

Expert Medical Witness

A. Preparation of Medical Expert¹

The selection of the medical expert is ordinarily made well in advance of trial. The expert medical witness should review all pertinent medical facts and discuss them with the hiring counsel. The expert witness should be told to not be embarrassed about this preparation, and to not hesitate to admit to such discussions if the subject of lengthy pretrial discussions with counsel is raised by the opponent during cross-examination. The following are helpful suggestions for all expert medical witnesses who are testifying:

- (1) **UNDERSTAND THE QUESTION** before attempting to give an answer. One can not possibly give a truthful and accurate answer unless the question is understood. If the expert does not understand, ask the lawyer to repeat the question. Keep a sharp lookout for questions with double meaning. Look out for questions that assume the expert has testified to a fact when that is not the case.
- (2) **DO NOT LOOK AT THE LAWYER FOR HELP** when the expert is on the stand. Neither the attorney nor the judge will help; the expert is on his or her own. If the expert looks at the lawyer for his or her side when a question is asked on cross-examination or for approval after answering a question, the jury is bound to notice it, and it will create a bad impression.
- (3) **DO NOT FENCE OR ARGUE WITH THE LAWYER** on the other side. The lawyer has a right to question the expert. If the expert engages in smart talk or give evasive answers, the judge may reprimand the expert. Do not answer a question with a question unless the question asked is not clear.
- (4) **REMAIN COOL AND AVOID LOSING TEMPER** no matter how hard the expert is pressed. Losing one's temper means losing the case, because the expert would have played right into the hands of the other side.
- (5) **BE COURTEOUS**. Being courteous is one of the best ways to make a good impression on the court and jury. Be sure to answer, "Yes, Sir or Madam" and "No, Sir or Madam" and to address the judge as "Your Honor."
- (6) **IF ASKED WHETHER you have talked to the lawyer on your side, or to an investigator, admit it freely**. Remember that the expert is not getting paid for the testimony, but rather is being reimbursed for the time lost from practice, preparation time and expenses.
- (7) **DO NOT BE AFRAID to look the jury in the eye and tell the story**. Jurors are naturally sympathetic and want to hear what the expert has to say. Look at the Jurors most of the time and speak to them frankly and openly as one would to a friend or neighbor.
- (8) **GIVE A POSITIVE ANSWER when you can**. If the expert was there and knew what happened or didn't happen, don't be afraid to "swear" to it. The expert was "sworn" to tell the truth when taking the stand.
- (9) **UNDER THE LAW this case must be tried without the jury being advised as to whether any party is covered by liability insurance**. Therefore, do not mention insurance in any way. Do not use the words "insurance," "insurance agent," "insurance adjuster," "insurance investigator," or any similar words, and do

¹ Adapted from: <http://www.lectlaw.com/tmed.html>

not identify any person as an "adjuster." All of the attorneys know about this rule and they will not ask you any questions that require you to violate the law in giving your answer.

B. The Doctor as an Expert Witness

The following instructions are helpful to all expert medical witness:

A. REQUIREMENT OF "MEDICAL PROBABILITY"

1. The law requires that a medical expert give an opinion based only upon "reasonable medical certainty" or "reasonable medical probability"; the two phrases are identical in meaning from the legal standpoint. However, the legal definition of these phrases is different than the medical definition.
2. The *legal definition* of the two phrases is simply that the doctor must believe or feel that the *opinion is more likely than not accurate*. For example, if the doctor is asked, based upon the reasonable medical certainty, whether the injuries were the result of the accident, the doctor need only feel that the accident was "more likely than not" the cause of the injury claimed in order to answer "yes."
3. The law makes a legal distinction between "possibility" and "probability." *Opinions based upon possibility are not necessarily admissible*. Therefore, if the doctor uses any of the following phrases in connection with his or her opinion, such testimony may be stricken by the judge:
 - (1) It "might be" true.
 - (2) It "is possible."
 - (3) It "might have" that effect.
 - (4) It "could have" that effect.
4. While there must be more than a bare possibility, the law does recognize that a degree of uncertainty is present in almost every medical opinion. One court has said: "It is consistent for a doctor to admit an element of speculation and still be convinced that an accident is more likely than not the cause of the injury." Also, "circumstantial evidence" is usable.

B. TESTIMONY REGARDING HISTORY OF PATIENT

The law allows a doctor who sees a patient for the purpose of examining or treating the patient to tell the jury what history the patient gave and to relate any subjective complaints or findings of the patient.

C. EXPLAINING MEDICAL TERMS

The medical expert should explain to the jury the use of medical terminology, like "loss of lordosis" or "scoliosis," because these things are generally foreign to the knowledge of the jury.

D. PROOF OF MEDICAL NEGLIGENCE

In a medical negligence case, the law requires the plaintiff to show the following things in order to recover a verdict:

- (1) That a physician-patient relationship existed, thereby creating a duty on the part of the physician, and that there is a standard of care and skill expected of the average medical practitioner acting under the circumstances involved in the case.
- (2) That the defendant physician failed to meet this established standard of care applicable; expert medical testimony is required.
- (3) That the defendant physician's failure to meet this standard of care caused the injury to the patient and resultant damages.
- (4) An expert witness is *not* required if the plaintiff applies the doctrine of *res ipsa loquitur* ("the thing speaks for itself").

E. HYPOTHETICAL QUESTIONS

- The law requires that a physician who does not have personal knowledge regarding the patient or the occurrence must give his or her opinions by hypothetical questions. A hypothetical question is one that asks the doctor to assume certain hypothetical facts and express an opinion based upon those facts contained in the question without specifically referring to a particular patient.
- The law requires, with regard to answering hypothetical questions, that the witness base his or her answer on the facts contained in the hypothetical question.

C. Direct Examination of Expert

I. ESTABLISH THE QUALIFICATIONS AND EXPERIENCE OF THE EXPERT WITNESS

- (1) Name (& AKA, nickname)
- (2) Profession(s)
 - Professional address
 - State(s) where licensed to practice
- (3) Educational background
 - High school
 - Pre-med
 - University (universities) location
 - Number of years
 - Degree(s) pre-med
- (4) Medical school
 - i. Medical school(s) location
 - ii. Number of years

- iii. Degree(s) – Single or dual degrees
- (5) Post-graduate training
 - a. Internship
 - i. Type
 - ii. Length – year(s)
 - iii. Location of training
 - b. Residency
 - i. Type (specialty)
 - ii. Length – year(s)
 - iii. Location of training
 - c. Fellowship
 - i. Type (specialty)
 - ii. Length – year(s)
 - iii. Location of training
- (6) Publications and Presentations
 - a. Scientific papers presented and where
 - b. Articles published and where
 - c. Books or chapter(s) – Names of books
- (7) Memberships in Medical and other Organizations
- (8) Awards/Medals – When, where and why
- (9) Medical Practice post-education and training
 - a. Location(s)
 - b. Length of time
 - c. Type of practice

II. EXPERIENCE IN LITIGATION - AREA BEING LITIGATED

- o Number of lawsuits where testified
- o Importance of practical experience
- o Questions regarding standard of care and the locality rule (The test for the locality rule is: familiarity with standard of care in locality similar in geographical location, size and character from a medical standpoint.)
 - Considering your training and experience generally, are you familiar with the local standards of care to which medical practitioners are held regarding the facts involved in this case?
 - (1) Is the standard of care for the problems involved in this case relatively uniform throughout the United States?
 - (2) Considering your training and experience, are you generally familiar with what is regarded as appropriate and reasonable medical care for the type of medical problem involved here?
 - Have you made an effort to investigate generally the standard of care in this locality at the time of this case?
 - (1) Have you talked with physicians regarding this case?
 - (2) Have you seen the hospital where the incident in this case occurred?
 - (3) Have you practiced in similar hospitals/clinics/communities?
 - (4) Have you read dispositions of physicians familiar with this locality and case?

- (5) Have you seen the hospital manuals/rules/JCAHO standards/guidelines, etc.?
- (6) Have you had experience with similar nursing situations?
- (7) Have you trained nurses regarding this kind of problem?

III. MATERIALS REVIEWED ABOUT THE CASE

1. What material has been provided you?
 - a. Clinic records
 - b. Hospital records
 - c. Depositions of key witnesses
2. Reviewed medical literature generally about this situation?
3. Examined plaintiff? If so, dates, nature, tests and findings

IV. WHAT IS YOUR ROLE IN THE CASE?

1. Were you asked to review facts of this case and objectively determine whether there was any departure from the proper standards of medical care involved here?
2. Did you do that?
3. Have you made such a determination?
4. Have the Defendants have taken your testimony under oath (deposition) previously?
5. Do you understand the test of reasonable medical probability in giving opinions? Whether the phrase is used or not?

V. SUMMARY OF OPINIONS

1. Did you form an opinion whether the professional care rendered by [Defendant] in this case met the standard of practice for that locality at the time?
2. What determination did you make?

Note: Repeat for each defendant in case.

VI. REASONS FOR OPINIONS

Q: Please explain to the jury your reasons for this opinion.

- What was not done?
- What should have been done instead?

VII. CAUSATION

Q: Do you have an opinion whether the care given was a contributing cause of the plaintiff's injuries?

VIII. AUTHORITATIVE BOOKS & ARTICLES

1. Are there any recognized medical texts or publications in this field that support your opinions?
2. Here see list of medical publications and ask if authoritative.

IX. CONCLUSION

- What is the prognosis in the case?
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D. Cross-Examination of Expert

A. "YES" AND "NO" QUESTIONS

If a question is phrased so that only a yes or no answer is expected, the witness must answer the question but has the right to explain the answer after answering. If the medical expert feels that he or she cannot answer a question yes or no, the witness has a right to respond that the question cannot be answered yes or no. If the witness feels a yes or no answer requires an explanation, the witness has the right to ask the judge whether he or she might explain.

B. ATTACK ON QUALIFICATIONS

Defense attorneys will sometimes attack the medical expert's qualifications to offer an opinion or to treat a particular type of medical problem. Questions suggesting that a specialist in the field would be in better position to treat the patient or give an opinion on the matter are not uncommon. The law, however, does not make a distinction as to the qualifications of an expert physician based upon medical specialties. Experience and training carry great weight as to the qualifications of a witness.

C. ATTACK THROUGH BOOKS OR ARTICLES

- (1) Some attorneys may use medical books or articles in an attempt to contradict the testimony of the expert physician. The approach is to ask whether the witness agrees with the statement found in some prestigious medical literature. The statement, of course, contradicts the previous testimony of the witness.
- (2) Remember that before this procedure can be used, the medical expert must recognize the book as authoritative in its field or a standard text in the medical field. If the medical expert does not so recognize the book or article, the cross-examining lawyer may not read from it. Only if the medical expert recognizes the book or article as authoritative in the field and "relies" upon it should he or she so admit it.

- (3) Even so, the medical expert has the privilege of disagreeing with the opinions of the most eminent specialists, particularly where the witness is referring to a specific patient about whom the witness has a great deal of information, and the book or article is speaking in generalities.

D. ATTACK BASED ON PERSONAL INTEREST IN CASE

- (1) On some occasions the doctor may be attacked for being personally interested in a patient who has been a patient of many years standing. The best rule is to answer the question fully and frankly since sincere, frank testimony registers with the jury.
- (2) On some occasions the doctor may be questioned as to an interest in the case if the patient's bill has not been paid; the implication being that the doctor is assisting the patient to get a recovery in order to see that the bill gets paid. Even though the question is insulting, the doctor should answer forthright and calmly.
- (3) The doctor may be asked about his or her fee for testifying in court with the implication that the doctor is a "paid witness." A reasonable answer is that you intend to bill based upon the amount of time involved in testifying as an expert in the case. No jury is going to consider that improper unless the amount is excessive.

E. FLATTERY TECHNIQUE

Many lawyers attempt to mitigate the effect of the injuries by what is called the "flattery technique." Such questions as "Doctor, you obtained a marvelous result with regard to your treatment" and the like are used. Keep in mind that the purpose of such questioning is to mitigate the extent of injuries. Also remember that at times a good functional result is obtained but yet serious injuries or disabilities remain.

F. "IT IS TOO EARLY TO TELL" TECHNIQUE

- (1) Another common technique on cross-examination is to suggest that opinions regarding the future are speculative because it is too early to tell. Suggestions that there will be improvements are likewise made. The questions are always framed in terms of 100% certainty. For example, "Doctor, are you 100% certain that this patient will not make some improvement?" "Isn't it possible, doctor, that there will be improvement?"
- (2) Obviously, no one can predict the future with 100% accuracy, but the law does not require such a test. The test is whether it is "more likely than not" in the doctor's opinion that these conditions will continue to exist. On the other hand, if the question can be answered with 100% certainty, be sure to give that answer.

G. ATTACKING THE DOCTOR'S OPINION GENERALLY

1. The main attack on cross-examination will be the defense attorney's attempt to quarrel with the diagnosis and treatment. There are various ways of doing that. Some of the most familiar are:

- (1) The doctor based the diagnosis on purely subjective complaints.
- (2) The doctor didn't have the complete and accurate case history.
- (3) The doctor didn't know that this plaintiff once had a prior injury.

(4) The plaintiff could be feigning or malingering and the doctor did not give any tests to rule out malingering.

2. The defense attorney's approach also may be that the symptoms are due to causes other than medical negligence or that some disease syndrome is giving rise to the various effects.

H. ATTACKING THE HYPOTHETICAL ANSWER

If the hypothetical answer has been given, several well-known cross-examination techniques will probably be used. These are:

- (1) ***Two Schools of Thought.*** The suggestion is made that there is no real uniform view on the particular matter but that there are, in fact, two substantial schools of thought in medicine on the subject. If this is true, there is no true standard of care and there can be no liability under such circumstances. A similar question asked is "Isn't there a 'respectable' minority" who would follow the actions that the defendant physician followed in this case?"
- (2) ***Matter of Judgment.*** The approach here is to suggest that medicine is not an exact science and there is much judgment involved in treatment; that the defendant doctor's actions were simply a matter of judgment on his or her part. The suggestion is that it falls in the gray area of judgment where there are no true standards as to what ought to be done.
- (3) ***Not What the Witness Would Have Done.*** Another attempt is to show that the witness is simply saying that he or she personally would not have done what this defendant doctor would have done. Again this is an attempt to show that there are no real standards involved, but that simply the doctor personally disagrees. The test is whether the standards of medicine in that area are contrary to the actions of the defendant doctor, not what the personal approach of the witness might have been.
- (4) ***Attacking Assumptions Made.*** Here the approach is to show that the witness has answered the question based solely upon the facts assumed in the question. Therefore, if any of the facts are incorrect, the doctor's whole opinion must be incorrect. The cross-examiner then proceeds to attempt to show certain facts that have been assumed are not really accurate. The witness must be careful in answering this question to be sure that the specific fact referred to is a crucial fact that might change the opinion if it were different.
- (5) ***Different Assumptions.*** The cross-examiner will invariably ask the witness to assume different facts than were originally contained in the hypothetical question and to express an opinion. This is permissible and the purpose is that the cross-examiner will assume all of the facts favorable to his or her case and ask the doctor to express an opinion. The doctor should be prepared to express opinions based upon facts favorable to the plaintiff and to express opinions based upon facts favorable to the defendant. Particular attention must be paid to the facts that the witness is being asked to assume however.
- (6) ***Even if Due Care Same Result.*** Another approach commonly used is to ask whether it is not true that even where due care and skill is being exercised do not these results sometimes occur. The purpose of this question is to show that "it was just one of those things."

E. Malpractice of Expert Witnesses

CASE 1: A physician expert witness agreed to prepare testimony on the effects of exposure to formaldehyde in building materials, and to explain why exposure to such materials had a different effect than did exposure to formaldehyde in cigarettes. The expert initially informed the law firm that was hiring her that she could address this problem, but during cross-examination she testified that she couldn't explain the difference. She later stated that her earlier analysis had been inaccurate, but she did not inform the law firm that she could not explain the difference if requested to do so on cross-examination. The law firm which retained her refused to pay her bill, and she sued. The law firm counterclaimed, alleging professional malpractice. The court found that public policy supported *expert witness immunity* from civil liability in this case; the expert had corrected the error in her pre-testimony analysis and had testified truthfully and accurately to the court.

CASE 2: The expert witness had *not* detected his mistake until it was pointed out by defense counsel, and then he was unable to do the calculation necessary to correct the mistake. The court held that the expert was not immune from liability for negligent preparation of evidence.

CASE 3: In Wyoming, the Court allowed a legal malpractice claim against the attorney for negligence in retaining experts for trial.

CASE 4: In a fourth case, a plaintiff sued the physician expert witness for medical liability when he changed his expert opinion during pretrial proceedings causing the dismissal of the plaintiff's lawsuit. The expert's change of opinion could rationally support at least two opposing inferences: (1) That the expert's behavior was unprofessional and amounted to professional malpractice, or (2) That he honestly changed his professional opinion.

Doctrine of Witness Immunity

In 1983, the Supreme Court ruled in *Briscoe v. LaHue* (460 U.S. 325) that witnesses cannot be sued for the content of their testimony. The doctrine of witness immunity has prevented the plaintiff from suing the witnesses for an adverse judgment. There are two types of witness immunity: (1) Immunity against criminal prosecution *based on* the testimony and (2) Immunity against civil liability for harm *caused by* the testimony. No legal action is allowed against either an expert or a fact witness for words spoken in the course of giving evidence even if the evidence given is false, malicious, negligent or defamatory. The immunity rule was initially confined to evidence given orally in court. Presently, the immunity extends to all civil proceedings brought against a defendant which are based any statement which the witness makes for the purpose of giving evidence to the court, including medical reports, affidavits, and depositions.

Expert Witness Liability

The expert witness is *not* absolutely immune from liability. Expert testimony by a physician constitutes the practice of medicine and it is presumably covered by medical liability insurance. Both plaintiff and defense expert medical witnesses are held accountable for the veracity of their testimony. An expert witness that states untruths while testifying under oath may be held in contempt of court and charged with perjury. Additionally, state medical licensing boards have the authority to discipline physician experts who provide false or misleading testimony. State medical societies and specialty societies also have the authority to discipline their members who provide false or misleading testimony. And, as noted in the above four cases, expert witnesses may be accountable to the parties in litigation for false, misleading, or negligent testimony.

Breach of Contract and Negligence

The performance of an expert witness both during pretrial and at trial is of concern to both the party that hires the expert to testify and the opposing party. The hiring party wants effective testimony as measured by a beneficial effect on the judge and jury, while the opposing party wants the expert discredited and the testimony stricken. Mere dissatisfaction by either party is *not* evidence of expert malpractice. Expert witness liability may be based on the ***breach of contract*** between the expert and the party employing the expert; only the employing party could sue. If the liability is based on the tort theory of ***negligence***, it is possible that both the hiring attorney and the opposing party who was injured by the negligence could sue the expert.

Golden Rules

To protect themselves and prevent a malpractice lawsuit, medical experts should consider doing at minimum the following:

- (1) Draft a detailed, clear and comprehensive retainer contract as to the duties and responsibilities of the expert and the hiring attorney, signed and dated, which may subject malpractice disputes to arbitration. Include updated and signed curriculum vitae.
- (2) Testify without bias, based on relevant, published, peer-reviewed and validated scientific evidence, generally accepted by the medical community, that would assist the jury and judge in comprehending the medical facts;
- (3) Be very wary of changing one's mind during trial even when doing so might be consistent with or compelled by professional standards; and
- (4) Check with the medical liability insurer if "negligent" expert testimony is covered. A conflict of interest may arise where the plaintiff's expert medical witness and the defendant physician are insured by the same liability insurance.