"So You're Going to be an Expert Witness"

AAFS Annual Meeting

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I. MEDICAL CONSULTATION AND PRE-TRIAL PREPARATION

It is a well-accepted fact that medical consultation is required in a great percentage of civil cases (approximately 70-80 percent).

On many occasions, especially in cases involving complex, controversial, subtle, or sophisticated medical-legal questions, the attending physician may be either unable or unwilling to render all the required expertise that the trial lawyer needs to properly and thoroughly review and evaluate the case. Of course, in medical malpractice actions, it is always necessary to obtain outside consultation with one or more medical experts in order to determine initially
whether there is a bona fide case, and if so, to then proceed to find an expert who is willing to render an opinion and testify in a pretrial deposition or at trial. And, of course, in all criminal cases of homicide, rape and sexual assault and child abuse, pathological and other forensic scientific testimony will be required.

For the medical and scientific consultant to function effectively, the lawyer must keep certain things in mind. All the relevant hospital records and medical reports should be obtained and submitted to the consultant. A narrative summary of the case, investigative reports, depositions, and other relevant materials should also be reviewed and evaluated by the consultant before he proffers an opinion or prepares a written report.

In cases in which a surgical procedure is involved as a relevant and significant issue in the case, the microscopic surgical slides should be requested from the hospital so that they can be reviewed by the consultant. The same principle is applicable, of course, in death cases where a postmortem has been performed. The microscopic autopsy slides should always be examined by a consultant to determine if the diagnoses and microscopic findings have been accurately reported and to review and evaluate the relationship of the original injury or negligent act to the subsequent death.

Often, lawyers submit records “cold turkey” to a consultant, without giving him the benefit of their thoughts, requests, or recommendations. Although the lawyer may be aware of all the specific questions that are involved in the case because of his direct interview with the client, he should appreciate the fact that the consultant might not be able to easily determine what the problem is by simply looking at the records. In order to save time and make the best possible use of the consultant’s expertise, the lawyer should always submit an outline or a brief narrative summary of the case along with all the medical records and other relevant data. The summary should state what questions the lawyer has in mind, the specific medical problems he would like to have researched by the consultant, and the theories he is considering. On many occasions, particularly in medical malpractice cases and product liability cases involving drugs, the lawyer may already have accumulated data by way of research, interrogatories, depositions, and the like. These also should be submitted to the consultant to facilitate his review of the case and ensure a complete and thorough analysis.

Whenever possible, a preliminary conference with the consultant physician is helpful. Such a discussion may often lead to a better understanding and broader perspective of the medical-legal issues involved in the case.

Whenever feasible and appropriate, the client should always be examined by the consultant, assuming that the consultant is a clinician (e.g., internist, surgeon, gynecologist, etc). This gives the consultant a more direct and personal involvement in the case and also enables him to be in a better position to render an opinion insofar as diagnosis and prognosis are concerned.
Before the consultant submits a final written opinion, the lawyer should see to it that all of the significant, relevant, and controverted medical issues involved in the case have been evaluated by the consultant and make certain that they are referred to in his report.

II. PRE-TRIAL DISCOVERY – STATE AND FEDERAL RULES

After the trial attorney has prepared the case through various means of investigation, consultation with experts, and additional research, the use of the various tools of discovery (in accordance with state and federal rules of pretrial discovery in civil cases) will follow.

Rule 25(b)(4) attempts to standardize throughout the federal courts the procedure, scope, and timing of pretrial disclosure of facts known and opinions held by an adversary’s expert. As the Rules Advisory Committee of the US Supreme Court has noted, effective cross-examination of an expert witness requires advance preparation. A lawyer often cannot anticipate the approach the adversary’s expert will take or the data on which the judgment will be based. Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side.

Although Rule 26(b)(4) permits liberal discovery of the adversary’s experts, it does not allow unlimited discovery. It places certain restrictions on discovery to prevent unfairness to the party who employed the expert. Commentators have noted the possibility that one side could wait until his opponent had employed an expert to testify and, by then using the discovery process, could take advantage of his opponent’s superior preparation to develop his own case.

Other provisions of the discovery rule also apply. Rule 26(b)(4)(A) limits discovery to trial witnesses. Under Rule 26(b)(4)(B), experts retained for research and background consultation, but who will not be called to testify, may be subject to discovery only upon showing that the expert’s knowledge could be obtained by no other means.

Clearly, Rule 26(b)(4)(A) contemplates that, by interrogatory, the opponent will be required to identify the experts who are expected to testify at trial and to state the subject matter on which each expert is expected to testify. Also, the opponent will be required to state the substance of the facts and opinions to which the expert is expected to testify, together with a summary of the grounds for each opinion.

Cases have dealt with what specifically may be discoverable as part of an expert witness’s identity. Courts have required that answers to interrogatories include the name, address, occupation, and the particular specialty of every expert called to testify. Courts have also held that an expert witness’s identity includes the expert witness’s qualifications.
Further discovery of the expert may be sought only upon motion and court order. As a practical matter, each expert should be deposed, but it is generally helpful to the attorney seeking further discovery to first obtain the written information available through interrogatories. The advantage of having a written report prior to taking a deposition is obvious. The attorney is able to plan the deposition or subsequent discovery of whatever nature. The attorney also is able to explore with his own expert the areas of demonstrable weakness in the adverse party’s expert opinions and conclusions of the adverse party’s witness prior to taking the deposition.

Many cases have held that further discovery could be granted by the court only after the parties have completed discovery by interrogatories. In practice, however, the parties themselves frequently waive the rigidity of the requirements of the rule and make the expert available for deposition at any time, if requested.

Although Rule 26(b)(4)(A) provides for further discovery upon motion and court order, no standard for granting the motion is set. Theoretically, a court in its discretion may determine the scope, timing, and manner of further discovery. Moreover, under certain circumstances, the court might permit not only discovery of the expert’s direct testimony, but also discovery to prepare for impeachment at trial and discovery in aid of the discovering party’s own case.

Historically, courts have interpreted statutes permitting a party to be examined as a hostile witness to extend only to eliciting facts known to the adverse witness, but have traditionally refused to compel the witness to testify as to his opinion. Recent cases, however, indicate a trend toward recognizing the right to elicit expert testimony from an adverse party.

Although there remain several jurisdictions that do not permit the adverse party to be cross-examined as to expert opinion, courts are more liberal in allowing such interrogation at pretrial discovery proceedings. This is particularly true in medical malpractice actions where the defendant is a physician. The purpose of discovery is to obtain evidence, and as many courts have stated in their decisions allowing liberal discovery, the plaintiff often has great difficulty in discovering evidence in medical malpractice cases. As a result, the defendant in a malpractice action is required to answer questions posed during discovery proceedings that relate not only to facts within his personal knowledge, but also to his expert opinions based on such facts.

The provisions of discovery are very specific with regard to experts who are not expected to be called as witnesses at the trial. The opponent may agree to permit discovery of the facts known by or opinions held by such experts, but that voluntariness is not frequently encountered. Consequently, it is necessary to show exceptional circumstances that make it impossible or impractical to obtain facts or opinions on that subject matter by any other means.
As a medical or forensic scientific expert consulted by an attorney in a civil or criminal lawsuit, you can only be effective as a witness if there has been thorough and appropriate pretrial preparation. The impact of your testimony in the courtroom will in great measure depend on the care and skill with which you are handled on direct examination.

First, the attorney should make it a point to properly and fully qualify you as an expert, eliciting your credentials, education, and experience. It is surprising how often a trial attorney will fail to properly develop the background of the expert before embarking on a substantive direct examination. With experts who have extensive qualifications, a good start toward winning the case can be accomplished by having the physician recite his professional background in detail for the jury.

Of course, this qualification process should be done in such a way as to avoid making the expert appear to be immodest and pompous. The trial attorney should handle this phase of the trial with a warm and light touch, to help his witness establish a good rapport and a positive relationship with the jury. If the expert has written any articles, done any research, or been involved in some other way with the particular questions at issue, then these should be specifically discussed and elaborated upon fully.

Sometimes, there may be an area of weakness in the expert's background insofar as his or her involvement with the case at issue is concerned. The expert may never have personally performed a particular test procedure that is a factor in the case. It is generally wise for the attorney to have these points mentioned in passing on direct examination, rather than to have opposing counsel raise them de novo on cross-examination. Even though the item might be relatively unimportant, there is no sense in permitting opposing counsel to create an inference for the jury that the expert and the attorney who called the expert as a witness are trying to hide something.

On the other hand, there may be specific points on which the attorney would like to hold back, hoping that opposing counsel will unwisely open the door into an area in which the expert witness can more effectively emphasize and buttress his opinion in response to cross-examination than he would have been able to do on direct examination. Such areas should be considered during the pretrial conference between the attorney and the witness as part of the overall trial strategy.

One of the most embarrassing moments in a courtroom to a medical or forensic science expert witness is when the attorney, who has discussed everything in advance and who has reviewed the line of questioning that was to have been pursued, becomes too ambitious or so enamored with the case that he proceeds to move into areas that are beyond the realm of the witness' expertise, or which cannot be answered unhesitatingly by the expert with "reasonable medical or scientific certainty." This kind of foolish and
adventurous courtroom frolic can prove to be disastrous and may undo all the affirmative impact of the testimony previously presented by the witness.

Occasionally, the attorney may not properly protect his expert witness during a blustering, overly aggressive, hostile, and improper cross-examination. This seems to be particularly true in those instances in which the attorney feels that the expert has had previous experience in the courtroom. The physician or other scientific expert, no matter how experienced on the witness stand, she or he may be placed in the position of having to repeatedly defend himself or herself from an unfair collateral attack. If the expert does this too often, too adeptly, or too aggressively, he or she may soon assume the appearance in the jury's eyes of an adversary in the trial, rather than an impartial, objective, scientific witness. Therefore, I strongly recommend that the attorney be prepared to react as frequently and firmly as required, in order to evoke the judge’s restraint and admonition of an obnoxious, overly aggressive, or personally insulting cross-examiner.

Some attorneys never seem to know when to end their direct or redirect examination of an expert witness. It has been my experience that the most effective testimony is generally that which is given in a concise fashion, covering all the issues involved but not rambling off into other areas of secondary, tangential, and even irrelevant scientific importance. If there are areas of substantive testimony that have been attacked on cross-examination by opposing counsel, which must be reviewed again, perhaps in a different way, or if the expert has been attacked and must be rehabilitated, then obviously, the attorney must undertake an appropriate, detailed, and extensive redirect examination.