

## **Inside the Litigation Process: Behind the Scenes of a Medical Malpractice Lawsuit**

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*(Part 4 of a multi-part series detailing the events that occur during the investigation and litigation of a medical malpractice lawsuit)*

### **Expert Witnesses**

In medical malpractice lawsuits, the law requires the plaintiff to offer “expert” testimony in order to make a submissible case. The courts perceive the complex nature of medical issues to be something that a lay jury would be unable to properly evaluate without the assistance of an expert to articulate and describe the relevant “standard of care “ that would apply to the physician defendant in the situation over which suit has been filed.

Since the expert offered by the plaintiff at trial has been retained by the plaintiff, however, he/she is not truly independent or unbiased, so the defendants usually offer expert testimony themselves to counter the opinions of the plaintiff’s expert. The reality is, then, that the experts don’t really “assist” the jury to understand the medical issues and standard of care, but they are, essentially, hired advocates for one party or the other. Since each party is likely to have an expert, and their opinions are likely to be different, of course, the trial of a medical malpractice case often comes down to a battle of experts.

### **Choosing an Expert**

The choice of an expert witness for our defendant physician often depends on a variety of factors, including price, location, scholarly writings in the relevant field, actual experience in the defendant’s type of practice or the technique utilized in the case, personality, past expert experience, probable trial presence, etc.

Ultimately, your professional liability insurance carrier generally has the final say regarding which expert your lawyer hires. Money is certainly an object. Many experts charge as much as \$500 to \$1000 per hour for review of records and/or deposition time, and from \$5000 to \$10,000 per day to testify at trial.

A local expert is also far easier to schedule for trial testimony. The plaintiff’s attorney has the luxury of knowing exactly when he might put on his expert, since they present their case first and can get their expert on the witness stand when they desire.

Retaining an expert who is willing to testify live is also critical. A number of surveys suggest that jurors really don’t pay much attention to videotaped depositions, and far less to those that are simply read into evidence by a lawyer. Deposition testimony, however, even if ignored by the jury, does allow the attorney to get evidence into the record about which he may then argue in closing argument; something he could not do without the testimony itself. For this reason, a cost-conscious plaintiff’s attorney may simply read an expert’s deposition.

**What constitutes an “expert”?**

Under Missouri law, medical experts need not be of the same specialty as the defendant. Essentially, any type of physician could testify about the care provided by any other physician.

**Expert Depositions**

Like any “discovery” vehicle, the deposition of the expert witness is the opportunity for the attorney to learn of the opinions held by that expert. The main goals are to obtain a thorough list of the expert’s opinions, the materials he reviewed to reach those opinions, and his qualifications to give the opinions.

**The Role of Experts**

Long before a case goes to trial, the review of a file conducted by an expert in whom I have confidence often bolsters my confidence (and that of the insurance company) in our ability to defend our physician client. Other times, of course, it may convince us that we face potentially insurmountable problems, suggesting that the case be settled. This is one of the most useful roles of an independent expert.

Once the case is going to be tried, however, no matter how many times we tell the jury that our expert is an “independent” expert, we actually pray that instead he becomes an advocate for our client. Why? Because medical malpractice trials often turn out to be, in essence, a battle of experts, by quantity, quality, qualifications, personality, and trial presence. They must help us “sell” the case to the jury.

Source: The Keane Insurance Group: August 1999