DEPOSING DOCTORS: PHRASING QUESTIONS AND CONTROLLING THE TESTIMONY

ALAN T. RADNOR is a retired partner with Vorys, Sater, Seymour and Pease LLP in Columbus, Ohio, and is a Fellow of the American College of Trial Lawyers. He has extensive trial experience in medical malpractice, products liability, insurance defense, and personal injury cases. His speeches and addresses have included "Presentation of Demonstrative Evidence," "Cross-Examination of Medical Experts," "Nursing Malpractice," "Pediatric Malpractice," and "Medical Ethics." Mr. Radnor also served for 20 years as an Adjunct Professor of Law at The Ohio State University Moritz College of Law, teaching Trial Advocacy to third-year law students.

"If you find yourself in a fair fight, you didn't plan your mission properly."

Colonel David Hackworth, 1930-2005.

Some contrarian legal writers claim leading questions are not practical or especially effective. I disagree. Leading questions—those that suggest an answer—have the benefit of presenting your argument in cross-examination and controlling the doctor. Sparring with the doctor without leading questions is a recipe for failure because you lose control and it is the doctor's answers that become the testimony instead of your questions. Compelling the favorable answer is what cross-examination is about. The best way to do that is to use leading questions.

Varying the way you ask leading questions is important. There is more to asking leading questions than beginning each one with, "Isn't that correct?" "Isn't that right?" or "Isn't that true?" It will become monotonous if you do not vary questions. You can and should ask some non-leading questions. But when the testimony is crucial and the client's interest is at stake, leading questions are required.

DO NOT REPEAT THE DIRECT EXAMINATION

This seems self-evident and, perhaps, not worth mentioning, except for the fact that it occurs so frequently. A lawyer will rise to cross-examine a doctor and instead of using leading questions to establish the case, allows the doctor to repeat the direct. Now the jurors have heard it twice. Pretty soon it becomes gospel. Why do lawyers do this? Lack of preparation, a misguided attempt to set up the cross-examination, or a lack of insight into effective techniques probably all play a role. Usually, the direct is repeated when a cross-examiner asks a "why" type of non-leading question. Don't do it. Do your examination, not the opposing lawyer's. Below is a discussion of other effective techniques available to control witnesses and compel favorable answers. For example, nonresponsive witnesses at trial are usually nonresponsive in discovery. Using certain phrasings of questions, discussed below, can be as useful in discovery depositions as they are in examinations at trial. These phrasing techniques are discussed here because they look both forward to use in cross-examination and back for use in discovery.

NONRESPONSIVE ANSWERS: AN OPPORTUNITY FOR CONTROL

Keeping control of a witness is a tactical concern in most examinations. In cross-examining doctors, it is a vital concern. Doctors are harder to control; they are smarter, often more-experienced witnesses. How do you compel the favorable answers? Using leading questions and not repeating (or allowing the doctor to repeat) the direct is a start in controlling the doctor's responses. Here are several other techniques.

Motion to strike

If the doctor's response at trial is nonresponsive, namely, you ask a question and the doctor gives an answer that is not a response to the question asked, the legal solution is to move the court to strike the nonresponsive answer. Federal Rule of Evidence 611 and similar state rules of evidence permit the court to control the questioning. Therefore, appeal to the court is appropriate:

> "Your Honor, I move the answer of the doctor be stricken as nonresponsive."
>
> Court: "Motion granted."
>
> "Your Honor, I request the jury be instructed to disregard that answer."
>
> Court: "I will do so."

There are several interesting aspects to the nonresponsive answer situation:

1. First, it is an objection to the answer, not the question;
2. Second, an objection to the answer is usually only made by the lawyer asking the question; and
3. Third, seeking assistance of the court is the least effective technique for controlling a nonresponsive answer. It should only be used if the doctor's answer contains highly prejudicial and inadmissible testimony, or it is clear that the doctor is consistently nonresponsive on continuing examination. Otherwise, use one of the following techniques to demonstrate to the jury that the doctor is nonresponsive. It will be more effective than seeking the court's assistance.

Require a responsive answer

Sometimes doctors (and other witnesses) will quickly process the question, not respond to it, and simply proceed to an explanation that favors your opponent. Even if the doctor is gracious about it, don't let it happen:

> Q: ". . . and by definition, then, the patient was unstable?"
>
> A: "If I may—"
>
> Q: "Well, first can you answer that question? Is that a correct statement?"
>
> A: "Yes, that is correct."

You may have to deal with the doctor's "If I may—" later, but having gained control, keep it and proceed with your cross-examination.

Here is another example of a witness who is more combative in interjecting an explanation:

> Q: "And the fact that he worked the rest of the week, is that of significance to you?"
>
> A: "Well, what did he do after that week? I don't think you can gauge it on one week."
>
> Q: "We will do one question at a time. Will you answer the question, please?"
>
> A: "I think he could work and still be disabled, but it would be of significance if he continued to work with no symptoms, yes."

Psychiatric cases seem to generate somewhat nonlinear examinations. Here is a discovery deposition discourse:

> Q: "How did he adjust to his teachers?"
>
> A: "I know he hasn't been convicted of any crime, he hasn't been in the penitentiary. He hasn't been dismissed from the service dishonorably, and he hasn't been in any kind of social trouble, in spite of his lack of education. He made a good adjustment."
>
> Q: "Doctor, that is very interesting. But I asked you about his school record."
>
> A: "Yes."
>
> Q: "What do you know about his school record?"

The doctor has become an advocate. You must demand a responsive answer.

Simply repeat the question

Look at the last example. Instead of politely requesting the doctor to respond to the original question, simply repeating the question has a devastating impact:

> Q: "How did he adjust to his teachers?"
>
> A: "I know he hasn't been convicted of any crime, he hasn't been in the penitentiary. He hasn't been dismissed from the service dishonorably, and he hasn't been in any kind of social trouble, in spite of his lack of education. He made a good adjustment."
>
> Q: "How did he adjust to his teachers?"

Repeating the question creates an unspoken bond between the jurors and the lawyer that the witness is not answering fair questions and, in fact, obviously avoiding them. It has impact because it is unstated. It allows the jurors to form their own opinions about the doctor's uncooperativeness, bias, and credibility.

This technique of repeating the question works well in an analogous situation. Once, a doctor was loquacious beyond all bounds. His nonresponsive answer went on for four minutes (a long time for a courtroom answer on cross-examination). Repeating the question only caused further lectures. Finally, the cross-examiner simply sat down next to the jury.

When the doctor was finished, she rose and repeated the unanswered question, which required a simple yes or no response. When he began again, she sat down again. The jury laughed at the doctor and, more important, ignored the unresponsive answers.

Finally, Gerry Spence, an innovative trial lawyer, has used a technique to demonstrate nonresponsiveness to the jury. It might be characterized as a "repeat the nonresponsive answer" technique. In the psychiatric outline above he might proceed as follows (this is fictional, since Mr. Spence is never on the defense in such a case):

> Q: "Doctor, Mr. Jones adjusted poorly to his teachers and school, didn't he?"
>
> A: "I know he hasn't been convicted of any crime, he hasn't been in the penitentiary. He hasn't been dismissed from the service dishonorably, and he hasn't been in any kind of social trouble, in spite of his lack of education. He made a good adjustment."
>
> Q: "Doctor, let me go to the blackboard. I'll write my question here and your answer here." (Writes side by side.)
>
> Question: Doctor, Mr. Jones adjusted poorly to his teachers and school, didn't he?
>
> Answer: I know he hasn't been convicted of any crime, hasn't been in the penitentiary. He hasn't been dismissed from the service dishonorably, and he hasn't had any kind of social trouble, in spite of his lack of education. He has made a good adjustment.
>
> Q: "I didn't ask (writing on the blackboard), 'Was he convicted of a crime?' did I? I didn't ask, 'Was he dishonorably discharged?' did I? I didn't ask whether he had any social trouble, in spite of his lack of education, did I? Do you see the difference between the question I asked and the answer you are trying to give the jury? Can you answer the question, please?"

This technique has risk, especially in repeating answers favorable to the other side. It should be used only when absolutely necessary.

Narrow the question—Don't ask "why"

At trial, asking a doctor "why" questions, except in limited situations, is disastrous. You will get a lecture favorable to the other side. Although it may be a proper inquiry to ask "why" in discovery, it seldom is on cross. Interestingly, some lawyers ask "why" on cross and fail to ask it in discovery. If asked in discovery, you can deal with the answer better when planning cross-examination. When asked at trial, you can never be as effective because you have not prepared for it.

The following is an example of a bad cross-examination in a deposition read at trial. The cross-examiner makes several disastrous mistakes. He in effect asks "why" by asking, "Is that your belief?" This allowed the doctor to explain asbestos exposure in a sympathetic or, at least, an understandable context. The testimony produced was more favorable than the testimony was on direct and more useful in closing argument because it was in response to an opponent's questions:

> Q: "Doctor, there is a great fear in the workplace of asbestos; is there not?"
>
> MR. TAGGART: "Objection. If you know." [The objection was withdrawn at trial.]
>
> A: "Yes, there is. May I say, I think it's exaggerated."
>
> Q: "You think it's exaggerated?"
>
> A: "I do."
>
> Q: "Is that your belief?"
>
> A: "I believe that—yes, for the following reasons: I think we all have to accept the fact that there is a large number of us who have inhaled dust, asbestos dust. This can be shown at a routine autopsy, that more than 50 percent of all patients that have routine autopsies, adults, you'll be able to find asbestos of the lungs and they don't have asbestosis and they don't have lung cancer."
>
> Q: "Doctor, you stated that all of us will probably inhale and autopsies will show that we have asbestos?"
>
> A: "Many of them."
>
> Q: "I would like to ask you why Mr. Airey, who works so many years with asbestos, would not show asbestos in his lungs?"
>
> A: "To answer your question, I think I touched upon this earlier when I said that we have a really relatively magnificent protective system that's designed to protect our lungs against all kinds of noxious gases, dust particles, and so forth, and mother nature does, indeed, protect us against these things. Now, all I can tell you is the ashing studies of his lungs did not show the presence of asbestos, and I think this is about as final a way of determining whether asbestos is present or not as I know it. It is kind of the high court."
>
> Q: "So you would say that he has a magnificent system that protects him against all kinds of dust and all these other fumes?"
>
> A: "It also depends in part upon the magnitude of the exposure, and how great his exposure was to asbestos particles, I can't tell you."

The fatal mistakes are clear. The cross-examiner asks open-ended, non-leading questions and asks "why." This leads to a freewheeling and perfectly proper discussion favorable to the asbestos defendant. There is a lack of preparation and a lack of ammunition to confront and contradict the doctor's answer when it is given. When the doctor responds, "I think it's exaggerated," it would have been the best opportunity to review the number of asbestos claims filed, the number of defendants, the number of claimants, the different diseases produced by asbestos, and the lack of cure for any of them. Then let the jury decide if the fear is "exaggerated." Instead, the examiner asks, "Is that your belief?" and allows the advocacy by the doctor.

Rephrasing and pursuing the question to get an answer

Sometimes, there is simply a misunderstanding between the cross-examiner and the doctor concerning the information sought. Often, there is resistance to answering the question because the admission is damaging. In either event, rephrasing the question in discovery or trial will sometimes get you to where you want to be. The following colloquy is from is a discovery deposition in a malpractice case in which the central question was whether surgery had been unacceptably delayed. The surgeon involved was called in late and probably not liable, but he did not want to implicate the intensive care unit doctors who failed to call him earlier:

Q: "Would it be fair to say that other than the fact that you were contacted, you don't really recall anything prior to 9:30?"

A: "Yeah, that would be fair. That would be fair."

Q: "Doctor, I'm going to put you on the spot a little bit, but I need to do that in order to get my—my mind around the circumstances. If indeed—and now, this is an assumption that I'm asking you to make—if indeed you were contacted at 8:00, but did not arrive at 9:00—until 9:30 to start the operation, in your opinion, was that delay of an hour-and-a-half unacceptable care?"

MR. THOMAS: "Objection."

MR. PORTER: "Objection."

THE WITNESS: "Well, I'm not sure what time I arrived. I mean—"

MR SCHERNER: "Right."

THE WITNESS: "—the case started at 9:30, but I also saw—you know—you know, I think that—I'm not sure if I saw the patient first in the intensive care unit, so I'm not sure what time I arrived here at the hospital."

BY MR. SCHERNER:

Q: "That's why I'm saying I'm asking you to make those assumptions. I'm not suggesting to you that they are accurate. I'm only asking you if, indeed, you were contacted at 8:00 and did not arrive here until 9:30 to take [the patient] to the operating room, do you feel that that delay was an inappropriate delay?"

A: "That would—that would be a—that would be a—a long delay, yes."

Q: "And it would be unacceptable, in your opinion?"

A: "I mean, it depends on what was going on during that time. Not every patient goes immediately from—"

Q: "Uh-huh."

A: "—the intensive care unit to the operating room without some preparation, so if there's a reason for the delay I can't say that it was inappropriate."

Q: "Uh-huh."

A: "Depending on the situation."

Q: "And based upon your review of the records, Doctor, is there anything that would suggest to you that an operation could not have been performed earlier than 9:30?"

A: "Well, it's hard for me to say because the records that I've looked at have been kind of scanty—"

Q: "Uh-huh."

A: "—as far as what was going on in the intensive care unit, I don't think I can comment on what was going on at the time, whether he was being resuscitated or what was going on there at the time. So I think it's—it's unfair for me to say yes or no."

Q: "Okay. And that's why I'm asking you, based upon your review of the record, is there anything that you saw which would indicate to you that surgery could not have been per—could not have been started before 9:30."

A: "Uh, it's hard for me to answer that question, but I'd say—I mean, I—I don't know how to answer that, is what I'm saying."

Q: "In other words, you don't have enough information?"

A: "I don't have enough information to answer that question."

Q: "If a laceration was identified, diagnosed, sometime between 5:00 and 6:00—"

A: "Uh-huh."

Q: "—that same evening of December 9th and surgery was not begun until 9:30, regardless of who the surgeon was, do you believe that a delay of some three-and a-half hours is acceptable in this case?"

A: "I think the sooner that you get to the—to repair the laceration, obviously, the—the better it is."

Q: "I can—"

A: "Once the—once the patient is stabilized."

Q: "And in this case, Doctor, do you believe—assuming those facts, as I've described them, to be accurate, do you believe that a three-and-a-half hour delay is an acceptable delay?"

MR. PORTER: "Objection."

THE WITNESS: "Again, I mean, I would do this as soon as—as soon as I could do it, I would do it."

BY MR. SCHERNER:

Q: "Would it be fair to say that if it could have been done earlier, it should have been done earlier?"

A: "Yes."

Q: "And if it could have been done earlier, should have been done earlier, is the failure to do it earlier, in your opinion, a deviation from acceptable standards of care?"

MR. PORTER: "Objection."

THE WITNESS: "Uhm, again, knowing, you know, what the—what the situation is, or what the resuscitation is, not every patient goes directly from—you know, to the operating room. But, you know, if the patient's stable and the patient's ready for surgery, yeah, it—it should be done as—as soon as possible."

BY MR. SCHERNER

Q: "And the failure to do it under those circumstances would be a deviation from the standard of care, would it not?"

A: "Yes."

This is a discovery deposition. The balance between gaining information and getting admissions in discovery is aptly demonstrated here. As an aside, look at the technique used to draw out the doctor's grounds for avoiding answering the question. The lawyer is either silent or says "uh-huh" and lets the doctor establish his reasons for not being able to answer, then rephrases the question to overcome the objection of the doctor in answering ("Is there anything which would suggest to you that an operation could not have been performed earlier than 9:30?"). Although not successful in that tack, the lawyer does get an admission that 8:00 to 9:30 is a long delay. He then moves even earlier in time and the doctor is compelled to admit an unacceptable delay.

"The Deal"

Many trial books describe what has come to be known as "the deal." It goes like this:

> Q: "Doctor, I'm going to ask you some questions which can be answered 'yes' or 'no.' If you cannot answer the question 'yes' or 'no,' please tell me and I will rephrase it. Is that fair?"

You then remind the doctor when he or she deviates from the deal.

I am not a fan of the deal. It seems to "deal" from weakness and fear that you cannot control the witness. I would rather control the witness with leading questions that will erode the doctor's credibility if he or she tries to avoid them. In practice, not only do witnesses breach the "deal," lawyers do it by not asking questions that can only be answered "yes" or "no." And no one much notices.

An alternative to the deal which carries less baggage with the jury is simply to ask the doctor to be fair. It is remarkable that this simple question may

adjust the doctor's attitude and make at least initial answers favorable while the doctor is still attempting to be fair.

Here is a brief example:

> MR. SMALLWOOD: "Doctor, may I presume, of course, that you will be as fair with me as you have been with Ms. Fairfield during the course of the examination?"
>
> A: "Thank you."

Here's a fascinating nonresponsive answer. The doctor (a psychiatrist) is bypassing the answer ("yes") and treating the question as a compliment! The rest of the exam is a litany of "Yes, sir" and "That is correct," not only because the questions are narrowly phrased, but in some odd way, the doctor is returning the perceived compliment!

"IS IT FAIR . . . ?"

Witnesses read a question beginning with, "Is it fair . . ." as being dangerous to disagree with because they may not appear "fair." A doctor may read the question that way, but depending on the context, may also read it, "Is it reasonable . . . ?" The doctor is more likely to assent to the latter as noted in the cited examination of the surgeon:

> Q: "Would it be fair to say, if it could have been done earlier, it should have been done earlier?"
>
> A: "Yes."

The beauty of the phrase is that the jury only reads the absolute part ("if it could have been done earlier, it should have been done earlier"), but the doctor is reading the less absolute part ("Would it be fair to say . . ."). It is a powerful tool because it works. There are two caveats: Don't overuse it and use it only at critical points.

Do not overuse

As with all of the introductory phrasing, too much use decreases impact. Repetitive use will cause the doctor to begin to resist the questions.

Use at a crucial point

Although it can be used at other points of examination to confirm an important point or opinion, it should, as much as possible, be used at crucial testimony points.

"IS IT GOOD MEDICAL PRACTICE . . . ?"

Another introductory phrase is, "Is it good medical practice. . . ?" I believe that jurors do not disregard this introductory phrase, but instead absorb the whole question. The doctor, on the other hand, reads it as a malpractice question and will readily assent. For example, assume you are trying to establish that, if a complaint of pain was missing from the records, the patient had no complaints that day. Here are two approaches. First, not using the phrase, then using "Is it good medical practice. . . ?"

> Q: "Doctor, do you record complaints of pain in your office record?"
>
> A: "I usually do."
>
> Q: "There is no complaint of pain noted on September 13, is there?"
>
> A: "No, but she complained every visit, so some I just didn't record."

Now try this:

> Q: "It's good medical practice, when a patient comes in with a complaint of pain, to make a note in your records of the complaint of pain?"
>
> A: "Yes."
>
> Q: "And you follow that practice?"
>
> A: "Yes."
>
> Q: "And did you record any complaint of pain on September 13?"
>
> A: "No."

Even if the doctor tries to answer that the patient complained of pain every time and the doctor failed

to record it, the jury will begin to doubt his practice and his testimony.

Without that phrasing, the jury will readily accept the doctor's explanation.

"WOULD THAT BE OF SIGNIFICANCE (OR INTEREST) TO YOU?"

As noted, the hardest thing to attack is the opinion itself. At best, the basis can be attacked, but even then it is difficult. An indirect but effective way to proceed is to ask, "Would it be significant" if a particular fact or situation occurred. It can be in the context of exposing a fact the doctor does not know or in setting up a hypothetical based on that fact. The following is an example showing its use in contradicting a hypothetical question on direct in a workers' compensation case. The situation is that a worker is found dead at the base of a scaffold. Did he slip and fall and suffer brain injury and death (compensable), or did he suffer an unrelated stroke that caused him to fall (not compensable)?

MR. HERROLD: "Were you told in the hypothetical question why Mr. Hoberg fell?"

A: "No."

Q: "If he had fallen because he got dizzy, would that be of interest or significance to you?"

A: "It might be, yes."

Q: "That might indicate that there had been a rupture or a leak within his circulatory system and his brain while he was up on the scaffold, isn't that so?"

MR. THOMAS: "Objection."

A: "I don't think that is a probability; that is a possibility."

Q: "And you can't say if he did have a leak either in the subarachnoid area or an aneurysm, you can't say whether that occurred before or after he fell from the scaffolding, can you?"

A: "Well, no. I don't think anybody knows."

Q: "And isn't it equally possible, Doctor, that the leak from his aneurysm could have caused the dizzy spell which caused him to fall?"

MR. THOMAS: "Object."

A: "Possibility. I don't think you can say it is probable."

Q: "It is an equal possibility, isn't it?"

MR. THOMAS: "Object."

A: "I would have to say yes."

The phrase, "Would it be significant" and the answer, "It might be, yes" leads the lawyer to ask the substantive legal question and get a favorable response.

Magic words such as "Is it fair" and "Would it be significant" without substantive thought and sound evidentiary basis will do you no good. Using both, however, may get you a directed verdict, as here, when the doctor cannot testify to the probability that the cause of death was work related.

"NOW, THIS IS IMPORTANT . . . ."

The phrase, "Now, this is important . . ." is used to emphasize and direct the jurors' attention to the question and answer. It is an attention-getter. Beginning a question, "Now, this is important . . ." alerts the jury to your opinion about that particular question and answer. Use it only when the answer is guaranteed by the discovery deposition or by the evidentiary records. A variation of alerting the jury to significant testimony is as follows. Also note the effort to deal with the partially nonresponsive explanation about the record:

Q: "Now, Doctor, the *most* interesting entry [emphasis added] in this December 23 admission I'd like to direct you to is the second page of your physical examination on that date. Under 'eyes, ears, nose, and throat essentially negative,' you also recorded the history, 'patient has sort of a reluctant speech and the patient has a tendency not to tell the truth at all times'; is that correct?"

A: "Yes."

Q: "And that was based on your three years of experience with this patient and your evaluation of him?"

A: "Well, he never looks at you directly when he talks, and he's hard to get a history out of. He's rather vague in some of his symptoms, and of course he's on—he almost had a complete nervous breakdown during this interval, and some of this could be drugs, could be some of the pain relieving drugs or some of the nerve pills he was taking."

Q: "Doctor, you didn't say any of that in this history. You just simply noted, 'Patient has a tendency not to tell the truth at all times'; is that correct?"

A: "That's correct."

Q: "Now, at this time, how many years had you been practicing medicine?"

A: "42. At this time? No, 41."

Q: "And you had seen a lot of patients over the years and evaluated a lot of different people, have you not?"

A: "I've seen a lot of people."

The "most interesting entry" and "Now, this is important" introduction may be objectionable as argumentative. On the other hand, on cross-examination most courts would consider it fair comment and let the jury decide if the phrase was true.

REPEATING VERBATIM DISCOVERY: DEPOSITION QUESTIONS

When taking discovery depositions, it was suggested that there are times when you want to seal information with leading questions and obtain short yes-or-no responses. The reason is that any difference between your cross-examination question and your discovery deposition question gives the doctor wiggle room to disavow his or her discovery deposition answer.

Repeating the question verbatim at trial eliminates a successful disavowal by the doctor. If the doctor disavows the answer, you can read the exact question and the now-contradicted answer back to the doctor. The impact is remarkable. So when preparing cross-examination, quote accurately from the discovery deposition. It will be the best technique to fairly control the doctor's answer.