# FOOD FOR THOUGHT: DO YOU REALLY NEED TO TAKE THAT DEFENSE EXPERT DEPOSITION?

By Susan Petersen, Esq.

For me, it was always an automatic: I scheduled and deposed each and every expert witness identified by the defense. Over the years, I spent a lot of money and traveled to a lot of states doing so. In recent years, I became increasingly frustrated by the defense approach of identifying multiple experts within the same specialty to defend the same person/entity. While I was able to secure a few orders limiting cumulative experts prior to deposition, I typically found myself deposing all of them. Doing so, I realized I was funding and conducting the defense audition for which expert would make it to trial. The better my cross examination, the more likely the expert would disappear forever.

Last year, I was so fed up with this process I decided to try an entirely new strategy – to not depose a single one of them. I'd heard from a colleague about the approach, but it never felt right. This time around, my courage was borne of disgust when the defense identified 16 experts in a medical negligence case to include: five in emergency medicine, three in vascular surgery, two in hematology, one orthopedic surgeon, one radiologist, two life care planners, one prosthetist, and one "hindsight bias" expert.[i] As I read their duplicative reports, I decided to get really brave and take a path which only a few trial lawyers I know had taken before . . . no discovery depositions for any of them.

With trial a few months out, the defense sought a continuance, based primarily on the claim that the discovery depositions could not possibly be completed in time.

That's when I retorted something to the effect of "Um… Mr. Defense Attorney, you actually have no basis for your motion to continue our trial. While you argued that we won't have enough time to travel the country to depose all your experts, I never requested their depositions. That's right. . . I don't want their depositions."

Continuance denied.

At that moment, the decision felt completely satisfying. When we reached trial, however, it was completely terrifying. Regardless of their nonsensical positions, these were paid professionals, and I was running blind, absent whatever prior depositions we could find.

After three and a half weeks of trial, the decision was back to feeling completely right. Out of sixteen experts identified, the defense called just two. Only two! While I know firsthand that change is hard and frightening, I share with you my experience and some food for thought as to two major advantages in forgoing defense expert depositions.

1. **The Power of Surprise**

We know from history that surprise attacks and ambushes can turn the tide of war. A well-timed and well-executed surprise gives the underdog a fighting chance. The same holds true to waging war in the courtroom. The single most powerful element of an effective cross-examination is surprise. It makes witnesses tell the truth because they are caught off guard. Surprise makes them answer based upon what they know versus what they have been coached to say. Surprise triggers nervousness on the stand and in turn, non-verbal messages that can signal dishonestly or ignorance.

If you are effective enough to get the defense expert to make a devastating admission, the moment will never be relived. While you can impeach at trial with the testimony, the expert will be prepared and ready to explain away the deposition admission or muddy the water, so the jury will end up lost in the impeachment process. Expert witnesses and the lawyers who hire them are smart enough to prepare for the second attack.

When you cross examine the defense expert for the first time on the stand, he won't know you, your style of questioning, your tone, or the weaknesses in his own testimony. Fear of the unknown will be very real for the expert. Chances are their anxiety will be much higher. Making defense experts squirm is a very important element to winning over your jury. Asking questions the experts don't expect -- even when it means you don't know exactly what the answer will be will – causes some anxious moments, but can be really fruitful. The expert does not know the path of your examination and has no transcript to rely on in preparation. The insight into your theory of the case gained from deposition is gone.

The following example from our recent trial epitomizes the benefit of venturing outside of your comfort zone:

**004:06 Q. My name is Susan Petersen. We never met**
**004:07 before, right?**
**004:08 A. No.**
**004:09 Q. You never met Todd Petersen, my partner,**
**004:10 either, true?**
**004:11 A. No.**
**004:12 Q. But we've done our homework, and so I have**
**004:13 some questions for you about that. First of all, as**
**004:14 part of your review did you keep any notes?**
**004:15 A. I did not.**
**004:16 Q. You typically do though, don't you?**
**004:17 A. I stopped taking notes years ago on my cases,**
**004:18 because they're discoverable.**

I wasn't expecting to receive such a wonderful gift this soon in my cross examination, but I seized the moment. After a very pregnant pause and a perplexed expression turned into an "ah-ha" smirk, I went on . . .

**004:19 Q. And you wouldn't want us to be able to**
**004:20 discover your notes, as to what you're thinking when**
**004:21 you're reviewing the case before you talk to the**
**004:22 lawyers, right?**
**004:23 THE COURT: Your answer?**
**004:24 A. I just prefer not to write things down that**
**004:25 might be misinterpreted potentially.**
**005:01 Q. When you say "discoverable, "that means that**
**005:02 we would be able to see them, right?**
**005:03 A. Yes.**
**005:04 Q. And you wouldn't want us to see what you're**
**005:05 thinking as you're looking at things, because then**
**005:06 they could be interpreted by us in a way that might**
**005:07 hurt the people who are paying your bill, right?**
**005:08 A. I don't agree with the way that you phrased**
**005:09 that.**
**005:10 Q. So for this case you destroyed the notes?**
**005:11 MR. VOUDOURIS: Objection.**
**005:12 THE COURT: Overruled.**
**005:13 A. No.**
**005:14 Q. You just didn't take any?**
**005:15 A. Correct.**

This particular expert nailed her direct. However, she hadn't prepared for this line of questioning and her stumble put her credibility at issue within the first five minutes. Had I deposed her, I most certainly would have asked – did you keep any notes? Even if she gave the same answer, she would have remedied the sting of how it came out by the time trial rolled around.

I encourage you to take the risk. If you can cross examine an expert in deposition, you can most certainly cross examine at trial. You prepare in the exact same way except at trial, the jury is watching, and the expert is sitting there not knowing what line of attack will be coming at them next. Instead of hours on airplanes and days

wasted out of the office taking depositions, you can strategize, research, game plan, and focus your cross-exam strategy. Unless the defense expert is a virgin to the process – which is usually never – you will not have to depose the witness cold. Deposition banks are helpful and helpful colleagues even more so; I had an arsenal of materials in preparation for my cross-examination of each defense expert.

I spent $150 bucks on Trialsmith to download three prior deposition transcripts. It was there I learned that she kept notes on her cases in the past. I had submitted a Request for Production to defense counsel for her file and while they turned over some documents, there were no notes. At trial, I figured the question was worth a shot in case she had notes that the defense lawyers hadn't tendered. Never in a million years did I expect her response. Never in a million years would she have given this answer a second time around.

Prepare for your trial cross in the same way you would for your deposition. Attempt to discover areas of attack via interrogatories, document requests, or Rule 45 subpoenas directly to the expert witnesses assuming they reside Ohio. Reach out to your colleagues at OAJ for prior depositions. Research and order transcripts via Trialsmith on the internet. Go on Westlaw and Lexis to dig for other transcripts or cases in which they have testified. Scour the medical literature for articles they authored. Check out their social media and employer websites. Prepare a binder with tabs sorted by subject matter followed by excerpts from all the different deposition testimony on that subject.

When faced with the decision whether to depose a defense expert, you must thoughtfully consider whether losing the element of surprise will be outweighed by some

other gain. I submit to you that in most cases, it will not be and the very best way to surprise the defense expert is the choice not to depose.

2. **Avoiding New Expert Opinions:**

How many times in deposition have you asked: Mr. Expert, do you have any other opinions not contained in your report which you anticipate providing at trial? . . . Why yes counselor, I'm so glad you asked . . . new opinion . . . new opinion . . . new opinion." We ask this question for fear of being surprised ourselves at trial. Often, we are shooting ourselves in the foot by allowing the expert to disclose new opinions in deposition, eliminating the argument of surprise. When you think about it, isn't deposing an expert to "tie down" opinions counterproductive? In federal and state courts in Ohio, full disclosure of an expert's opinions is already required by the rules. Specifically, FRCP 26(a)(2)(B) requires parties to disclose, for all retained expert witnesses, "all opinions" and the "full factual basis" of all those opinions, among other things. The rule requires complete disclosure. All opinions include "a complete statement of all opinions the witness will express and the basis and reasons for them." FRCP 26(a)(2)(B)(i). A full factual basis includes "the facts or data *considered* by the witness in forming" all of the opinions disclosed in the report. FRCP 26(a)(2)(B)(ii) (emphasis added). Failure to properly disclose an opinion can result in the expert being excluded from giving such testimony at trial.

In Cuyahoga County, the scope of expert testimony at trial is governed by Loc.R. 21.1. The rule requires the parties to disclose expert opinions in a report or written summary and contemplates the exclusion of expert opinions at trial that were not previously disclosed. Loc.R. 21.1(B) and (C). The purpose of the rule is to eliminate

surprise, with the existence and effect of prejudice resulting from noncompliance being the primary concern. *Maloney v. Day*, 8th Dist. No. 73037, 1998 Ohio App. LEXIS 3640, *6 (Aug. 6, 1998). As stated by the Supreme Court of Ohio, the clear import of Loc.R. 21.1 was to vest in the trial court the discretion to determine whether party has complied with the rule and the appropriate sanctions for its transgression. Such determinations will not be reversed on appeal absent an abuse of discretion. *Paugh Farmer, Inc. v. Menorah Home for Jewish Aged*, 15 Ohio St.3d 44 (1984).

It is actually far easier to limit the opposing expert's permissible testimony to within the four corners of her expert report at trial than once you have eliminated surprise by allowing expansion of the report in deposition. In my experience, the deposition "reopens" discovery by giving expert witnesses the green light to expand and add. Although some courts will limit what expert witnesses can sneak in during deposition, a judge at trial is more likely to see the "expansion" upon the opinions in the report as "sandbagging" and exclude the new opinion.

Next time you receive that list of defense experts, ask yourself -- "Do I really need to take the deposition?" Don't give a knee-jerk reaction and immediately begin scheduling. Thoughtfully consider whether the benefit of surprise outweighs the comfort of knowing what they are going to say. It will not be a comfortable approach the first time you use it – frankly, it may always be uncomfortable – but it can change the dynamics of an entire case.

[i] 1 I must give credit to OAJ Members Chris Patno, Dan Mordarski, and Nick DiCello who shared with me their positive experiences in choosing not to depose opposing experts as I worked up my case. Their experiences helped to give me the courage and impetus to rethink my strategy.