Seeking Truth, or Competitive Advantage? The Timing of Expert Disclosures and Depositions in Medical Negligence Cases

By

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I. Introduction

In the typical medical malpractice case, discovery, and more specifically, disclosing and deposing experts, occurs sequentially: the plaintiff, and then the defendant, disclose their experts; and the plaintiff's experts, followed by the defendant's, are then deposed. Occasionally, however, defendants seek to depose the plaintiff's experts before they are even required to disclose their own. This is no trivial discovery dispute: such a procedure would mark a fundamental change in the litigation of medical negligence suits in this state. Indeed, it is so patently unfair and one-sided that it has never been adopted by a judge in any case handled by this article's authors in more than thirty years of practice, and has only been suggested by opposing counsel on a handful of occasions.

In essence, defendants who take this position endeavor to hide even the basic contours of their experts' opinions until they can lock in the trial testimony of the plaintiff's experts by deposing them in a vacuum. This presents the defense with a critical advantage, akin to allowing the defense to withhold its answer to the plaintiff's complaint until after the plaintiff has rested its case-in-chief at trial. In either situation, the plaintiff is forced to proceed without even the most rudimentary understanding of the defense.

An expert's "discovery" deposition, in the medical malpractice context, is often where cases are won and lost. Anything that an expert says under oath in a deposition will invariably be used to either directly contradict her trial

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testimony, or to encourage the jury to question her credibility. It is thus a tremendous advantage to the defense if it can obtain sworn testimony from a plaintiff's expert who has not had an opportunity to even consider what the defense experts intend to discuss. Once deposed, the plaintiff's expert cannot effectively respond to the subsequent disclosure of the defense experts' opinions because her later "explanations" are likely to be viewed skeptically by a jury hungry for a reason to believe one highly-qualified expert and disbelieve another.

Nor could a defendant explain how this profound change in discovery practice could possibly assist in the search for the truth, which, of course, is the preeminent goal of the discovery process. The courts have the inherent authority to "regulate the scope and timing of discovery so as to balance the competing interests of all affected parties or individuals and to achieve justice in the particular case." State v. Carter, 167 N.H. 161, 169 (2014) (internal parenthesis omitted) (harmonizing competing statutes and discovery rules). For the aforementioned reasons, and those explicated below, courts should employ that discretion to reject any defense motion to compel the production of a plaintiff's expert for deposition before the defendant has disclosed his own experts, and thus re-affirm the expert discovery process that has worked smoothly and gone virtually unchallenged in New Hampshire medical malpractice cases for more than three decades.

II. The Court Has Recently Rejected This Unfair Proposal

On May 5, 2017, the Hillsborough County Superior Court (North) issued an order addressing this very question. See McLaughlin v. Patten et al., Docket No. 216-2017-CV-00104 (N.H. Super., May 5, 2017). Unequivocally adopting the plaintiff's position, the Court held, *inter alia*, that "[d]ecades of accepted and respected New Hampshire practice ***has always followed the procedure of deposing experts after both sides have disclosed experts***." Id. at 2 (emphasis added). Such a procedure, the Court found, "is fair and just, ensuring both parties are on equal footing during the depositions of their respective expert witnesses." Id. Anticipating the unfair advantage that would result from the defendant's proposed sequencing, the Court further elaborated that "the procedure [of deposing experts after both sides have disclosed experts] avoids plaintiff being at a disadvantage by virtue of going first; plaintiff's expert may face complications at trial when attempting to rebut theories posited by defendants' expert of which he had no knowledge at the time of his deposition." Id. Accordingly, recent New Hampshire jurisprudence squarely supports the position that expert depositions should not be scheduled until both parties have complied with their expert disclosure requirements.

III. Such a Discovery Procedure Would Be Inconsistent with Customary

Practice in New Hampshire

Nor is the Court, in the above-referenced order, the only source of authority to recognize that the plaintiff's position here is consistent with the customary practice in New Hampshire. Attorney Doreen Connor, a well-respected New Hampshire insurance defense attorney, authored the chapter on "Discovery Relating to Experts" in Supreme Court Justice Gary E. Hicks' Discovery Treatise, A Practical Guide to Discovery and Depositions in New Hampshire, which includes the following excerpts regarding disclosure of expert opinions and depositions of expert witnesses:

> § 17.5.1 – Timing of Disclosure of Expert Opinions
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> Written disclosures should always precede oral depositions, if any, and the plaintiff typically will be required to disclose his or her experts first. The timing of the disclosure may be arranged by agreement, or, as is more likely, by a scheduling order issued by the court.
>
> § 17.6 – Expert Witness Discovery Depositions
>
> *Once both sides have disclosed their experts, you will have to decide whether to take expert depositions*.

Hon. Gary E. Hicks and Daniel E. Will, A Practical Guide to Discovery and Depositions in New Hampshire, Vol. II, Ch. 17, Discovery Relating to Experts (MCLE, Inc. 2011) (emphasis added). The obvious inference to be drawn, from the language of these two provisions, is that expert depositions should always be preceded by expert disclosures from all parties.

IV. Providing the Defense With Such a Competitive Advantage Would be Unfair to Plaintiffs and Undermine the Search for the Truth

As recognized by the New Hampshire Supreme Court, the underlying purpose of discovery procedures "is to reach the truth and to reach it as early in the process as possible by narrowing the issues." Hartford Acc. & Indem. Co. v. Cutter, 108 N.H. 112, 113 (1967). To effectuate that purpose, the trial court is imbued with broad "discretion to regulate the scope and timing of discovery so as to balance the competing interests of all affected parties or individuals and achieve justice in the particular case." State v. Carter, 167 N.H. at 169 (internal parenthesis omitted). This is consistent with decades of New Hampshire case law recognizing that, in a civil case, "[d]ecisions concerning pretrial discovery are within the sound discretion of the trial judge." N.H. Ball Bearings, Inc. v. Jackson, 158 N.H. 421, 429 (2009). Exercising that

broad discretion, courts should focus on the harm presented by the defendant's proposed sequence of discovery.

As a preliminary matter, the defense position undermines the universal childhood maxim that every civilized process requires taking turns. Unsurprisingly, New Hampshire's traditional litigation practice operates within the contours of that maxim. From the beginning of the pleading process through closing argument at trial, the process is sequential to ensure fairness: the plaintiff files a complaint, and the defendant files an answer; the plaintiff produces automatic disclosures, and the defendant produces her own automatic disclosures; the plaintiff discloses expert witnesses, and the defendant discloses her own expert witnesses; the plaintiff's experts are deposed, and the defendant's experts are deposed; and so forth throughout the discovery and trial process. Why the continuity of that fair process should be broken to provide a defendant with what amounts to an extra turn is wholly unclear.

Moreover, a process in which each side gets its "turn" also ensures that cases are decided on the merits. After all, the overarching purpose of these litigation procedures is to facilitate the truth:

> It is the philosophy of the adversary system that the truth will more likely be reached if both sides of the issue are fully presented and that is more likely to occur if the sides are presented by partisan advocates. To permit the system to have maximum effectiveness, therefore, each of the advocates must be fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one which has been raised by him or his opponent, and whether the evidence is in the possession of his opponent or someone else. ***If a party is surprised by the introduction of evidence or an issue or the presentation of a witness previously unknown to him, the trier of fact is likely to be deprived of having that party's side of the issue fully presented, and the system becomes a less effective means of discovering the truth***.

Scontsas v. Citizens Ins. Co., 109 N.H. 386, 388 (1969) (emphasis added); see also Barry v. Horne, 117 N.H. 693, 695-96 (1977) ("We are aware of the theory propounded by some commentators that attainment of the truth is not necessarily a primary goal of the adversary system. These writers view considerations such as the zealous representation of a client's interests or the determination of a just result as the paramount concerns of the adjudicative process. Although these goals are essential, we are convinced that a truth-seeking adversary system is the only legitimate means through which they may

be attained.").

The defense, in taking this position, seeks to sweep away this time-tested tradition of truth-seeking in discovery, effectively asking the Court to give him an extra turn. The only conceivable purpose is to catch the plaintiff's experts unprepared and elicit testimony which, although true, can be taken out of context and exploited at trial after the defense finally unveils its experts' previously hidden opinions. Courtroom litigation, however, "is no place for games, especially 'gotcha' games." Hess v. Volkswagen Grp. Of Am., Inc., 2016 U.S. Dist. LEXIS 82951, at *7 (N.D. Ala., June 27, 2016). Such tactics are nothing more than expert deposition by ambush, and have no place in the modern adversarial system.

As the United States Court of Appeals for the First Circuit has recognized, plaintiffs are put at a potentially insurmountable disadvantage when their experts are required to provide sworn testimony in a void, without even a basic understanding of what the other side's experts are going to say. In Chappee v. Vose, 843 F.3d 25, 31 (1st Cir. 1988), the Court emphasized its "vital interest in preserving the integrity of the adversary process against the ravages of what the trial judge accurately described as 'trial by ambush,' where the 'truth determining function' of the trial process was grievously at risk." Id. at 31-32. Specifically, the Court recognized the unfair advantage obtained by concealing expert witness identities and subjecting an opponent's expert witness to cross-examination "***without fair warning of the nature of the defense*** . . . ." Id. at 31 (emphasis added). It condemned the tactic, calling it a "deliberate and calculated ploy, prejudicial to the government's litigation stance, and menacing to the integrity of the adversary process." Id. at 32. Such "buccaneering," the Court concluded, "cannot be countenanced." Id. at 31. And for good reason. Though inherently adversarial, the goal of the judicial process is to find the truth, and apply that truth to the law – not to achieve victory by manipulating the rules of discovery.

V. Adopting the Defense Position Would Extend the Duration of Litigation

Finally, permitting the defense to defer its own expert disclosure until it has deposed all of the plaintiff's experts would inevitably, and needlessly, extend the length of virtually every case, and provide an easy method to engage in dilatory tactics. It is unlikely, in many cases, that defense counsel would be able to depose all of the plaintiff's experts within the relatively brief window between the parties respective expert disclosure dates; and in any event, the

defense could easily delay such depositions, resulting in the deferment of the defendant's own disclosure date and the depositions of the defendant's experts.

VI. Conclusion

As recently held by the New Hampshire Superior Court, adopting the plaintiff's position – which is consistent with New Hampshire tradition and customary practice – and deferring the depositions of all experts until both parties have met their expert disclosure requirements "will likely promote the search for the truth and enhance the effectiveness of the adversary system in New Hampshire," McLaughlin, at *3 (citing Barry, 117 N.H. at 96), which remains the ultimate goal of the process despite the adversarial nature of our litigative system.