TIPS FOR THE MEDICAL EXPERT

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Introduction

"Doctor, I need an expert witness. Will you help?"

Note that this is a request, not a command, unlike a subpoena for jury duty. If you react with instant aversion, then say "no." However, a positive response probably will lead to an interesting professional experience.

Most physicians are unfamiliar with legal procedure. We are accustomed to being "in charge" in our usual environment, but the legal arena is unknown territory. This chapter, based on my own participation, presents an overview of the role of the medical expert and how it is fulfilled, particularly in malpractice litigation.

Why Are Experts Needed?

The medical malpractice plaintiff must prove that the defendant physician's acts or failures to act did not follow the applicable standard of care and that these were the direct and substantial cause of whatever harm the plaintiff has suffered. The jury (occasionally the judge) is responsible for determining whether this has occurred. Some conclusions can come from one's own education and life experience. However, nonphysician jurors cannot call upon their own backgrounds to resolve questions involving medical care standards. An expert is required to inform and educate the jury through special knowledge and experience about the unfamiliar subject matter of the dispute. The unique feature of expert testimony is that it consists of opinions on matters in the case and that the jury will employ these opinions prominently in its findings.
Who May Be a Medical Expert?

The judge is the gatekeeper who determines whether the proffered expert is legally competent to serve as such after hearing the physician’s responses to questions about his or her education, residency, and possible fellowship training. In actual practice, the requirements usually are easily met by the holding of the pertinent professional licenses and specialty board or equivalent certification.

A distinction should be made between competence to provide expert opinions and the weight that the jury will give to such testimony. Relevant experience in the field and publications are persuasive indicators of expertise. The court may not require practice in the ophthalmic subspecialty involved in the dispute, but a request to serve as an expert in an unfamiliar field is an invitation to courtroom disaster for both the expert and the case. I have seen this occur when a general ophthalmologist testifying on behalf of a plaintiff claimed it was malpractice not to have made strabismus measurements in nine positions, ignoring every other detail of a thorough analysis that led to an intelligent decision on treatment. The defense expert made short work of this textbook argument, which constituted the plaintiff’s entire case. In this instance, “will you help?” would have been better interpreted as “should I help?”

Basis for Expert Opinion

The special qualifications (education, training, and experience) of the medical expert allow the expression of opinion, but the court will allow the jury to consider only opinions that are appropriately reached. Reliability of expert testimony depends on whether it is based on the kind of information a member of that discipline would ordinarily use to form a professional judgment and whether the foundation for that information is generally accepted within that professional discipline. Perhaps unduly, courts regard peer-reviewed publication as a prominent hallmark of validity. In any event, “junk science” derived from unproven, unaccepted methodology is disfavored, and you can be certain that the opposing attorney will explore this question of your sources.

The Process

In deciding to serve, the physician undertakes certain obligations to the engaging attorney, who is fulfilling his or her own legal and ethical professional responsibilities of vigorous advocacy for the client. Doctors typically disparage attorneys for not comporting themselves “above the fray,” but this is an unfortunate misunderstanding of the lawyer’s role. If a potential expert will not actively assist the attorney in advocating for the client irrespective of whether plaintiff or defendant, including testifying if necessary, the assignment should be declined.
Chapter 5. The Medical Expert

The expert will be asked to review the case file, typically consisting of the pleadings (why and for what relief the plaintiff is suing and the answer to these allegations by the defendant), medical and hospital records, various documents from which each party learns the merits of the other's case ("discovery"), depositions (examinations before trial of the parties and often other individuals with personal knowledge of the circumstances), reports of the opponent's experts and perhaps their deposition and reports of economic experts on the extent of the plaintiff's financial harm. Of some photocopies are illegible, and replacements should be requested.

To protect the credibility of his testimony, the expert should require inspection of available medical documents in the case. I have personally observed the extreme embarrassment of a witness whose opinion was given with no knowledge of convincing contrary information in a portion of the medical record with which he was never supplied.

I find it helpful to do an initial general reading in order to learn what each says about the case. This should be followed by a more detailed line-by-line analysis, particularly of the medical and associated records, which can consume much time. The first goal should be to address the most important issues. The expert's analysis may cast matters in a different order of priority than that of the attorney whose strategy will depend on knowledge of the medical facts and on how to highlight them presented in the most favorable light possible.

The objectives are to point out the strengths as well as the weaknesses of the case and to identify any good argument for the other side. The attorney benefits most from being able to see, through the expert's assistance, the case from both opposing perspectives. As part of a thorough attempt to assist, the expert should offer to read the day-by-day transcript of the trial, if one later takes place, to point out additional opportunities or problems.

When the medical review indicates an unwinnable case, should the expert recommend settlement? My practice is to avoid direct suggestions on legal strategy. The advice can be conveyed indirectly by offering an estimate of the likelihood prevailing based on the medical assessment. One way or another, the expert should deliver the message despite the probability of the loss of a witness fee.

The element of surprise is not a part of litigation, which explains the discovery process and the requirement for exchange of information between the opposing parties. However, for valid strategic reasons, such as a decision that expert testimony on one or more issues will not be introduced or that a different expertise is required, a formal written report should not be prepared unless requested. If made, it should include a listing of every document reviewed, and it is proper to include a statement reserving the right to amend the opinion on the basis of later-received information.

Testifying

Juries are inevitably influenced in one direction or another by a comparison, so-called battle of the experts. For this reason, an attorney chooses an expert not on the basis of the required qualifications but also for whether the expert will project
an impression of knowledge and confidence. These latter qualities are assessed by
the opposing lawyer as well in evaluating the expert’s effect on his client’s case.

Trial procedure calls for the expert’s willingness to be flexible about dates and
times for appearing. Delays because of revision of the trial schedule; juror prob-
lems, the intervention of other court business preempting the judge’s time, unex-
pectedly prolonged testimony of other witnesses, and other factors should be
expected and accommodated, as these are generally outside of the attorney’s con-
trol. The compensation agreement should reflect a reasonable figure for time spent
that includes such delays.

The expert should appear punctually for the deposition or trial and treat the
adversaries courteously at all times. Dress should be conservative. Depositions
are most often conducted in a setting other than a courtroom, typically in the
office of the attorney for one of the parties. This does not diminish the formal
nature of the exercise. At depositions while temporarily off the record, confine
conversation to “small talk.” During the trial, be extremely careful to avoid even
informal interaction with the jurors or the attorneys for other parties, even extending
to the courthouse elevators.

Courtrooms generally are arranged so that the witness stand is just to one side
of the judge’s bench, facing the “well,” which is where the parties’ attorneys have
their tables. The jury box typically is along the side wall nearest the witness stand.
Although attorneys ask the questions, testimony should be directed at the jury, in
keeping with the expert’s role of educator and informer. Directly facing the jurors
irrespective of the location of the questioning lawyer accomplishes this objective.
Be prepared also for questions from the judge, who has the discretion to assist in
clarifying the jury’s understanding of the issues. If your testimony involves a dem-
onstration requiring you to step off the stand, ask the judge’s permission to do so.

Answer only the questions asked; additional information can be inadvertently
damaging. When you do not know an answer, this should be stated, but when applic-
cable, point out that you do-not know because nobody does. Pause before replying
to the opponent’s question; this gives an opportunity for objection by the attorney
engaging you if the question is improper.

There should be no discussion of the case with uninvolved persons, colleagues
who also may actually become witnesses themselves, and above all with the party
for whom the expert is testifying. This last is because of the importance of avoiding
even the appearance of collusion. The expert must be able to state under oath that
no such collaboration has occurred. This does not preclude casual greeting or tem-
porary intermingling provided that no substantive discussion of the case occurs.

“Minefields” for the Expert

The appropriate goal of the opposing attorney during cross-examination is to dis-
credit the testimony of the expert. Do not be intimidated by the questioner’s possi-
bly brusque manner. Remember that it is not personal; on occasion my services
have been solicited by a lawyer by whom I have been vigorously cross-examined in a prior lawsuit.

One attempt at discrediting is to have the expert admit to no personal publications on the subject of the case. I counter this by indicating the extent of my involvement in clinical care experience and any unpublished lectures and pointing out that subject areas in my field have taken priority for my literary efforts and have rested in numerous publications.

An additional point of attack is to ask how often the expert has testified in malpractice cases and whether it is always for the same side. The opposing attorney hopes to convince the jury that you are a “hired gun” and a biased one at that. The answer must be truthful; to the extent that it presents a credibility problem, this should have been evaluated by the attorney who requested your participation.

It is common to inquire about on what literature sources the expert relied. The opposing attorney hopes to raise the inference that the expert has been less than vigilant and not up to date on the necessary information. An effective reply, if truth be told, is that the expert did read not in order to form an opinion but to test the reasonable opinion against those of knowledgeable colleagues concerning similar facts.

Another minefield is whether a certain published work (usually professors, opinion other than the expert’s own) is considered an authority. This depends highly on the definition of “authority.” If the witness believes that any opinion from source ought to be followed without question or hesitation, the point must be conceded, but it is far more likely that an expert chosen for his or her qualifications will reply that while the opinions detailed in the suggested authority are worth considering, they do not necessarily apply to this particular case and in any event must be tempered through and reconciled with the expert’s own knowledge and experience.

You might be asked whether your testimony is based on personal examination of the patient. This actually is irrelevant, because, as noted earlier, experts may in forming their opinion on the kinds of information customarily relied on by similarly situated practitioners of the discipline. The medical and associated records clearly fall under that criterion. Your best reply is a simple “no”; if necessary, the opposing attorney who engaged you is probably able to elicit the same response from the expert.

An issue whose importance is usually overemphasized is whether and how the expert is to be compensated for testifying. The correct characterization is compensation for time lost from income-producing activities, not for the testimony itself. This explanation will be entirely truthful if the hourly rate charged is reasonably related to that of the expert’s usual charges for medically related efforts.

More Advice

Do not underestimate the abilities of the attorneys on both sides of the case, nor of whom have specialized in this area of the law for a long period. Their lawyering skills and preparation for trial are likely to be considerable, and they are functionally
in their own arena, to which the physician is essentially a stranger. Most important, the physician expert should understand that while the attorneys may seek to intimidate as part of trial strategy (risky in many instances), they are merely adversaries, not enemies.

Learn the outcome of the case, and take the opportunity to hear the jury's evaluation of your testimony, as may have been revealed in the customary postverdict interview. This and the attorney's own evaluation of your efforts are very instructive for the further development of your interest and effectiveness.