

### EXPERT WITNESSES IN THE MEDICAL MALPRACTICE CASE

By Stephen C. Kaufman

In every medical malpractice case there is always the question how to obtain experts, what kinds of experts to use, and what documentation the attorney should give them to review. This article will address these issues.

In dealing with standard of care experts, it is a foregone conclusion for many, if not most, attorneys that by necessity the expert will have to come from out-of-state. They believe that no in-state practitioner will be willing to testify against another practitioner in the same state. However, I have had good success to the contrary. The first step is to call a doctor you know in any field and ask for a referral to someone else in the appropriate field who might be willing to review records and testify if he or she came to the conclusion that there was malpractice. Then make a cold call to that doctor, make reference to how you obtained his or her name and make the request. If the answer is no, ask who might be willing to do so and use his or her name as the referring source when contacting the next doctor. Keep doing this until a doctor agrees. Eventually someone will agree, and it is really just a numbers game if you keep calling.

Make sure that when the doctor agrees to review the records, he or she also commits to testify if he or she concludes there was malpractice. Then put that agreement in writing when you send the records for review. Many doctors will agree to review records, but none of them really wants to testify. In fact, most originally become involved because they think that after reading through the records they will be telling you that you have no case. Unless you first receive the commitment to testify and confirm it in writing, you will find that the doctor will be very reluctant to testify if he or she concludes malpractice was involved. Moreover, do not shy away from bringing this matter up and obtaining the commitment in the first phone conversation. If you cannot obtain the commitment at that time, you probably never will. Remember, the

goal is not merely to have an expert review records and tell you that you have a good case; the goal is to find an expert that will testify to the merits of your case. A good case without a testifying expert is as good as having no case at all.

This method of expert selection does not give you the advantage of knowing that you will have an expert who has had experience testifying and knows what is expected of him or her, as well as what to expect from the other side. On the other hand, probably you will find someone who has little or no

standard of care expert only needs to show familiarity with your defendant's field of practice. Accordingly, you may want to ask an M.D. to give a standard of care opinion with respect to a nurse or midwife. However, in case the court will not let your doctor testify with respect to other medical professionals, also have a nurse or midwife as an expert. It also appeals to the jury to have someone in the same position as the defendant testifying that what occurred was wrong.

Turning to causation, you will have to

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expert or testimony experience. When these practitioners stay involved beyond reviewing records, they do so because they truly believe malpractice was committed, and they are upset about it. It seems that their sincerity readily comes across when testifying, especially when compared with the well-polished testimony of the professional witness which often makes him or her appear to be no more than just a "hired gun."

As for which experts to search for, remember that by statute only a physician can testify against another physician, and you will need a physician in the same field as the doctor you are suing.<sup>1</sup> With respect to other medical practitioners, your stan-

determine who is best to render an opinion. For example, in a birth asphyxia case, the obstetrician rendering a standard of care opinion may also testify to causation. But, a neonatologist, perinatologist, pediatric neurologist or placental pathologist may be more qualified to give a causation opinion. Therefore, have both the obstetrician and the more specialized expert testify to the same opinion. In this regard, do not overlook the opinion of other medical providers who were involved with care.

For proving damages you will need not

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only treating physicians to prove injuries, pain and suffering and the like, but also you will need to prove economic damages. You may need to have experts in vocational rehabilitation, cost of future care and economics. Life expectancy may be an issue which will require either testimony from someone with special expertise or from one or more of the treating physicians. This is important, for example, when trying to prove cost of future care or loss of enjoyment of life since those elements of damages will continue only so long as the plaintiff lives.

Next, there is the question of just what documentation to give your experts. This necessitates walking the thin line between giving them too much so that they question their involvement, or even choose to drop out, and giving them enough so that the basis for their opinions will not be open to serious challenge. If the documentation is not overwhelming, give your experts everything so as to preclude the defense attorney from making it look like you have held important information back from your experts. If the documentation is voluminous, be sure to give your expert everything of relevance. This is particularly true of documents that hurt your case so that it is clear that your experts have reached their conclusion with facts and information against you in mind.

Be reluctant to give your experts summaries prepared by an attorney or paralegal in place of the actual documentation. These summaries are not materials that experts in the field typically rely upon, and it makes it look like the attorney is trying to steer experts to their conclusions, as opposed to reaching it on their own. Similarly, when I have more than one expert testifying on the same point, I will send each the other's report, but not until after each has provided me with their own report. In this way neither expert has influenced the other, yet each has arrived at the same conclusion based upon independent review, which is a good point to make with a jury.

For standard of care witnesses, give them all medical records of treatment up to and including the time of the malpractice, and if you are having them testify to causation also, give them whatever records they will need to know what injuries resulted from the malpractice. All interrogatories and depositions from all parties and witnesses, and important documents obtained in discovery should be provided as well. Your

economic experts will also need the medical records, plaintiff's answers to interrogatories, tax returns, employment documentation and depositions from treating providers.

Your life expectancy analysis should go to both your future cost of care expert and economist, and the future cost of care report should go to your economist. In this way each economic expert will have the back-up necessary to support his or her opinion. Furthermore, you should have your life expectancy and future cost of care experts meet with the plaintiff or watch your "day-in-the-life" film so that they will have a first-hand basis for their opinions. You may also want to forward your "day-in-the-life" film to your liability experts so that the case they are involved in has a face with emotions attached to it and is not just a set of cold medical records. In this way they may gain a greater appreciation for their purpose in the case.

Obviously, there is no set or scientific way of acquiring and dealing with experts in a medical malpractice case and the above represents no more than one approach to use. Nevertheless, I hope that it will be of some benefit to practitioners when working with experts in their own medical malpractice cases.

#### ENDNOTES

- <sup>1</sup> C.R.S. § 13-64-401.

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