be used when cross-examining an expert cold at trial. For example, my most favorite cross-examination document is the defendant's deposition. All deposition testimony by a defendant is substantively admissible and every one of his admissions make great cross-examination material, especially if you've videotaped the deposition. It is very powerful indeed to show the defendant saying something opposite of the expert he hired.

Other material that can and should be used includes: the medical records, the depositions of parties and witnesses, the expert's 213 disclosures, the expert's CV, anything written by the expert (including webpages) and, of course, prior depositions of the defense expert (taken by someone other than you).[13] Medical literature can also be used to great effect if the medical principle you are advancing is clear, mostly uncontroversial, and easily authenticated. For example, in one of my bacterial meningitis cases, I used chapters on bacterial meningitis from

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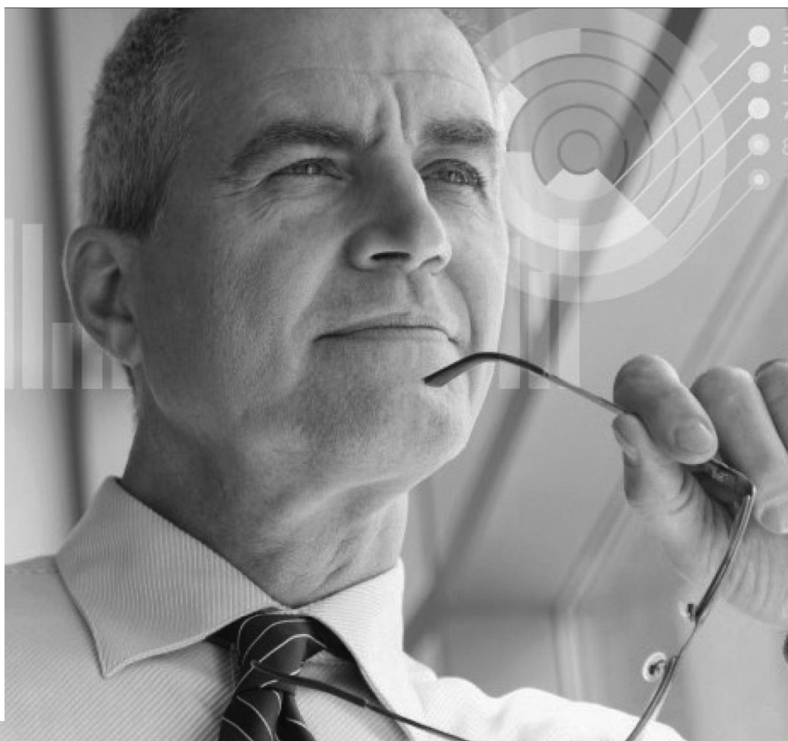

about a dozen text books from the fields of pediatrics, infectious disease, and emergency medicine, as well as guidelines from the Infectious Disease Society of America, to establish that time to treatment is the single most important element in surviving bacterial meningitis uninjured. With some of this literature I had my experts lay the foundation, with others, namely the IDSA guidelines, I held it back in order to "surprise" the defense expert with it at trial. Since the IDSA guidelines are published by a well-known medical organization and authored by at least a dozen of the most well-known doctors in their field, it was not difficult to lay the foundation for its use with the defense expert himself.

Here's what your cold examination might look like.

Let's assume the defense expert in the hypothetical bacterial meningitis case is a well-known crusader who believes there is a subset of bacterial meningitis kids who have "fulminant" bacterial meningitis and will die or suffer great injury irrespective of when they get treatment. When you ask him to agree that the vast majority of patients who receive treatment recover from the bacterial meningitis, he may say something like this: "Yes, but not for the subset of kids who have fulminant bacterial meningitis, like little Johnny did in this case."

Initially, observe that this is an answer you'd have gotten whether you took his deposition of not, and it is not a surprise to you. After all, this is the essence of his opinions, why he was hired, and what he has already disclosed in his 213s. Consequently, you are ready for this answer and, indeed, ready for all material answers he gives at trial in the same way you'd have been ready for them at deposition. At this point you have two choices, just like you did at deposition. You could avoid the confrontation by moving onto another subject, but the only reason to do this is if you didn't have a potentially effective cross. (If you didn't have a good cross, then you shouldn't have raised the topic in the first place). Assuming, however, that you have a cross that might work, your second option is to use it at trial just like you would at deposition:

Q. So you're saying that even if this jury found Acme hospital negligent in taking 15 hours to start Johnny's antibiotics, they're not responsible for his death because he would have died anyway?

A. Well, they weren't negligent, but yes, I am saying waiting 15 hours to give antibiotics didn't cause his death.

Q. But if this jury disagrees with you and finds that a 15 hour delay was in fact negligent, you'd still say that the hospital should walk out free of responsibility because Johnny just happened to have the kind of bacterial meningitis that fast treatment wouldn't have changed; correct?

A. Yes, there are just some kinds of

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bacterial meningitis cases that don't respond to treatment.

Q. [Here I would grab the first text book from my desk and hold it aloft]: You've heard of Fleisher' textbook on pediatric emergency medicine, haven't you doctor?

Notice that what he says to these questions about the medical literature don't really matter because the text books were authenticated with my own experts. If he says yes, he's heard of it, then I build up the book; if he says no, I express shock that he hasn't heard or read the text book written by a Professor at Harvard Medical School who is also the Chief of Division of Emergency Medicine at Children's Hospital of Boston. I'd additionally say something like, "Certainly you've heard of Harvard Medical School, correct? It's one of the top medical schools in the world, right?" Then I'd hand him the book, point out that there is a thirty-page chapter on bacterial meningitis and ask him to find anything in there with the word fulminant, or anything which says that there are cases where time to treatment doesn't matter to outcome.

With this first book, he'll make an effort to find something useful, but since I've read every line I know he won't. Once he is done with book one, I repeat this same process with all twelve textbooks, which I stack visibly on the corner of my table until they are teetering. After two or three more textbook chapters, he will assume they don't say anything about fulminant bacterial meningitis, and his review will become perfunctory. After the textbooks, I will use the "surprise" IDSA guidelines which directly considers his opinion but rejects it. Finally, when this is done, I will physically stand next to him, hold my hands out toward him and say something like this:

Q. So, Dr. Jones, *you* are saying that there are cases of bacterial meningitis where fast treatment won't make a difference—[then I'll walk to the table by my stacks of textbooks]—and you want the jury to believe your opinion even though not a single one of these textbooks, nor the IDSA guidelines, support what you say; is that right?

Once again, it doesn't matter what he says because you were never going to change his mind. What you were after was loss of credibility, and showing him struggle in front of the jury achieves that end. In fact, most of the time agreement is just icing on the cake; what you are chiefly after is "incredible disagreement." That is why even if he continues to evade or refuses to give a straight answer to a straight question, you still win.

Note, finally, that this "cold" technique doesn't require the use of medical literature. You can cross him on the gaps or mistakes in his 213 answers, or on material he hasn't read, or material he wrote, or the just plain *illogic* of what he says. The list is endless.

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The point is, you can do at trial what you'd do at deposition except at trial he must weather your cross examination in front of the jury without knowing what is coming, which means you get a big bang for your buck.

Conclusion

Surprise is so important in litigation that it should never be given away without careful thought and a benefit in return that is greater than the loss. Giving up surprise in order to know everything a defense expert is going to say is rarely a good bargain. It is not lost on me how difficult it is say no to defense expert depositions. Doing so requires trust in your knowledge of the case and trust in your ability as a trial lawyer, but the greatest proof that you are gifted in both areas is how successful you are at expert depositions. If you can cross at deposition, you can cross at trial. There are also many peripheral benefits, saving money and time being two of the greatest. Instead of flying around the country revealing your case strategy by deposing defense experts, you could instead work on sequencing, framing, focus-grouping or just plain "cogitating" about your case.[14] All practices that produce more value than a defense expert deposition.

Endnotes

[1] I need to give credit to Elizabeth N. Mulvey, Paul Scoptur, Tim Aiken and a host of other lawyers who have discussed, advocated and sometimes valiantly fought against the ideas I have discussed here.

[2] In fact, it is much easier for a judge to rule favorably on 213 objections in the heat of the moment with only the disclosure statement to review instead of the expert's 200 page deposition.

[3] Be sure to also file a motion in limine *that points to the specific gaps of a specific expert*, and give the court a copy of the notice you sent to defendants warning them to file complete 213 answers.

[4] Supreme Court Rule 202 says this: "Any party may take the testimony of any party or person by deposition…for the *purpose of discovery*."

[5] If you doubt the singular importance of nonverbal cues in communication and persuasion, there is a host of scientific literature that will convince you. Researcher John M. Gottman has written extensively on the topic in the context of marriage relationships, but the lessons are universally applicable. If you want something law-specific, a good place to start is *Courtroom Power: Communication Strategies for Trial Lawyers*, by Eric Oliver and Dr. Paul Lisnek.

[6] If the defense expert is the academic kind who will give you admissions just for the asking, then you'll get them at trial just as readily as you'd get them at deposition. But if you get them at deposition first, you risk having him mature into a crusader by the time trial rolls around and backing up on his deposition testimony.

[7] Unless the person seeing or reading the deposition is an ISMIE adjuster who will settle the case with you if his expert tanks. If you know this to be true—that is, *really* know it—then by

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all means take the deposition. In my experience, however, settlement rarely depends solely on the performance of a defense expert, and when it does, the defense rarely hires an expert who cannot perform.

[8] If, by rare chance, the defense expert is a "super-expert" and handles your surprise questions with aplomb and Ronald Reagan-like communication skills, then it will be a rough cross. But this would be true even if you deposed him.

[9] It is interesting that Younger says that the reason for this commandment is because cross-examination is not for uncovering "new surprises at trial." Hmm.

[10] To be clear, I am *not* saying that cross-examination of an expert at trial is conducted blindly or carelessly. If that is your approach, then you'd definitely be served better applying it at deposition than in front of a jury.

[11] I learned this lesson from Wisconsin lawyer Tim Aiken the way I learn best: by being forced into it during the middle of a Wisconsin trial when I and the defense shifted theories on the fly, rendering my brilliant expert deposition useless.

[12] Of course, I only do this when I know that the medicine is not controversial.

[13] Check out TrialSmith. If the defense expert is a seasoned one, you will find prior depositions.

[14] Spending more time "cogitating" about our cases was once again taught to me by Tim Aiken and is truly a lost habit that needs to be rediscovered.

*The author, **William A. Cirignani**, practices what he preaches and finds even the most experienced experts visibly nervous and jittery at trial. It's also the most fun he's had as a trial lawyer. His work focuses almost exclusively on medical malpractice but is convinced that the lessons of this article apply to most kinds of cases. A graduate of Northwestern he began his career as a defense litigator until seeing the light in 1995.*

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