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Expert Witnesses and Testimony in Malpractice Cases

The standard for the qualification of expert witnesses in Pennsylvania is is set forth in the seminal case of Miller v. Brass Rail Tavern, Inc., 541 Pa. 474, 664 A.2d 525 (1995) which, generally speaking, permits anyone with almost any degree of specialized knowledge to serve as an expert and provide opinion testimony. However, qualification of expert witnesses in medical malpractice cases against physicians is governed by §512 of the MCARE Act and not the general standard articulated in Miller. It is important to remember that unlike most provisions of the MCARE Act, §512 is limited in application to actions against physicians. Professional liability actions against non physician health care providers including: physician's assistants, nurses, nurse practitioners and dentists are not subject to the stricter qualification requirements of §512.

Section 512 requires liability expert witnesses to possess the same specialty board certification and if applicable sub-board certification of the defendant physician against whom they are testifying with limited exceptions. Additionally, §512 requires the expert witnesses to be licensed to practice medicine in the United States, have an unrestricted medical license, be in active clinical practice, teaching or retired no more than five years as of the date testimony is offered to the jury. Where there are two or more specialty boards or sub-specialty boards that perform the same procedure, §512 permits physicians of different specialty boards to serve as experts so long as the standard of care applicable to each is the same for the procedure at issue in the case.

There are some recent Pennsylvania appellate decisions that have affirmed the trial court's ability to exercise discretion in evaluating an expert's credentials in limited circumstances, but it is perilous to go into battle (trial) with an expert that is not overtly qualified under §512 in the hope that a trial judge will exercise that discretion in your favor. Allowing your opponent to have a potential knockout punch virtually insures the case will not settle at least until you have survived a motion for nonsuit.

TOM DUFFY'S *firm has represented plaintiffs in personal injury cases for over a quarter of a century. Visit duffyfirm.com to learn more.*

SELECTION

The number of defense firms in Pennsylvania regularly doing medical malpractice defense work is relatively small and they tend to rely upon the same experts over and over again. This practice is a double edged sword. On one side, the experts tend to be well credentialed, experienced practitioners and well seasoned in providing courtroom testimony. On the other side, they also tend to have long-standing affiliations with the defense firms that hire them, the institutions on whose behalf they are asked to testify and a long track record of prior testimony.

Whether you are retaining an expert for the defense or for the plaintiff's case you must, if you have not used them before, research the

expert's litigation history as a litigant and as an expert before relying upon them to go into court. It is relatively easy now to obtain at least some of an expert's prior testimony in transcript form. This enables you to anticipate and be prepared for the attacks during cross examination on your own expert. Importantly, this same research is a first step in developing the ammunition needed to undermine the effectiveness and the credibility of the opposing party's expert.

Our firm limits our medical malpractice cases to the representation of plaintiffs. In the representation of plaintiffs, you should assume you will have to leave the immediate geographic area before you can retain an expert who is willing to testify against a local physician or hospital. If the case is venued in Philadelphia, you are likely to be looking for experts in New York, Baltimore, Washington, D.C. and, if necessary, the west coast. A common attack on your out of town expert is the suggestion artfully put forth by defense counsel that your case was not strong enough for a local physician to support so you had to shop it all over the country before you could find an expert willing to support the case in court. So long as the expert you have retained has solid credentials and real experience in the field, this "carpet bagger" attack on the expert is seldom effective. Finding an expert with clinical experience in the procedure or care at issue should not be difficult.

Most teaching hospitals include biographical information on their physicians by department. This information is easily available over the internet and most of the time makes it relatively easy to identify physicians with clinical experience in the specific care or procedure at issue in your case or with a special interest in some narrow aspect of the medicine particularly relevant to your case.

INVESTIGATION

As I mentioned above, there are numerous services now available that can retrieve (at a price) the prior testimony of expert witnesses.Transcripts are expensive and you will not always know in advance what useful information they contain that may be helpful or relevant to your case. However, if you can get a recent transcript of the expert's trial testimony you will likely learn, at a minimum, the percentage of time the expert testifies for the defense or plaintiff, what the expert charges, how often they testify in court, and how combative they are likely to be during cross examination.

It should go without saying that the expert's education, medical training, past hospital affiliations and publications should be carefully scrutinized both for your own expert and your opponents. Nevertheless, obvious things are frequently overlooked. It is not uncommon for our firm to encounter an opposing party's expert testifying on behalf of a defendant hospital where that expert either did his residency, fellowship training, was previously on staff, or is a frequent guest lecturer at the institution. This information skillfully used during cross examination paints a picture of bias that is difficult to erase.

TRIAL

Many articles, treatises and books have been written on the art of direct and cross examination of expert witnesses. I will not attempt to distill the wide range of approaches taught and practiced by many skillful practitioners. I will simply offer a couple of tips that our firm has found useful in our cases.

First, as a general rule, expert testimony in a medical malpractice case should be given live. The jurors' lives have been interrupted by mandatory jury duty. The jurors were summoned by the court, on a day and time not of their choosing, directed to a waiting room usually in the basement of the courthouse, told to wait their turn to be called as a potential juror and then compelled to answer personal questions under oath asked by strangers. While serving on a jury may be one of the most important duties of citizenship, it is not convenient. It will not be lost on the jury that the so called "expert" who professes to care so deeply about the issues in the case could not suffer the inconvenience of coming to the same courthouse the jurors have been forced to attend for a week to testify for a few hours. The videotaped trial testimony of expert witnesses in medical malpractice trials cannot always be avoided but should only be utilized as a last resort.

Second, do not try to control the clock with the direct of your own expert or cross examination of your opponent's expert. Have your own witnesses and evidence ready so you can keep the trial moving. There is a limited window of time during which you have the jury's full attention, do not squander it by stretching out a cross examination for hours that can be accomplished in twenty minutes.

Third, during cross examination keep your ambitions and expectations reasonable but plan ahead. The opposing expert is almost never going to agree with your theory of the case, the medicine and may even dispute the undisputed facts that support your case. You may not always have a "book" of prior inconsistent testimony but you can always, at a minimum, force the expert to acknowledge the facts in the case that you have previously established as critical to your theory and theme of the case.

Finally, maintain control but never back down. Stay on point and calmly repeat the question as many times as necessary if the expert fails to answer your question with or without judicial intervention. By planning ahead you will already have established in the first two questions that your job is to ask questions and the expert's job is to answer them. Carefully constructed, simple questions that the expert should concede but does not or simply refuses to answer will show the jury what it needs to assess credibility and make a determination as to how much weight to give the witness's testimony. It is your examination, your questions and your client's only case. Having done your homework you will be prepared to deal with the expert's responses and maintain the control and command of the facts you demonstrated to the jury long before the expert took the stand.