Presented at: Successfully Navigating Civil Litigation Evidence and Theory involving Topics of Expert Testimony

Medical Legal Issues
Use of Experts
November 8, 2013

Written Materials Prepared by

E. Angelo Spyrtatos, Esq.

Momkus McCluskey, LLC
221 N. LaSalle St. Suite 2050
Chicago, IL 60601

1001 Warrenville Road Suite 500
Lisle, IL 60532
630-434-0400
aspyrtatos@momlaw.com
630-434-0286

Co-Presenter Dr. Giri T. Gireesen M.D.
Introduction:

Your personal injury case has progressed through the initial stages of litigation and approaches the conclusion of fact discovery. The parties have identified medical witnesses in their initial answers to interrogatories and responses to production of documents. Issues remain that will require testimony of medical witnesses who offer special knowledge on the – the time has arrived for expert medical discovery.

An expert medical witness is a witness who by education, training or employment is qualified to provide medical opinions on issues to be decided by the trier of fact. Expert medical witnesses are called to give testimony on matters beyond the purview of the average juror. This presentation suggests items an attorney may want to consider to most effectively elicit deposition and trial testimony from expert medical opinion witnesses.

Independent vs. Controlled Medical Witness:

All expert witnesses are categorized under Illinois Supreme Court Rules 213(f)(2) and 213(f)(3) as either independent or controlled, respectively. This designation applies to medical experts as well. Supreme Court Rule 213(f)(2) addresses independent expert witnesses. An independent expert has not been retained by a party to the litigation. Rather, a non-controlled expert witness is involved due to their profession or occupation. An independent expert witness’s professional duties do not inherently involve giving opinion testimony. Put another way, when performing their professional occupation, such witnesses are oftentimes unaware that they may be called to give opinions in litigation involving their expertise. However, certain medical professionals expect that they may and will be called as witnesses on behalf of their patients if the patient has been involved in an accident or casualty event.

For purpose of disclosure, if a party intends to call an independent expert medial witness, the litigant must identify only the “subject on which the witness will testify and the opinions the party expects to elicit.” As an example, it is appropriate to list a treating physician in a case involving personal injury. It is sufficient for a party to disclose that the medical witness will testify regarding the plaintiff’s diagnosis, care, treatment and future medical treatment. No further specificity is required in the disclosure.

In contrast, under Supreme Court Rule 213(f)(3), an medical expert witness who has been retained by a party is considered a controlled expert. In this scenario, a party who controls the witness must disclose in written discovery, among other things, “. . . the conclusions and

1 Sup. Ct Rule 213(f)(2)
2 If you know more detail about the opinion it may be wise to disclose it, however.
opinions of the witness . . . “ Under 213(f)(3) a party is required to disclose opinions with greater specificity when intending to call a controlled expert.

For example, if a party retains a medical professional such as an orthopedic surgeon under Supreme Court Rule 213(f)(3), the following disclosure is insufficient: “the witness will testify as to the medical treatment and causation as related to the incident of . . . .” Instead, the retaining party must disclose the specific expected opinion to which the orthopedic surgeon will testify: “Dr. Jones is expected to testify that the defendant’s sustained a disk herniation at the L4-5 level as a result of the incident of . . . .” Moreover, every opinion of the retained medical expert must be disclosed with specificity.

When your opponent discloses a controlled expert, you are allowed to request certain information through discovery in order to prepare for the expert’s deposition and test the expert’s opinions.

Preparation for Expert’s Deposition

Before you proceed with the deposition of a medical expert witness you will want know something about his or her professional background and qualifications. If the expert witness is an independent expert, you may not be able get all of the detailed materials I suggest in this article; however, many of the suggestions apply equally to preparing to depose any expert witness, whether independent or controlled.

Often the controlled medical expert has prepared a narrative report or correspondence to opposing counsel containing in detail the opinions he holds and the basis thereof. This report is vital for your deposition preparation. The narrative report should be the basis upon which you formulate your outline and questions for the medical expert’s deposition. I usually photocopy the expert’s report and mark it up, highlighting the relevant portions. This marked copy serves as my roadmap for deposing the expert. In addition, I have a standard outline I follow during the deposition.

Avoid questions that allow the expert to expand upon the opinions he gives in the narrative report. Under the rules, it is sufficient to disclose an opinion in a discovery deposition even if the opinion was not communicated written discovery answers. Therefore, by asking the expert for opinions not contained in the narrative report you may be giving your opponent more ammunition against your client.

Chances are that your opponent has included with their answers to written discovery, the medical expert’s curriculum vitae. This “CV” contains information about the expert’s education and work experience. It may also list the expert’s professional licenses and certifications,

---

3 Sup. Ct Rule 213(f)(3)
4 Be sure to save a clean copy of the report if you want to use it and have it admitted into evidence as an exhibit at trial.
5 See Outline attached to this presentation.
6 See Sup. Ct. Rule 213(g)
published articles in professional journals, teaching appointments, awards, and memberships in professional organization.

In addition to the CV, many experts and professionals have web sites that list their professional accomplishments and services. Consider performing an internet search. Look to see whether the professional has a LinkedIn listing, Twitter account or Facebook page. While the internet is not always accurate, there is no harm in researching the expert online.

Finally, if you are a member, consider reaching out to bar association like the Illinois Trial Lawyers Association (ITLA) or the Illinois Association of Defense Trial Counsel (IDC). Such organizations often maintain databases or other information on experts, which they make available to their members. Also, posting inquiries on bar association bulletin or discussion forums may yield valuable information about your opponent’s expert.

Request materials from your opponent that bear upon the expert’s opinions and qualifications, including documents, objects and tangible things. It is appropriate to ask for the expert’s entire file because no privilege attaches that would prevent you access to this information. You should request all correspondence between the attorney and the expert involving your case. In addition you should request all documents, photographs, videos and drawings the expert reviewed. Request all notes he has taken, including hand-written notes. Ask for all invoices and statements related to this case. Seek copies of any rough drafts of the narrative report that the expert prepared for the case. Request a list of the pleadings, discovery documents or depositions that the expert reviewed. This is not necessarily an exhaustive list, but you get the idea.

In addition to materials related to your case, consider asking for other materials that may reveal the expert’s bias. For example, consider asking for tax information reflecting income derived from the expert’s activities in legal matters. What portion of the expert’s income is derived from participation as an expert witness? If you cannot find this information prior to the deposition, make sure you ask it during the deposition. Finally, ask your opponent to provide a list of matters in which the expert has testified (both depositions and proceedings) in the past four years. Some experts do not maintain such a list, but if the expert testified in Federal District Court he may have had to compile one.

If the medical expert is not involved in medical legal testimony except for patients he treated, ask him how many patients he treats are involved in litigation, how often he gives depositions and how often he has testified at trial. Also ask treating medical experts the rate he charges for his time when he gives depositions.

Make sure you understand the subject matter upon which the expert is offering opinions. Educate yourself. The internet is a good place to start. Consider locating materials in the area of specialty of your opponent’s expert. Find books, journals or treatises in the expert’s field. Many reputable sources are now available online. Is the expert’s opinion based upon methods

---

7 See Sup Ct. Rule 214
8 FRCP 26(a)(2)(B)
that are tried and true or are they cutting edge? Are the principles and methods used by the expert generally accepted in his field? Once you have answers to these questions, you are ready to depose the expert.

**The Medical Expert’s Background**

If you are deposing an independent medical expert, the chances are pretty good that you were just handed his *curriculum vitae* for the first time immediately prior to the deposition. Take some time to review it. Whether an independent or controlled expert, I focus on the education and work experience of the expert as a starting point. Next, I want to know whether the expert’s involvement in litigation is ancillary to his full time employment. Does he spend most of his time consulting with lawyers or is this a small part of his full time employment? Ask the expert how many times he has testified at depositions or at trial. When retained is he typically retained by plaintiff of defendant? What are the percentages for each side?

Additionally, ask the medical expert whether he has any special certifications or awards that relate specifically to the issues in this case. Does he publish on the subject matter at issue in the case? Has the expert spoken or lectured at organizations or bar associations that cater to the plaintiff’s or the defense bar. If so, consider asking him for a copy or locating a copy of the published material. Where does the expert advertise his services? Ask the expert whether his CV is current. If not, what additions or deletions should be made? At this stage, I always ask that the expert’s CV be marked as an exhibit and have the court reporter attach it to the deposition transcript.

**How was the Expert Retained?**

Inquire of the medical expert how she became involved in this case and when she was retained. Was she contacted by the attorney or by the party? Did a party’s insurance company retain her? Inquire whether she has worked with counsel for this case or other members of the firm. If so, how often has she been retained by your opposition? Numerous previous retentions by one attorney, firm or client may expose a bias or predisposition that you can use to undermine the expert’s opinions. The jury may attribute less weight to the expert’s opinions if she has been retained too many times by your opponent.

Next ask what was the medical expert hired to do? Confirm the expert’s recollection of the assignment with correspondence from opposing counsel. Was this assignment letter the point at which the expert first learned whether she was being hired by the plaintiff or defendant? Also check the medical expert’s billing or time entries for dates and task descriptions. Look specifically for a communication from opposing counsel that suggests to the expert what the outcome needs to be.

For example, a physician could have been hired to determine what injuries a party sustained in a motor vehicle collision. By contrast, if the injuries are obvious, the attorney may have asked the physician to comment only on whether the party will require future treatment for injuries sustained in the accident. If your opponent asked the expert a “leading” question in the
assignment letter, you may be able to suggest that your opponent was not looking for an objective opinion.

Work Performed on the File

Ask the medical expert what work he performed in advance of formulating his opinions for the case. What materials did the doctor review and who provided the materials? Did the expert review medical records or diagnostic films? Did the expert keep notes of the tasks he performed? Did the expert review pleadings in your case? If so, did the expert review the complaint, answers, counterclaims, affirmative defense or dispositive motions? Did the expert assist counsel in formulating a strategy for a motion for summary judgment or a motion to bar evidence?

What studies, articles, books or treatises did the medical expert rely upon in reaching an opinion in the case? Ask the expert to provide a citation for the source, if not an actual copy of any such reference. Ask the expert to explain how these sources were significant in formulating opinions. Do his peers and colleagues generally accept these materials? Once you have the source the expert relied upon, some independent research on the study or article may yield whether this article is considered authoritative or whether it is not generally accepted.

Make sure that the expert’s qualifications match the subject matter about which she is testifying. For example, if the expert is an orthopedic surgeon, does she limit her practice to knee surgeries but is providing an opinion regarding a hand injury? Does the medical expert have a sub-specialty? While you may not disqualify the expert completely, the court may limit the testimony of the medical expert. At the very least, presenting a jury with discrepancies between the medical expert’s area of expertise and the area of his opinions may undermine the weight of the expert’s opinions.

Opinions and the Basis for Medical Expert Opinions

For controlled medical expert witnesses, you should know what opinions they hold prior to the deposition, by virtue of the retaining attorney’s disclosure obligations. For independent expert witnesses, you may only know the subject matter of the opinions. So in that context, the deposition is your opportunity to flush-out the specific opinions they hold.

All expert opinions need to be based upon a reasonable degree of certainty in order for the opinions to be allowed by the court. I suggest that you ask the expert to testify as to his opinions soon after you completed your questions about the expert’s background and work performed on the case. In the remainder of the deposition you can focus on the basis for those opinions, including specious assumptions, incomplete information, bias, and inaccurate testimony. If you sufficiently undermine the basis for the opinions, the opinions will collapse.

Consider some examples of opinions that collapsed once it was shown that the information the expert considered was false. In a case involving medical opinions, the plaintiff told the

---

physician that she was involved in a collision in which the defendant’s vehicle was traveling at 45 mph upon impact. In reality, the impact was less than 5 mph. Another plaintiff told her doctor that her neck pain began with the accident. However, less than one month prior to the accident she reported neck pain to a different physician who prescribed her medication.

In terms of strategy for revealing bad foundation information, sandbag a little. Try not to hit the homerun with your opponent’s expert at the deposition. Chances are high that your opponent’s expert is not going to abandon the opinions your opponent disclosed in written discovery. Rather, focus on the little discrepancies in the basis for the opinions, the expert’s biases, and the expert’s oversights. If you elicit enough of these weaknesses, the expert’s impact will be minimized. At the appropriate time, remind your opponent of the inconsistencies of the medical expert’s opinions.

Compensation

Finally, ask the medical expert what compensation he received for his work on this case. I typically save this line of questioning for last. No matter how seasoned the expert, he likely perceives questions of compensation as an attempt to expose his bias in favor of the party retaining him. As a result he may become defensive. By saving this line of question for the end, I allow the expert to testify on matters less obviously hostile. This way the expert feels more comfortable with me, thus, increasing the chances of obtaining some concessions in his testimony.

Ask how the medical expert is compensated: by the hour or on a flat fee basis? Ask whether the expert knows how his rates compare to his colleagues with similar experience. Then ask how much he has been paid to date for this case and how much he expects to be paid if called to testify at trial. If the expert traveled some distance to participate in this case, does he charge door to door? Does he pass through his travel expenses and meals to his client?

The last item I will request of the expert is to quantify the amount of money he or she earns by participating in litigation as an expert. I prefer that the expert answer this question in actual dollars rather than a percentage of income. Some attorneys will request the expert’s tax returns. Experts will often refuse to provide these materials. Many courts will compel production of an expert’s tax returns. Some experts would rather withdraw from the case than comply. The attorney hiring an expert may want to make an inquiry early on in the case whether, if asked, the expert will disclose sensitive financial information.

Conclusions

Experts are a critical part of many cases. By preparing thoroughly and asking the appropriate questions at deposition, you can minimize or maximize expert’s impact as a witness in litigation.
I. Background

A. Name and Occupation

B. Educational Background

1. Undergraduate Degree

2. Graduate Degree

3. Internship and Residency

4. Fellowships, Special Experience

C. Work Experience

D. Professional Organizations/Memberships

E. List of Articles or Publications Limited to Area of Expertise Upon which the Expert Will Testify.

F. Board Certification – Explain What Board Certified Means

II. How the Expert Was Retained

A. Who Retained the Expert
B. For What Reason, Purpose Was the Expert Retained

1. To Review Records
2. To Examine Plaintiff
3. Give Opinions Regarding the Issue
   a. Causation
   b. Standard of Care

C. Disclose What Communication Instructions Did You Have with the Expert

1. Oral
2. Written/Correspondence

III. Work Expert Performed on this File

A. Record Review
B. Examination with Plaintiff
C. Special Research Conducted
D. Special Publications or Articles to which Expert Referred

IV. Expert's Opinions Based upon a Reasonable Degree of Certainty

A. Opinion As to Causation
   1. Specific Facts of this Case which Support Opinion as to Causation i.e. Speed of the Vehicles, History Given by the Patient, etc.
   2. Symptoms or Objective Findings which Support Opinions

B. Damages
   1. Past Damages Including Medical Bills, Pain and Suffering and Disability
2. Future Damages Including Medical Bills, Pain and Suffering and Disability

C. Standard of Care Opinions

1. Reemphasize Doctor’s Expertise

2. Knowledgeable Re: Standard in the Industry

V. Expert’s Fees*

A. How the Expert is Compensated i.e. Hourly Basis or Per Day for Trial Testimony

B. The Amount of Compensation

C. The Expert is Compensated for Time not Opinions

*Make sure you ask rate charged by ALL professionals in a case, especially the rate charged by your opponent’s treaters and experts.