



FINDING AND EMPOWERING EXPERT WITNESSES

By Patricia K. Greenstreet, R.N., J.D.*

**With special thanks to Gene Moen, J.D. for his generous contribution*

This paper is not intended to be an exhaustive review of the law related to the use of expert witnesses, but only as an outline of a few practical suggestions I have found helpful in dealing with them. Since my practice is limited to representing plaintiffs in medical negligence cases, I will most often refer to those cases and medical-related experts. However, the suggestions I offer are applicable to most personal injury cases.

I. LEGAL FUNDAMENTALS

Medical negligence cases, more than any other, are often “battles of the experts.” With very few exceptions, you cannot present a medical negligence claim without having, and using, experts. Why you need an expert is reflected in ER 702:

“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

In medical negligence cases, the “may” in this rule has been interpreted as a “shall,” since few lay persons have knowledge of medicine or medical standards. To prevail in a medical negligence claim, RCW 7.70.030 requires that the plaintiff must establish that “the injury resulted from the failure

of a health care provider to follow the accepted standard of care,” which is defined as “failing to exercise the degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he belongs, in the State of Washington, acting in the same or similar circumstances.” RCW 7.70.040 also requires that the failure be “a proximate cause of the injury complained of.”

Except in those rare cases where the negligence is observable by lay persons and describable without medical training, expert testimony is always needed to establish the standard of care and to prove causation. Morinaga v. Vue, 85 Wn.App. 822, 831-32, 935 P.2d 637 (Div. 3, 1997). In fact, it is enough in a summary judgment action for the defendant to simply point out, without the support of affidavits, that the plaintiff lacks medical evidence to make out a prima facie case of negligence, and thus to compel the plaintiff to present expert testimony. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 226 (1989). “Without such expert medical testimony plaintiffs could not prove negligence and could not recover.” Shoberg v. Kelly, 1 Wn.App. 673, 677 (1969), rev. den. 78 Wn.2d 902 (1970). “[E]xpert testimony will generally be necessary to establish the standard of care and most aspects of causation” Harris v. Groth, 99 Wn.2d 438, 449 (1983).

Once the plaintiff has expert witnesses in support of negligence and causation, the practical burden is shifted to the defense to counter with its own experts. Thus is created the “battle of the experts.”

II. WHAT TYPE OF EXPERT DO YOU NEED?

Case needs vary, of course, depending on the complexity of the case and the variety of disciplines involved. Obstetrical negligence cases are among the most complex cases and may involve as many as 23 distinct medical and allied disciplines. Slightly simpler cases, such as a delay in the diagnosis of breast cancer, can require seven to nine different types of experts. Once you have identified the specific disciplines you require for your case, there are several additional qualifications for you to consider:

A. DO YOU NEED A PRACTITIONER IN THE SAME SPECIALTY AS THE DEFENDANT?

If it is a hospital-based case, you need to determine which providers were negligent: e.g., a nurse, a respiratory therapist, an x-ray technician, or a doctor? If the negligence is that of a non-physician, you will probably seek an expert in that field. A recent case holds that a physician director of an ICU who works with and supervises ICU nurses may testify as to the standard of care for ICU nurses. Hall v. Dominican Sisters of Spokane, 2000



WL 297748, 995 P.2d 621 (Wash. App. Div. 3, 2000). But it is rare that you will rely on the testimony of someone other than an expert in the same field.

Questions also arise as to whether a specialist may testify as to the standard of care for a generalist and whether a physician in some specialty may testify as to the standard for another specialty who performs the same procedure. Following is a brief summary of the key Washington cases that deal with these issues:

1. McKee v. American Home Products, Corp., 113 Wash.2d 701, 706-7, 782 P.2d 1045 (1989). Arizona physician may not testify to the standard of care for Washington pharmacists where plaintiff alleged negligent failure of pharmacist to warn of drug dangers.

2. Young v. Key Pharmaceuticals, Inc., 112 Wash.2d 216, 227 et seq., 770 P.2d 182 (1989) (dissenting opinion omitted). Pharmacist may not testify to physician standard of care on proper dosage of medication.

3. Hall v. Dominican Sisters of Spokane, 2000 WL 297748, *3-4, 995 P.2d 621 (Wash. App. Div. 3 2000). Physician ICU director who works with and supervises ICU nurses may testify to the standard of care for ICU nurses.

4. White v. Kent Medical Center, 61 Wash. App. 163, 169 et seq., 810 P.2d 4 (Wash. App. Div. 1 1991). Specialists may testify to the standard of care for generalists.

5. Miller v. Peterson, 42 Wash.App. 822, 831 et seq., 714 P.2d 695, review denied, 106 Wash.2d 1006 (1986). Orthopedic surgeon may testify to standard of care of podiatrist where (1) methods of treatment in different schools are the same, (2) where methods

of treatment should be the same, or (3) the expert's knowledge is based on the defendant's school.

As established in these cases, there are situations where you can use an expert in another specialty to establish standard of care for a defendant. But why make things difficult for yourself? In the vast majority of cases it will make sense to find an expert whose credentials and background match those of the defendant.

B. OTHER QUALIFICATIONS TO CONSIDER

Once you have identified the expert discipline you need for your case, there are several other qualifications to consider before you can commence your search.

1. Do you want an academician or a clinician? Do you want someone who practices in a university, or out in the community? There is no clear answer for every case. The academician may have participated in more relevant studies, have an impressive curriculum vitae with more publications, and be an able teacher, but if the expert comes across as an "ivory tower" researcher out of touch with the demands of private practice which is where your case arose, then their utility is limited in your case. A busy community clinician may be more comfortable dealing with patients directly (and hence with a jury) and may have far more practical experience dealing with the particular situation involved in your case.

Part of your decision will depend on who you are trying to impress. If your goal is for the defendant physician to give consent to settle the case, go to physicians he or she will respect and give deference to. That expert may have

published the national authoritative article or text on the topic at hand, or spoken at national professional meetings attended by the defendant. If you are convinced that the case will likely proceed to trial, choose an expert who will be liked, respected and trusted by the jury. In our office, we often try to have one of each: one national expert from a leading university and one "in the trenches" practitioner whose job responsibilities are similar to those of the defendant.

2. Do you want a national or regional expert? Unfortunately if you represent the plaintiff you may not have the luxury of a choice. The medical community in our nation is small and, thanks to the internet, is growing smaller with each passing year. If you are looking for a negligence expert for a Washington case, it is increasingly difficult to get a Washington state physician to testify. The situation is compounded if your Washington defendant is the chair of a department for their renown may extend beyond Washington and limit your ability to recruit a similarly situated expert in the western US if not nationally. I recently went through 45 experts who declined to review my case because they knew of the defendant who was a politically powerful department chair.

The reluctance to testify extends to entire institutions if the defendant health care facility participates with other national institutions in research study groups. In a bone marrow transplant case, 25 national experts refused to even look at my case because of the identity of the institution involved. If you can succeed in securing only an out of state expert, you will hear at trial from defense counsel that if your case was at all clear you would have been able to find a local expert! Rubbish!



3. Do you want an expert who is experienced or inexperienced in forensic matters?

The benefit of dealing with an experienced expert witness is that it makes our lives as lawyers easier. The experienced witness knows what to look for, does a complete yet succinct analysis, and can offer suggestions for case development including approaches for overcoming defenses. The experienced witness needs little preparation for deposition or trial and is often a skilled communicator. If an acknowledged authority in their field, the experienced witness can be very impressive to both the defense and the jury. However, many experienced witnesses are not recognized authorities in their fields but are merely willing to frequently serve as expert witnesses. Whether this is a detriment to your case depends in part on the topic of the expert's testimony. If you select a seasoned economist in your case, his or her prior testifying experience is not likely to be a significant issue. The same may not be true if your key liability witness has testified in many similar cases, however. Each candidate must be evaluated individually, but use caution to screen high volume experts. The risk is that they appear to be professional witnesses rather than practicing professionals.

The novice witness can be refreshingly sincere and knowledgeable, disarming in demeanor, and yet entails far more work for the lawyer. The rewards of using an inexperienced witness are many, but they often require significant guidance and support from counsel. You may need to instruct the inexperienced witness about the relevant law, your expectations regarding their case

review, whether you wish a written report, and guidelines for the amount of time they are to spend on the project. Preparation for deposition and trial testimony may be extensive and include role-playing. If you have the personal or office resources to invest in a novice witness, their testimony can be quite impressive in its sincerity.

4. Can you use a professional already involved with the plaintiff as an expert witness?

Treating therapists, physicians, nurses, educators, vocational counselors or other allied professionals make very persuasive expert witnesses because they have knowledge which extends beyond the medical records. If you are seeking expert witness testimony on a negligence issue, you may be hard-pressed to find a treating professional willing to express an opinion due to the proximity of the defendant geographically and within the same professional circles. If the issue is causation or damages, however, subsequent treating providers are often willing to express opinions if you make it clear that you do not expect them to express any criticisms of the defendant.

II. WHERE TO FIND THE EXPERT YOU NEED

Once you have determined what kind of expert you need, how do you find the expert? In general, there are five ways of locating experts: review of the medical literature, referrals by other attorneys, referrals by other experts, web research, and expert services. The only expert service with whom I have experience and I recommend without qualification is the King County Nurses Association Nurse Legal

Consultant Clearinghouse. KCNA matches attorney requests with possible qualified nurses. The attorney pays a small administrative fee to KCNA for each curriculum vitae selected, but the rest of the negotiation is up to the attorney and the nurse expert. You may reach the Clearinghouse by calling KCNA at (206) 545-0603. The nurses vary in experience and qualifications, so caveat emptor.

1. Medical Literature

If you are looking for a top expert in any field, you may want to find the authors who have published in that field. Thus, if you need an expert in carotid endarterectomies, you can either find current articles on that subject or check who authored the chapter on endarterectomies in a vascular surgery text. (See the appendix on using the internet for ideas on locating the literature). Be aware, however, that the top experts in a field are often busy academicians or researchers, and may not want to, or be able to, participate as an expert witness.

The internet has afforded unique direct access to national experts. Gone are the days of unreturned phone calls or letters of inquiry languishing unopened on desks. I contact most experts today by email using addresses garnered from hospital or university web sites. By compressing the facts and issues into a one paragraph summary and indicating what I am looking for from the expert witness, I can send identical emails to multiple experts and often receive responses within an hour or two. The following is a recent example of an email I sent to prospective consultants:



Dear Dr. X:

I am writing to inquire whether you might be interested and available to review a shoulder dystocia delivery case arising in Washington state. The case involves a vaginal delivery at 38 weeks in a 265 pound primipara who delivered after allegedly 15 minutes of vacuum extraction and 20-30 minutes of forceps instrumentation. The records are not yet in, but the baby weighed 10 pounds 14 ounces at birth and now has right brachial plexus injury and Horner's syndrome. We are in the process of assembling all relevant medical records, but I wondered if you might be willing to review the records when they are available to determine whether the obstetrical care provided was reasonable. Please either call or send an email reply. Thank you for your consideration of this request.

Note that I do not include any identifying information about the parties to protect their privacy. In the distant past I included the name of the defendant to screen for conflicts, but an expert wrote an impassioned letter asking me to omit that information in the future because the mere allegation of negligence is potentially damaging to a reputation. I now reveal the names of the parties only after a potential expert has agreed to review the records.

2. Referrals by Other Attorneys

This is a valuable means of locating good experts. If you know someone who has handled a similar case, or can find reference to such a case in the medical malpractice publications, then call and ask the plaintiff's attorney who he or she would recommend. There are publications that report on medical negligence cases, and they can be a source of information on

experts. Medical Malpractice Verdicts, Settlements, and Experts is published by attorney Lewis Laska, and includes in each month's report as many as 200 cases nationally. They also will do an "expert search" or a "similar case search" through their database for a modest cost. Another publication is Medical Liability Reporter, which reports on selected cases (usually appellate cases) and has brief articles on each.

WSTLA's Trial News has articles on occasion about a medical negligence case, and contact with the plaintiff's attorney could elicit information about the experts used in that case. Finally, Northwest Personal Injury Litigation Reports (formerly Jury Verdicts Northwest) will publish reports of medical negligence cases and will include identities of experts used by each side. A caveat is in order: when this publication lists "medical experts" it often includes treating physicians who testified only about the care they provided, and were not expert witnesses as such.

The advantage of culling the names of potential experts from these sources is that you can also call the attorney who handled the case and ask whether the expert was effective in deposition or at trial. An expert who appears qualified on paper may turn out to be a dud when it comes to testimony.

A new means of locating experts is the ATLA medical malpractice list-serve, open only to plaintiff's attorneys who belong to the medical malpractice section of ATLA. Like many list-serves, you get a lot of "garbage" stuff that doesn't interest you. In fact, the limit of 60 messages a day is often reached, and it includes such items as queries about a good orthopedist in Omaha

or "what is the statute of limitations in Iowa?" But if you put out a query asking for an expert in a particular field, you will often receive dozens of responses from attorneys who have handled similar cases and can recommend an effective witness. Since joining the list-serve about a year ago, we have used it at least once a week and, even when we don't use it, we gather the names of potential experts every week from responses made to other attorneys who askaboutexperts. Use caution in relying on information from any list-serve: often the responses contain errors in the expert's discipline, present practice location, phone number or email address. We confirm all information prior to contacting any expert for this reason.

3. Referrals by Other Experts

This is also a good means of introduction to potential experts. If you can call "Dr. Smith" and say that "Dr. Brown" suggested you call him, you have an automatic entree and there is a good chance Dr. Smith will at least listen to your request before hanging up the phone. We work often with experts from certain medical schools, especially the University of California at San Francisco, Stanford University, and the University of California at San Diego. When we need an expert for which we don't have a source, we will often contact the experts we have worked with at those schools and ask them if they could suggest someone at their institution. They can often steer us to the top people in their departments or those who have a special interest or expertise in our area of medicine. See the appendix on "Using the Internet for Medical Research" for ideas on how to find medical schools and names of potential experts.



4. Web Research

Lately I have been using the web for general research to identify organizations, academic institutions, and support networks which can serve as resources for identifying individual expert witnesses or centers which can steer you to qualified experts.

For instance, I represent a minor who as a result of negligent care sustained a permanent hearing loss. A local vocational consultant advised me that although she could speak in generalities about the vocational impact of hearing loss, she would be unable to quantify the impact of moderate hearing loss because there is nothing published on that topic.

Through the web I was able to identify the nation's leading centers which deal with the deaf and hard of hearing. I sent email inquiries to their employment departments describing my client's hearing loss and asking if they had any suggestions as to where I could turn for hard data on the impact of moderate hearing loss on future career limitations, job market access, employment advancement opportunities, salaries, and employee retention for this child. I received several responses which ultimately led me to consult with experts at the National Technical Institute for the Deaf in Rochester, New York. Since this is their life work, they were able to address our issues in a comprehensive, persuasive report.

There are also many web sites for people who suffer from certain diseases or conditions. These sites can be a treasure trove of resources for your clients and a source to identify potential expert witnesses.

III. EMPOWERING YOUR EXPERT WITNESS

Once you have identified a potential reviewing expert witness, your challenge is to motivate the witness and maintain their motivation. Make them care about your case and your client. Reviewing cases is difficult, especially for busy professionals who are already working too many hours. The political fallout can be painful and lasting for the reviewer, so they deserve respect for their willingness to provide this professional service. I try to build credibility and trust with our experts by being meticulously straight with them and avoiding embellishment, which as we have seen in our recent political campaigns can be devastating to credibility.

A. THE INITIAL REVIEW

Your packet of materials for expert review is a reflection of you and your firm, so the materials should be well-organized and professionally presented. We send all medical records tabbed, indexed and in a three ring binder with identifying information on the binder front and spine. I enclose a letter outlining the specific issues which I would like the expert to evaluate. This letter will serve as a helpful outline for our future discussion of the expert's review. If I am not providing all of the records which we have available because the review is limited to a particular issue, I identify the omitted records and invite the expert to request them if they would be helpful. I err on the side of providing too much information lest I inadvertently omit a relevant document. If the records are voluminous, I enclose a detailed chronology which is clearly labeled "Attorney Work Product;

Intended as an Annotated Index Only; Not Intended to be Relied Upon." I want to make the expert's job as easy as possible which also serves to minimize charges for their review.

Two weeks after sending the records, I have a legal assistant contact the expert to schedule a telephone conference. I used to have experts call at their convenience, but too often I was not available or prepared at the time of their call. By scheduling the conference both reviewer and attorney are prepared and able to focus exclusively on the case. I initiate the call so the reviewer doesn't have to worry about the telephone bill and I call on time.

At the conclusion of our conversation discussing the merits of the case, I invite the expert to send me a bill for this initial work even though the expert may continue to be involved in the case for many months. Our office pays expert bills within two weeks of receipt. All of these courtesies serve to underscore your professionalism, ease the burden for the expert, and motivate the expert to work with you on this and other cases.

B. AFTER THE EXPERT IS "ON BOARD"

Empowering the expert involves not just motivating them to want to work with you on the case, but enhancing their effectiveness as an expert in your case. I send the damages expert updated records as they become available and periodically meet with the treating physicians not only to learn about the client's progress, but also to develop areas in which they will later feel comfortable expressing expert opinions.



I consult with liability experts before drafting interrogatories or developing deposition questions, asking “What do you want to know? Are there any additional documents that you want to see?” I provide the opponent’s discovery responses to the liability expert if the responses are relevant, as well as deposition transcripts from parties, fact witnesses and opposing experts. I also send each expert a copy of my draft expert witness disclosure for editing changes so that my disclosure accurately reflects their anticipated testimony.

By providing your expert with full and complete records, relevant discovery documents and deposition transcripts, and including the expert in framing discovery related to their issue, your expert will be prepared to express opinions with confidence.

C. PREPARING FOR DEPOSITION TESTIMONY

The degree of attorney-initiated testimony preparation varies depending on the forensic experience of the witness. For every expert witness, we meet or have a telephone conference a week or so before the scheduled deposition to review the scope and details of their anticipated testimony. An inexperienced witness, particularly a nurse or other allied health care professional, may need to role play their testimony to become comfortable with different examination styles. An experienced witness who has previously testified in any similar cases should be familiar with the prior testimony and be prepared to address any perceived inconsistencies.

In rare cases, well-credentialed experts have had personal mannerisms

or habits which detract from the substance of their testimony so we have utilized the services of a trial consultant to maximize their credibility. This is reserved for key experts with very annoying habits, fortunately the rare exception! I will not repeat the usual expert witness pre-deposition instructions other than to say that even the most seasoned of experts need regular refreshers.

Although already covered in our telephone conference, I encourage the soon-to-be-testifying expert to call me any time with further questions about the underlying facts, scope of their testimony or anticipated challenges. I also explain that the time the expert spends preparing for the deposition is billed to me and I want them to spend as much time as they need. I have yet to see an expert abuse this offer by padding their hours.

The old adage “Knowledge is Power” in my experience applies to expert witnesses. By providing the expert with all relevant documents, inviting their participation in formulating discovery requests and areas of deposition questioning, and by preparing them well for their depositions, the expert will be empowered to provide their most credible and persuasive testimony for your client.