Quarterly Review

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Ohio Association of Civil Trial Attorneys

A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...

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Back to Basics: The Differences Between Expert Witness Cross Examination at Discovery Deposition and at Trial

John A. Fiocca, Esq.
Smith, Rolfes & Skavdahl Company, LPA

The half truths of one generation tend at times to perpetuate themselves in the law as the whole truth of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten.

– Benjamin Cardozo

So, all expert cross examinations are the same, right? Not exactly.

A few weeks ago, I attended the discovery deposition of an adverse medical witness. The young and bright counsel for the co-defendant was eager to take the lead, and I obliged. I could ask the omitted follow-up questions. As defense counsel, we had much to learn about the expert's views; particularly regarding the existence of any causal relationship between the plaintiff's closed head injury and his subsequent cognitive impairment. I was sure both of us had a litany of questions we would be asking this witness. After an hour, however, I noticed my legal pad was atypically, and alarmingly, clean. And I was still on page one. Granted, much of what had been discussed during that hour related to the expert's experience and credentials. But I already had that information in front of me in the form of the expert's *curriculum vitae*. No, something else was going on. Why did I feel my understanding of the expert's views in the case was the same as when I first I walked into the conference room?

Then it dawned on me: My enthusiastic colleague was not really conducting a discovery deposition at all. He was applying expert cross examination techniques commonly used at trial. It became apparent counsel had blurred the distinction between an expert discovery cross examination, and a trial cross examination. And we were squandering our clients' time and money.

So, at the risk of boring some of my colleagues, it's time to get "back to basics," and re-visit the distinction between an expert *discovery* deposition, and a videotaped expert deposition of an expert *for use at trial*. There are several differences, because your goals at a discovery cross examination, and your goals at trial with respect to the cross examination of an opposing expert, are fundamentally different.

The purpose of a discovery deposition of an opposing expert is to obtain as much information as possible regarding the nature, extent, and basis for the expert's professional opinions. However, the main goal of your expert cross examination at *trial* should is to weaken the effect of the expert's opinions and the expert's credibility.

An expert discovery deposition does not usually make or break a case, but it is a valuable way to learn about the opposing party's case and to teach the other side about your case. Because the goals of these two types of depositions are different, the manner in which depositions are conducted, are also different.

I was reminded of the introductory quote from the eminent judicial scholar, Benjamin Cardozo, within the "deposition" context as I reflected Cornell Professor Irving Younger's "10 Commandments of Cross Examination" we all learned in law school:

1. Be brief.
2. Short questions, plain words.
3. Always ask leading questions.
4. Don't ask a question to which you do not know the answer.
5. Listen to the witness' answers.
6. Don't quarrel with the witness.
7. Don't allow the witness to repeat his direct testimony.

8. Don't permit the witness to explain his answers.

9. Don't ask the "one question too many."

10. Save the ultimate point of your cross for summation.

Younger's "Ten Commandments of Cross Examination" are as relevant in 2014 as they were when Professor Younger first brought them down from the mountain ("Far above Cayuga's waters"). However, those mandates were intended for *trial*, not for discovery depositions!

And that was the problem with my colleague's technique at our expert discovery deposition: He was trying to "box in" the expert, rather than obtain information from the expert: Information that we *both* needed.

Whether or not you will want to take an expert discovery deposition is often dictated by the forum county in Ohio. In some counties, the court will require the expert to produce a written report, and exclude the expert from testifying in a manner inconsistent with the contents of that report. In other counties, there is no report requirement, and you may very well want to take a discovery deposition in that situation. Why? Because you will want to lock in the expert's opinions and the reasons underlying those opinions.

In addition to eliciting the opinions themselves, you do need to probe the expert's credentials. And, of course, you need to use the deposition to understand the underlying bases for the opinions, in addition to understanding the opinions themselves. Often, there is no real scientific basis for an expert opinion, and if the underlying basis is shaky or non-existent, the expert's responses can provide you with background information you may need for a *Daubert* motion, or motion to exclude the expert's evidence under Ohio Evidence Rules 702 through 705.

A discovery deposition will also give you information which you can use to find materials with which to impeach the expert at trial. You may also use a discovery deposition for the purpose of uncovering expert bias. Often, you can use the expert discovery deposition testimony to support a Rule 56 motion.

Discovery depositions give you the best opportunity to learn about the opposing party's position in the case. Use the deposition to extract helpful admissions of fact. You can also use the deposition to neutralize a witness by eliciting, for example, multiple "I don't know" responses from the expert. And, perhaps most significantly, you can use the expert discovery deposition to set the stage for a favorable settlement.

There are as many successful expert discovery deposition strategies as there are experienced defense attorneys. You just need to avoid conducting your discovery cross examination like your trial cross examination.

For expert discovery depositions, consider an approach which is non-confrontational, non- aggressive. There will be plenty of time for "marginalizing" the opposing expert if the case goes to trial. A good expert discovery deposition is thorough and complete. It is "conversational." It is friendly. You are trying to elicit as much information as you can from the witness. You want the witness to talk freely, openly. You find as much common ground as you can, so you can better understand your differences. Try to turn the opposing expert into *your* expert. It may sound counterintuitive, but this approach can be very productive. You *want* to ask a lot of "why" questions, and you want to break the deposition down into the proverbial "half-court game." You need to identify and explore the expert's reasoning process. Unlike the approach you will use as upon cross examination at trial, you *want* the expert to "open up" in the discovery deposition. With this approach, the witness will give you plenty of ammunition you can use during the settlement negotiation process, and later on if the case goes to jury trial.

In complex cases, there will often be many witnesses. The lawyer needs to know what these experts are going to say before even beginning to think about the trial strategy. The lawyer needs to know how all the pieces fit together, and then how to use the testimony of the experts to support the theory of defense.

There is no one set of "Rules of the Road" for expert discovery depositions. But you may wish to consider a few ideas:

- I generally write out my cross examination questions for expert discovery depositions. A lot of things can happen during a deposition, and losing track of where you are, or where you want to go, is never a good thing.

- If you are able, obtain in advance the substance of the expert's opinions, the grounds for those opinions, and all of the documents that the expert has created and/or relied upon in forming his or her opinions. Clearly, you submit interrogatories to your opponent requiring him or her to identify all testifying experts and to state all

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of his or her opinions and all of the grounds for each opinion. If you fail to do this, you will spend most of the deposition simply obtaining the expert's opinions rather than or testing the bases for those opinions.

- After the witness is sworn, ask to see the expert's file and go off the record to review it. I do this even if the file is previously produced, because you would be shocked at the editing which occurs in connection with the expert's file.

- Don't forget to ask the expert a very basic question. After you have covered the preliminary matters, you need to ask the witness to describe his "assignment" in the case, i.e., what did the plaintiff's attorney ask that witness to do. You need to clarify the "scope" of the expert's involvement in the case.

- Ask to see the communications between the attorney and the expert to see whether the attorney is coaching the expert what to say.

- Ask how much time the expert has spent working on the case.

- Some lawyers often spend far *too* much time in discovery depositions exploring the expert's credentials, educational background, affiliations, and prior cases. The defense attorney may wish to consider truncating this time consuming process by having the expert stipulate on the record the accuracy of the information contained in the curriculum vitae. If you get that concession, you can find and expose problems areas for the witness at a later time devolving from inaccuracies on the CV. You can then "pick and chose" to focus on certain publications, areas of expertise, etc., where you believe the expert is vulnerable from a credentialing standpoint.

- Consider asking ask what the expert has done on the case. You question the expert on the file, including related deposition transcripts, notes, photos, calculations, records, drawings, etc.

- Ask the expert to identify his opinions in the case.

- Ask the expert "why" he reached those opinions, and the bases of those opinions.

- Ask the expert if he or she disagrees with any other expert in the case, and ask him to provide the basis for the disagreement.

- Try to turn the expert into your expert. Find common points of agreement. This helps you down the road in a couple of ways. It may open the door up to a Rule 56 motion. It tells the jury that you are "honest" insofar as you are willing to concede a known fact or opinion, and that you are not taking the position that everything that expert says, is wrong. It makes you appear logical and reasonable.

- Try to find out if plaintiff's expert make factual assumptions or employ a different methodology from your expert. Identify the basis of the disagreement between the experts. That way you can use your own expert to show "why" your analysis is more valid than your opponent's.

- Do not argue with the expert. You want the expert to open up to you. You need to be approachable.

- Ask intelligent questions. You cannot ask intelligent questions if you are not prepared. Be familiar with the expert's background, and the records in the case.

- Finally, be patient. Break down your questions. Keep the questions short. Build. Go for base hits, not home runs.

Now, go take an expert discovery deposition, learn some things, and save the "rough stuff" for trial!

John Fiocca, is a shareholder in the Columbus office of Smith, Rolfes & Skavdahl, Co., L.P.A. with almost 40 years of trial and appellate insurance defense litigation experience, primarily in the areas of professional liability (including judicial, legal, medical, and design malpractice), product liability, personal injury, construction, and employer intentional tort. John was the first Vice President of Marketing for the Ohio Bar Liability Insurance Company in 1980, and co-authored the Ohio State Bar Association's Merit Selection of Judges State Constitutional Ballot Amendment in 1987.