Defending Medical Malpractice Lawsuits
Trying the "Gray Area" Cases[1]

By Robert C. Seibel and J. Thaddeus Eckenrode

Undertaking the representation of a medical professional or institution being sued for medical negligence presents the defense attorney with a variety of interesting challenges. Almost all malpractice cases involve a serious, if not devastating or crippling injury, complication, or death. Juror sympathy for the plaintiff is highly probable. The defense attorney's first job, in conjunction with the healthcare provider's professional liability insurance carrier, is to try to accurately assess the case at the earliest possible stage. A predictable small percentage of cases will present as such clear liability matters that defense counsel and the insurance company may try to promptly settle these cases, where possible, to avoid needless additional litigation expense to the carrier or disruption of time to the physician. Many of those cases cannot be resolved quickly, however, because damages (and therefore the potential value of the case) cannot be accurately ascertained in the early stages without some formal or informal discovery. Even so, very few "clear liability" cases ultimately make it to trial.

Another small percentage of cases are so clearly merit less and defensible, of course, that they should be vigorously defended through trial, if not otherwise dismissed earlier, either voluntarily or by motion. Several years ago, we saw a greater number of these "frivolous" cases, at a time when some plaintiff's attorneys believed (sometimes correctly) that professional liability insurance carriers would, at some point in the case, make a nominal or "cost of defense" settlement offer. Over the past decade or so, with the introduction in 1986 of both Missouri's medical malpractice statute[2] (discussed *infra),* and the development of the National Practitioner Data Bank, [3] professional liability insurance companies and their claims departments are likely to force a plaintiff to file a "healthcare affidavit"4 before ever considering settlement, and physicians with "consent" policies may object to any payment that would require their name to be listed with the Data Bank.

Defending a non-meritorious case, or settling a clear liability case, are easy decisions to make. Medicine itself, of course, is rarely black and white, and the majority of medical malpractice cases, therefore, will fall into a vast "gray area." In these "gray area" cases, we know that the plaintiff will be able to find an expert to testify that there was malpractice, and we know that we can find an expert to say that there was not. Some of these cases get settled, and some must be tried. Statistics suggest, of course, that even the great majority of these cases will ultimately be settled, although the wisdom of settling "gray area" cases should be debated. The factors that go into the decision to settle such a case vary from insurance company to insurance company, and physician to physician. Sometimes the amount for which a case can be settled, measured against the downside verdict potential, plays a role. Sometimes it does not. Sometimes the trial venue or the appearance of the parties themselves plays a role. Sometimes they do not. Despite their belief to the contrary, the identity of the plaintiff's attorney himself rarely factors into the decision. Professional liability carriers today require defense counsel who are committed to the proposition that the "gray area" cases can, and need to be tried. Ultimately, the most interesting and important challenge to the defense attorney is in preparing to try the "gray area" case.

Service of Suit

The first key to successfully defending any case, in our opinion, is to prepare the case from the outset with the assumption that the case *will* go to trial. Despite statistics to the contrary, we do not believe in assuming that a case will settle or be dismissed. Preparation for trial, therefore, begins the moment that we receive the petition from the

insurance company. The initial inquiry is whether there are any immediate defenses to be raised by motion[5] (i.e., improper venue,[6] statute of limitations violations,[7] etc.).[8] Then we turn to the allegations themselves. Although Missouri is a "fact pleading" state,[8] most judges in the various eastern Missouri counties in which we have appeared seem to take a dim view of motions for more definite statement, motions to strike, etc. Many insurance companies now encourage defense counsel to avoid needless motion practice, so unless the petition is so unreasonably defective as to make it nonsensical, we prefer to simply file an answer and to commence meaningful discovery.

A review of the allegations of negligence should provide a general overview of the claims being made against the defendant, but frequently we see completely different allegations or criticisms of the defendant by the time plaintiff's expert is deposed. Obviously, therefore, the limited claims made in the petition should not restrict defense counsel's evaluation of the care provided by the defendant in the case.

The Affidavit of Merit

Pursuant to statute,[9] a plaintiff must file an affidavit attesting that plaintiff's attorney has obtained the written opinion of a physician who finds plaintiff's claim to have merit. It is a statute with bark, but little bite, and probably is the neutered result of legislative compromise. The statute does not require the plaintiff to actually produce the "written opinion" or to even disclose the identity of the reviewing expert, allowing for the possibility for an attorney of questionable ethics to file such an affidavit without actually having had the case reviewed. The statute requires that a separate affidavit be filed as to each defendant within 90 days of suit or the case is subject to dismissal. We frequently see motions filed on behalf of some defendants because a "separate" affidavit has not been filed as to each defendant, but we believe that to be a waste of our client's money to pursue if the plaintiff's affidavit mentions our client somewhere. We will vigorously pursue dismissal if *no* affidavit has been filed, although most judges seem willing to give a plaintiff up to 60 days additional time upon request when told that someone is currently "reviewing" the case. Most plaintiffs' attorneys who handle malpractice cases with any frequency at all, however, will usually voluntarily dismiss a case if they have not already found an expert within 90 days. Sometimes it takes the filing of the motion to prompt that action, and we recommend that defense counsel make an effort to promptly seek dismissal of those suits where plaintiff's counsel has failed to timely file the required statutory affidavit.

Early Case Investigation

An early meeting with the defendant healthcare provider is important. Defense counsel has the opportunity to assess him as a witness, determine what problems he sees (or is willing to admit) with the case, and to get him focused on the seriousness of the matter and the need to stay in touch with us. We try to collect the relevant medical records as quickly as possible. This process is often easier if there are codefendants in the case, since we can exchange our clients' respective records. When we are on our own, collecting records means waiting for signed authorizations from the plaintiff, unless we want to spend the time and money to depose a records custodian.

Once the records are obtained, we evaluate and compare the allegations of the plaintiff's petition against the records. This frequently allows us some insight into whether the plaintiff's attorney has had the case reviewed, or whether he is so off base that the petition must have been based solely upon his client's story. We also try to get the records into the hands of a good reviewing expert as promptly as possible. This helps us with the ever-critical early assessment of the case, and in determining if the story our client tells us really holds water.

We find the use of nurse-paralegals of great importance in preparing the defense of malpractice cases and to be the most significant paraprofessional support that is available to defense counsel. A well-organized and complete medical chronology, bound and

indexed medical records, and preliminary medical literature research prepared by a good nurse-paralegal is almost essential in allowing defense counsel to understand and locate the key medical information, and to thereafter focus ongoing discovery efforts.

Elements of the Medical Malpractice Claim:
Negligence and Causation

Like any personal injury tort claim, a medical malpractice case requires that the plaintiff establish the defendant's negligence, and a causal relationship between the negligence and plaintiff's injury. Negligence in a medical malpractice case is defined specifically in the Missouri Approved Jury Instructions as the "failure to use that degree of skill and learning ordinarily used in the same or similar circumstances by members of defendant's profession."[10] Until trial itself, most attorneys simply refer to this as the "standard of care," which is a phrase used throughout the pendency of a case during expert depositions, etc. Establishing a deviation from the standard of care by the defendant (usually through the testimony of plaintiff's expert) is a required element of plaintiff's proof, without which, plaintiff does not make a submissible case.'[11]

Plaintiff must also prove that "but for" the defendant's negligence, plaintiff would not have suffered the injury alleged.[12]

Written Discovery

The recent trend of using "pattern" discovery in St. Louis City civil courts'[3] has taken some of the creativity and "heat" out of interrogatories, objections to which once seemed to keep the courts' motion dockets going for hours. Although that is a good thing, we still believe that it is important to review and note the answers to some of the pertinent pattern questions, i.e., identity of treating physicians, experts, and witnesses, damages claimed, employment history, etc. A diligent defense attorney will not leave a question unanswered, partially answered or with an objection unresolved without approaching the court for relief. Otherwise, he might find himself facing a surprise witness at trial who he cannot keep from the witness stand simply because the witness was not identified, if plaintiff's vague answer or objection to the interrogatory was never taken up and ruled upon.[14]

Although written discovery tends to simply be an exchange of the aforementioned "pattern" discovery these days, nothing prevents counsel from preparing or utilizing supplemental requests or additional interrogatories,[15] and well crafted and case-specific written discovery can help isolate issues, and weed out irrelevancies at trial.

Plaintiff's Deposition

The deposition of the plaintiff is necessary, but infrequently of overwhelming benefit, since plaintiffs themselves often have minimal recall or understanding of the truly important medical issues. The deposition is important, however, to allow defense counsel to tie down the story to be told factually at trial, and to determine how the non-economic" damage claim will be described. To that end, of course, the deposition of the plaintiff should almost always be secured, unless there is some reason to believe the plaintiff might die before his/her testimony is otherwise memorialized.

Defendant's Deposition

The defendant doctor's deposition, on the other hand, is, in many respects, the most important part of preparing the defense case. Substantial pre-deposition preparation of the defendant is sometimes the critical difference in a malpractice case. A defendant who does not listen carefully or whose answers ramble on may inadvertently say something that exposes him to a verdict without ever meaning to do so. The line between conduct which meets the "standard of care" and that which is outside the standard of care is often

thin, blurred and potentially still evolving. A question posed to the defendant that leaves out certain important facts may lead to a deposition answer that is not truly relevant to the case itself, and if taken out of context at trial, may seem to the jury to be an admission against the defendant's interest. To that end, defense counsel must listen carefully to the questions put to the defendant, and be prepared to lodge the appropriate objections.

There are a variety of questioning tactics or styles for which the defendant should be prepared. Some plaintiff's attorneys bore into the defendant aggressively and accusatorily. Others are slow and detail oriented. Some are almost apologetic in tone and try to "buddy up" to the defendant. Many attorneys use one or more of these methods purposefully, while for others, it may simply be their general style. No matter what, however, the defendant should be alerted to concern himself more with *what* is being asked, not how it is being asked. Despite the oft-repeated mantra of "just answer the question," the most difficult thing in preparing a physician for his deposition is frequently trying to convince him that he will not talk plaintiff's counsel out of the suit by going on endlessly, trying to oversell his medical knowledge.

Although the plaintiff's expert has likely come to some preliminary opinions based upon his initial review of the medical records, his review of the defendant's deposition will be his first opportunity to learn about *why* the defendant did some of the things he did, and it will (depending on the extent of plaintiff's counsel's examination) illuminate details that may not appear in the medical records and accompanying office notes. If well prepared, and by answering carefully and articulately, the defendant physician can force a reasonable plaintiff's expert to either limit his criticisms or to concede important elements of the defense case.

It is rarely good strategy for defense counsel to ask any questions of the defendant on crossexamination, since that may just remind the plaintiff's counsel of additional questions to cover, and is not likely, in most cases, to flush out an answer that will cause the plaintiff's expert to completely change his opinions. The general rule almost always applies to defending the defendant doctor's deposition: keep the answers honest, short, and responsive to the question asked. Despite extensive pre-deposition preparation, even the most intelligent and savvy doctors still remain unpredictable once the deposition begins, and may yield to the temptation to say too much.

Expert Witnesses and Discovery

Medical malpractice cases are unique in that expert testimony is generally *requiredl6* of the plaintiff in order for the plaintiff to make a *prima facie* and submissible case. Although the defendant is not required to offer expert testimony, a defense expert is usually offered in order to counter the fact that the plaintiff offered "expert" testimony. Despite the recent attacks on "junk science" and the *Daubertl*[7] case, it still requires very little to qualify as an "expert" witness in medical negligence cases in Missouri. While

many states require an expert to be currently practicingl8 or suggest that he be of the same specialty as the defendant physician about whom he will offer opinions,'[9] Missouri law still is broad enough to allow, *theoretically,* a long retired, out of state neurologist to testify against an obstetrician (albeit subject to substantial impeachment regarding his lack of any directly relevant qualifications).

In deposing the plaintiff's expert witness, there are certain goals that should always be met. Defense counsel should determine: 1) all of the opinions the expert holds (with regard to liability of the defendant, the causal relationship to injuries claimed, and damages); 2) all of the material he has reviewed (and what he has not) to reach those opinions; and 3) background information about the expert.

We frequently do *not* ask questions about the expert's qualifications, all of which can be obtained from his curriculum vitae. We tend to ask about "negative" background on the record (extent of his experience as an expert, charges for this work, relationship with plaintiff's counsel generally or in this case, bias against defendant physicians, licensure or staff privilege suspensions, etc.). Defense counsel may want to avoid asking "positive" background questions that would "qualify" the witness, since Missouri law allows any deposition to be read into evidence if the witness is not a resident of the county in which the case is pending (frequently the case with experts).[20] This is unlike Illinois, for instance, which has rules for both "discovery" and "evidentiary" depositions.[21] There is no reason to give your opponent a free ride in the event that his expert has last minute travel problems, dies, or refuses to come to trial for any reason. Of course, if the plaintiff's counsel wishes to "qualify" the deposition, he can obviously do so in cross-examination.

After defense counsel has satisfied himself that he has obtained *all22* of the necessary information from the plaintiff's expert, he may choose to try to challenge the opinions offered. With careful questioning and appropriate medical information at hand, defense counsel may be able to get the expert to concede that some of his "criticisms" do not rise to the level of deviations from the standard of care, or that certain conduct, albeit a deviation from the standard of care, had no causal relationship to the damages claimed. The expert willing to concede anything might then be more vigorously challenged on other issues as well. Nevertheless, we have found that the best practice is to save your best cross-examination for trial, since the opposing expert is less likely to be prepared for either the content or style of your trial cross-examination.

Co-defendant Finger-pointing

One of the most difficult problems to overcome in the defense of any medical malpractice case in which there are multiple defendants is when one defendant "dumps" on another defendant. There are times, of course, when one defendant has no choice but to do so, such as those cases where the other defendant's liability is clear and your client runs a significant risk of losing credibility in trying to "cover" for the other defendant.

Where all of the care falls within the great "gray area," however, we believe that the best defense is a unified defense. A splintered defense tends to do the plaintiff's work for him, makes a verdict for the plaintiff more likely, and thereby increases the chance that the jury will apportion fault across the board. When searching for an expert witness, it is best to find one who at least has no reason to believe the codefendant's care deviated from the standard of care, even if he is not able to affirmatively endorse the conduct.

Damages

In medical malpractice cases in Missouri, there are five categories of damages that maybe submitted to the jury if supported by the evidence.23 Past and/or future "noneconomic" damages are the intangible damages for pain and suffering, disfigurement, etc. The malpractice statute, supra, caps these damages for each defendant at an amount set annually ($517,000 in 1999).24 Plaintiffs argue that this cap should be applied to each defendant multi-plied by the number of individual plaintiffs in the lawsuit (assuming a verdict for plaintiff in an amount in excess of the "cap" figure) but no appellate decision has yet ruled that the "cap" was intended to be applied in that manner.

The other three categories of damages to be itemized by the jury are all for items of "special" damage: past economic damage (medical expenses, lost wages, etc.), future medical expenses, and future economic damages (lost wages, etc.). These amounts, while subject to reasonable dispute and problems of proof at trial, are certainly easier for defense counsel to assess and to attack.

Trial Tactics

The actual trial of a medical malpractice case, of course, is the culmination of the careful and arduous work performed by defense counsel in the months or years since suit was filed. There are myriad things that trial counsel must keep in mind throughout the trial to try to keep the playing field otherwise level, and to maximize the chances of prevailing in the end:

1. Careful jury selection.

An entire article, book or seminar could be devoted to this topic alone. In general, we start from the beginning with a goal of not giving the jury any reason to dislike our client or us. Post-trial jury surveys that we have conducted in the past have suggested that frequently it may be the little things that sway the jury. Therefore, we suggest that counsel be polite, succinct, and never demean or insult anyone in front of the jury. Try to do a fair, but unobjectionable, amount of educating the jury to the issues of in the case during voir dire. Look for and isolate those jurors who affirmatively acknowledge that medicine is not an exact science and who realize that bad results can happen no matter what.

2. Preserve your record.
Any attorney who has ever had to read a deposition into evidence at trial knows how difficult and sometimes useless a sloppy interrogation can be. The record on appeal is no different. Making your objections or offers of proof clearly on the trial record assists the court of appeals in understanding the issues being raised on appeal, and also prevents the appellate court from resolving an appeal against the appellant on technical grounds. Defense counsel should, therefore, make sure that everything (all motions made, objections raised, stipulations offered, identification of exhibits, offers of proof, etc.) gets into the record. Frequently discussions with the trial judge on certain issues take place after court is concluded for the day, off the record, or during unrecorded sidebar conferences. It is the responsibility of the trial counsel to make sure that those rulings or findings are not forgotten and are included in the trial record.

3. File written motions in limine and motions for directed verdict.
This also helps preserve your record and potential appellate points. The written motion helps supplement oral discussion on the record. Always make a motion for directed verdict, even if you just hand a written motion to the judge for a "denied" stamp, unless there is simply no chance on earth that the court could ever set aside a plaintiff's verdict. A motion for directed verdict must be filed to preserve your right to file a post-trial motion for judgment notwithstanding the verdict.[25]

4. Use exhibits, blowups, charts, photos, etc. Jurors lose interest quickly, especially in simple, dry testimony from a witness. Incorporating some "show and tell" keeps the jury focused and interested.

5. *Avoid reading depositions.*
Although counsel sometimes has no choice, jurors have very little interest in depositions, including those that are presented by videotape. Even if you know the jury will not pay attention to it, however, reading a deposition into evidence affords counsel the opportunity to discuss that testimony in closing argument (since it is in evidence), and with a blowup of a page or two from the deposition, any juror who slept through the reading of it will at least be convinced that the testimony came in and he just somehow missed it.

6. Keep it short and interesting.
Like the use of exhibits, keeping the testimony as short as possible will score important points with jury for not wasting their time, and will allow them to hear the important testimony from the witness before they tune out.

7. Bring in experts in person, if possible.
As referenced above, jurors would prefer live testimony to depositions, and certainly will pay more attention to it. One of the hardest jobs of defense counsel, however, is scheduling witnesses, especially those from out of state, for live trial appearance. The

plaintiff's case may take longer than anticipated, or a co-defendant listed ahead of you may settle out of the suit, completely disrupting your timetable. Do whatever it takes to be prepared for these contingencies.

8. Stay cool and calm.
No matter how bad things may be going, never act like there is a problem. Animals smell fear, and jurors sense an attorney's worry about the case. They may not think the case is going the same way you do, but if they think that you are agonizing over something, they are bound to start believing that you must be losing.

9. *Keep the defendant focused.*
Try your best not to give the jury any reason to dislike the defendant. That means making sure that he does not make faces or react to unfavorable testimony, that he pays attention and does not nod off at counsel table, that his posture and demeanor demonstrate that he takes the case seriously, and that he is a polished individual. Defense counsel should also advise the defendant to be present throughout the trial, despite his potential desire to cover "office hours" or do surgery one afternoon. Despite the potential economics involved, he needs to understand the importance of the case and of his being present the entire time, since the jury doesn't get to go to work when they want. We often tell our clients to keep in mind that the jury will be constantly looking at him throughout the trial, assessing his every move even when he is not on the witness stand.

10. Don't attack the plaintiff (too aggressively).
Let the jury come to their own conclusion that the plaintiff is a liar or a malingerer. You never know if the juror harbors sympathy for the plaintiff because of his injury. Attacking the plaintiff may actually cause the jury to feel sorry for your opponent. Ask simple questions in a low-key tone to try to flush out some of the problems with the plaintiff's story.

11.Chip away at the damages a little at a time.
Small victories may snowball. If you can show that the plaintiff is puffing his future economic damage claim (even if by a small amount) the jury may become increasingly skeptical of the rest of plaintiff's claims.

12. *Have case law ready.*
Be prepared for any objection or legal argument you anticipate arising or discussing at sidebar. The judge's evidentiary rulings at trial are frequently quick judgment calls made at the time of objection or motion. Even if wrong, a ruling may not be sufficiently prejudicial to require reversal if there is an adverse verdict. Try to win those arguments at the first instance by handing the judge a copy of the case on point so that he feels comfortable about ruling in your favor, and does so.

13.*Suggest a 'fair" damage figure.*
Plaintiff's counsel is likely to ask for a large award in anticipation of the jury giving him less than he requests. Although most defense lawyers hate to do so, you should at least touch on the subject of damages and suggest that the figure requested by plaintiff is grossly inflated, and suggest an alternative figure that seems supportable by the evidence in the event that the jury feels plaintiff has satisfied their burden of proof. The consequence of suggesting nothing may be an award for exactly what plaintiff requests.

14. *Never rub it in.* Once defense counsel has prevailed in a case, he should be as gracious in victory as he would like to be in defeat. Nobody wants a second shot more than the combatant who hears the trash talk or sees the laughter from his opponent. The St. Louis metropolitan area is still small enough that you are bound to meet again.

Conclusion
Although winning a defense verdict does not have the same type of glamour, newsworthiness, or financial reward that a plaintiff's verdict in a malpractice case may have, there is still something very satisfying about the relieved look on the face of a nervous doctor after a difficult and trying lawsuit. Sometimes, given that the defendant doctor's "jury of his peers" are not true peers (physicians) at all, but persons with little medical knowledge, the difference between a successful defense and a plaintiff's verdict are the small, subtle things. Careful preparation from the inception of suit, viewed as a case that *will* go to trial, make the "gray area" cases defensible.

Robert C. Seibel is a principal in the law firm of Seibel & Eckenrode, P.C. where his practice involves primarily defending physicians in medical malpractice lawsuits. He received his B.A. from Mercyhurst College in Erie, Pennsylvania in 1979 and his J.D. from the University of Akron in 1982. He is a frequent speaker at Bar Association and Continuing Legal Education seminars, and has tried over thirty (30) malpractice cases to jury verdict.

J. Thaddeus Eckenrode is a principal in the law firm of Seibel & Eckenrode, P.C. where his practice substantially involves the representation of physicians being sued for medical malpractice. He received his B.B.A. from Siena College in Albany, New York in 1980 and his J.D. from Washington University School of Law in 1983. He was formerly an Assistant Prosecuting Attorney in Franklin County, Missouri. He has completed over two dozen civil jury trials, and is frequently a speaker for various healthcare provider ~ in-services and seminars on issues related to medical negligence claims and lawsuits.

You may visit the firm's website at www.seibel-eckenrode.com

1. All references in this article in the masculine form are intended to refer to both the masculine and feminine.

2. § 538.205, Mo. Rev. Stat., *et seq.,* became effective as of February 3, 1986.

3. The National Practitioner Data Bank was created by the Healthcare Quality Improvement Act of 1986 (Title IV of Public Law 99-660) as a repository for the collection of information related to the general competency and conduct of physicians, dentists and other healthcare providers. Generally, *any* payment made by or on behalf of a physician in resolution of a claim or lawsuit must be reported to the Data Bank, as well as any adverse licensure, professional membership, or clinical privileges actions. Currently, only state licensing boards, hospitals and specific other healthcare entities have access to Data Bank information.

4. § 538.225, Mo. Rev. Stat.

5. Per Rule 55.27 Mo. R. Civ. Pro., certain defenses may be raised by motion as well as affirmative defense.

6. § 508.010, Mo. Rev. Stat., *et seq.*

7. § 516.105, Mo. Rev. Stat.

8. *See Luethans v. Washington University,* 894 S.W.2d 169 (Mo. 1995).

9. § 538.225, Mo. Rev. Stat.

10. M.A.I. 11.06 (1990 Rev.).

11. *Hurlock v. Park Lane Medical Center,* 709 S.W.2d 872 (Mo. Ct. App. 1985).

12. *Callahan v. Cardinal Glennon Hospital,* 863 S.W.2d 852 (Mo. 1993).

13. Local Rule 32.2.2, Rules of the 22nd Judicial Circuit.

14. *See generally, DeLisle v. Cape Mutual Insurance Co.,* 675 S.W.2d 97 (Mo. Ct. App. 1984), where a witness who was not specifically identified in response to an interrogatory was allowed to testify in the discretion of the trial court since counsel had not sought a more specific response to a vaguely answered interrogatory.

15. Pursuant to St. Louis City (22nd Judicial Circuit) Rule 32.2.2, up to five (5) additional interrogatories may be propounded without leave of court, and with leave of court thereafter, further additional interrogatories may be utilized.

16. *See Dine v. Williams,* 830 S.W.2d 453 (Mo. Ct. App. 1992), *Yoos v. Jewish Hospital of St. Louis,* 645 S.W.2d *177* (Mo. Ct. App. 1982). The exceptions to the requirement to offer expert testimony arise in cases in which the act of negligence would be obvious to, and within the knowledge of, laymen and where it would not be necessary for a medical professional to articulate the standard of care (e.g., leaving a surgical instrument or foreign object inside the body, etc.).

17. *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993). In this case, the supreme court ruled that the trial judge must ensure that an expert's testimony must rest upon a reliable foundation and is relevant. That determination may call for an assessment of whether the expert's theory or technique has ever been tested, been subject to peer review and publication, and the degree to which it is accepted in the scientific community.

18. See, e.g., Kansas, where a physician must have devoted 50% of his professional time in the two years before the incident to actual clinical practice in the same profession in which the defendant is licensed. Kan. Stat. Ann. Section 60-3412.

19. See, e.g., Illinois, where recent statutory amendments mandate that the inquiry for the court's consideration before a witness qualifies as an expert should include the question of whether he is board certified or board-eligible in the same specialty as the defendant. 735 ILCS 5/8-2501 (1995 Rev).

20. Rule 37.07(a)(3), Mo. R. Civ. Pro.

21. Ill. S. Ct. Rule 202.

22. We suggest asking a final summation question to the expert to verify that he has articulated *all* of his opinions, so that he can potentially be prevented from coming up with additional opinions at trial. *See Green v. Fleishman,* 882 S.W.2d 269 (Mo. Ct. App. 1990).

23. M.A.I. 21.05 (1990 Rev.), § 538.215.1, Mo. Rev. Stat.

24. § 338.210.4, Mo. Rev. Stat. The Missouri Department of Insurance recalculates the cap every year and publishes the new cap in the Missouri Register. The initial cap amount was $330,000 in 1986, and has been increased by amounts ranging from $4,000 to $29,000 annually, depending on the economy, interest rates, and various other factors calculated by the Department of Insurance.

Source: St. Louis Bar Journal; Spring 2000