



# The medical expert witness in malpractice cases

## *A look at the strategy of deposing and examining medical experts*

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The one essential requirement to the prosecution of any medical-malpractice case is the need for expert testimony to establish liability. For all injury cases, further experts are required to prove any future damages. Unfortunately, many medical-malpractice cases that proceed through trial result in a defense verdict by a jury, even where there may be significant economic damages and reasonably good facts on negligence. An objective review as to the reason for such result that seemingly vindicates the defendant doctor and/or hospital often reveals the inability of the plaintiff's experts to convince the jury on liability.

### **1. Liability means more than negligence**

Some medical experts will review the records and depositions in a case and conclude that there was negligent care, but not be able to give an opinion that in the absence of such negligent care the outcome would be any different. Another expert may be willing to say that the care provided was below the standard of care and that appropriate care might have led to a different outcome, thinking that is a sufficient liability opinion. Even an expert who opines that there would have been a different outcome "to a reasonable degree of medical probability" may not understand that such an opinion must have a supportable basis within the scope of the medical literature or "evidence based practice." An expert may be strong on negligence and even willing to sign a declaration sufficient to get past a motion for summary judgment and then testify at

deposition. But unless the opinion has a sufficient medical basis, the expert may not be able to sufficiently substantiate their opinion on cross-examination at trial.

Any expert who offers an opinion in a medical-malpractice case should be able to provide the relevant medical literature that supports both the negligence and causation aspects of their opinion. Since there is so much medical literature available directly on the Internet, any attorney handling medical-malpractice cases would do well to conduct their own search for the literature (including PubMed). Such a search will often provide leads for experts in the field who have published some of the relevant literature.

### **2. Causation need not be proven to a medical certainty**

Some medical experts, especially the more academic experts or those who do not have much experience doing medical-legal work may be confused by the standard required for causation. Unlike the concept of medical certainty required for evidence of causation in medical research, causation in medical malpractice cases requires reasonable medical probability. Most research studies refer to a confidence level of at least 95 percent relationship between the factor under study and the outcome.

Anything less than that is not sufficient for most peer-reviewed scientific literature, but reasonable medical probability implies a 50.1 percent relation between the negligent care and the outcome. When the actual data referenced in many articles in the medical literature is carefully reviewed such data can show a 51 percent or even greater relationship

between the factor or treatment studied and the harmful outcome, even though such data is not sufficient to be considered statistically significant in proving a causal relationship.

### **3. Depositions vs. trial — Plaintiff experts**

There are two different styles for defense attorneys taking the deposition of a plaintiff's liability expert — one is to ask for the expert's opinions and the basis for each such opinion and the other is to ask the expert to agree with general statements about care and/or causation. An expert who is fully prepared to state their opinion on negligent care and/or causation and who is not actually asked for their opinions needs to be asked specifically about such opinions and their basis by the plaintiff attorney. Otherwise, at trial the defense at trial will claim that the expert's testimony at trial is beyond the opinions stated in deposition.

Most defense attorneys will use some combination of the two approaches, but if the full extent of the plaintiff's experts' opinion on negligence and causation, and the basis for such opinions, are not clear by the end of the defense examination, the expert must be asked those questions by the plaintiff's attorney. Some attorneys may not think that they need to ask such questions since the expert should be able to put forth all of their opinions, and many experts will view the deposition as simply answering the defense attorney's questions and not the opportunity to put forth their full opinions.

Also, plaintiffs' experts should be encouraged to give full and complete answers to all questions, especially the basis for their opinions. Defense attorneys will



want to get as many yes or no answers to questions since it is far easier to impeach a witness with a simple question and yes or no answer than a more wordy answer. Defense attorneys will rarely want to read a long answer to try and impeach a witness at trial even if the answer would qualify for impeachment.

#### 4. Depositions vs. trial – Defense experts

Asking a defense medical expert for their opinions and the basis for their opinions is a fruitless exercise and a waste of time and money. In simple terms, any defense expert will say that the standard of care was met and the basis for that opinion is their experience, the medical records, and the depositions. Instead, a defense medical expert should be asked to agree with those facts in the case that are not in dispute and to agree with as many basic principles of physiology or anatomy that might apply to the case. This will allow a cross-examination at trial to appear that the expert is agreeing with some of the basis for plaintiff's claim on liability.

Where facts are in dispute, give the expert a hypothetical that is based on the plaintiff's version of the facts. Some experts, knowing that the plaintiff's version of the facts would indicate negligent care, will attempt to avoid answering such a question because they know that a jury can better understand factual disputes than the underlying medicine of the case. Some defense experts will refuse to admit that any version of the facts would indicate negligent care and such explanations at trial may greatly undermine the credibility of such an expert.

#### 5. Expert needs to be objective and not an advocate

There are experts who may be timid or have opinions with multiple qualifiers, but the flipside is an expert who is convinced that the doctor or nurse was negligent may feel compelled to become an advocate for the plaintiff. Such an expert may be fine in deposition where such enthusiasm may be impressive to defense attorneys. But at trial, an expert who appears to be an advocate will more likely be discounted by a jury.

Many experts assume that cross-examination by a defense attorney requires that they defend their opinion in response to questions. Good defense attorneys, however, know how to trap those experts and even get the court to intervene when an answer becomes non-responsive to the question. Defense attorneys will often look for some tangential or irrelevant fact about the expert's background (which they can often discover by talking to the personnel at hospitals where the expert has staff privileges) and use that fact to embarrass the witness or get them upset.

Defense experts will often appear as highly opinionated and defensive of their opinions, but the best experts will attempt to appear objective and disinterested about which side hired their services. When the plaintiff's experts appear to be objective and independent and the defense experts appear as advocates, the natural advantage that the defense has on the medical issues can be blunted and even reversed.

Experts need to be advised to not argue with defense counsel on cross-examination, especially if the expert was

strong in their deposition and "convinced that their view of the case is correct." Experts need to be reminded that it is not their job to determine the facts, but only to comment on the significance of certain facts in relation to the standard of care.

Yet most experts expect to determine the facts from their review of the medical records and depositions, and they need to make such a determination of facts before forming an opinion on the standard of care. Experts who testify at trial need to know and understand that if they answer the defense attorneys questions simply and without argument or advocacy, that on re-direct exam any issues that need to be placed in their proper context can be done much better by you as the attorney rather than their attempt to explain their answers on cross-examination.



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