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EXPERT OPINION

Selecting the Right Expert Witness for Your Medical Malpractice Case

If you practice medical malpractice litigation, almost every case will require expert testimony to support the positions you have taken in the case. Attorneys sometimes fail, whether it be from lack of time or inexperience, to properly research, vet and select the right expert for the case. And even when the “perfect” expert is on board, an attorney may fail to ensure that the opinions this expert intends to offer are sound and well-supported such that the expert will not be precluded or stricken by the court.

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Medical Malpractice

By Valerie Grove

If you practice medical malpractice litigation, almost every case will require expert testimony to support the positions you have taken in the case. Attorneys sometimes fail, whether it be from lack of time or inexperience, to properly research, vet and select the right expert for the case. And even when the “perfect” expert is on board, an attorney may fail to ensure that the opinions this expert intends to offer are sound and well-supported such that the expert will not be precluded or stricken by the court. Doing the necessary work to select the witness most qualified for your needs and making sure your expert will be permitted to testify at trial will save you time, money and needless worry down the road.

Vetting Your Expert

Before you make the decision to hire a particular expert, obtain his or her CV and read it carefully. Does this expert have the specialized education, training and experience in the specific area of medicine or other profession that you need? Many states require that the expert witness testifying as to standard of care be board certified in the same or similar field as the defendant health care provider. While you should strive to meet that requirement, there are some cases where the procedure or care rendered by the defendant crosses over to other specialties. For example, treatment of acute urinary retention is not specific to one health care specialty. Or a patient developing vascular complications after orthopedic surgery could fall under the purview of either an orthopedic surgeon or a vascular surgeon, such that both experts could opine on the standard of care. See *DeMuth v. Strong*, 205 Md. App.521(2012).

Explore with your potential expert how much time he or she spends on forensic expert work versus his or her clinical and/or teaching practice. Some states, like Maryland, restrict some expert witnesses to no more than a certain percentage of his or her professional time spent on testifying activities. Defense attorneys are not shy when demanding proof via 1099 invoices to prove the number of hours experts devote to testifying and will not hesitate to move to preclude your expert if they run afoul of the rules.

Heading Off a 'Daubert' Challenge

You selected and retained your expert. You provided the expert with all of the relevant factual materials, and the expert has shared his opinions with you. You have reviewed your state’s rules of evidence governing the admissibility of expert evidence and testimony by the trial court. Once

you clear those hurdles, make sure you are familiar with *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Under *Daubert*, a trial judge must determine whether the testimony of the expert has “a reliable basis in the knowledge and experience of the relevant discipline.” *Daubert*, 509 U.S. 579 at 592. Maryland has recently joined the supermajority of states and formally adopted the *Daubert* standard for the admission of expert witness testimony. *Daubert* provides a trial judge with a roadmap to analyze proposed expert testimony before permitting such testimony to reach the jury.

Daubert focuses on the reliability of a methodology to reach a particular result rather than general acceptance. See *Katz, Abosch, Windesheim, Gersham & Freedman v. Parkway Neuroscience & Spine Institute*, 485 Md. 335, 342 (2023). *Daubert* requires the parties and the court to examine “the factors that really do determine whether the evidence is reliable, relevant, and ‘fits’ the case at issue.” See *Daubert* at 647 (citing *United States v. Horn*, 185 F. Supp. 2d 530, 553 (D. Md. 2002)). Your expert’s testimony must be reliable in all aspects. Under *Daubert*, trial courts are required to:

act as ‘gatekeepers’ to ensure that speculative, unreliable expert testimony does not reach the jury ... and they must ‘make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that ‘characterizes the practice of an expert in the relevant field.’

See *Kilpatrick v. Breg*, 613 F.3d 1329, 1335 (11th Cir. 2010) (quoting *Daubert*, 509 U.S. at 597, n.13 and *Kumho Tire v. Carmichael*, 526 U.S. 137, 152 (1999)).

Daubert is concerned not with whether an expert witness is *generally* qualified or the opinions are persuasive, but instead with the *process* used by the witness to come to his opinions and whether that process is sufficiently reliable. If the other side files a *Daubert* challenge to your expert witness, the court may hold a *Daubert* evidentiary hearing to determine if your expert’s opinions are admissible. The factors for the court to consider are:

1. Whether the theory or technique can be (and has been) tested.
2. Whether a theory or technique has been subjected to peer review and publication.
3. Whether a particular scientific technique has a known rate of error.
4. The existence and maintenance of standards and controls.
5. Whether a theory or technique is generally accepted.

It would be prudent for a plaintiff's attorney to inquire with his or her experts in advance of designating those experts whether there exists any reliable, peer-reviewed literature that would support the opinions the expert holds. Under *Daubert*, an expert must base his or her opinions on the facts. The expert is not permitted to come up with a novel theory that is untested and unproven by his or her peers, and the expert must employ a reliable methodology in analyzing the factual data. The expert's opinions must be more than simply mere speculation or conjecture and must extrapolate from existing data. See *Exxon Mobil v. Ford*, 433 Md. 426, 478 (2013).

None of these factors, taken alone, are necessarily dispositive of the issue. However, understand that the *credibility* of your expert is not a factor in the analysis. The court cannot consider the persuasive value of your expert or the level of an expert's experience as this goes to credibility and the weight the jury assigns to the testimony, not to the admissibility of the opinions. Keep in mind, however, that if another expert cannot replicate your expert's analysis, you are unlikely to survive a *Daubert* challenge. The ability to provide peer-reviewed literature that supports your expert's analysis may save the day.

Aside from your expert's standard of care opinions, you will need an expert to testify as to causation. Keep in mind that your expert must provide sound reasoning and underpinning for the conclusions and opinions he or she draws from the factual evidence. Part of satisfying this requirement is accounting for obvious alternative explanations for an injury or causation. Some states, including Maryland, follow a substantial factor causation standard so that an expert, when considering alternative explanations, must be able to opine that the factors they believe were a cause of injury were in fact a substantial cause of the injury, even if there are other alternative explanations.

Conclusion

Select your experts early and make sure you thoroughly vet them. Make sure they comply with any restriction in your state as to the limits of their professional forensic activities. Ensure your expert meets any rule that they be board certified in the same or related specialty as the defendant health care provider. Provide your experts with all of the factual materials in your case so that they have an adequate factual basis for the opinions they formulate. Make sure your experts have considered and accounted for alternate explanations offered by the other side as to standard of care and causation. If there are no studies or analysis in the literature that will back up your expert's opinions and it appears there is literature that directly contradicts what your expert is telling you, strongly consider not using this particular expert. Remember, "Because I say so" will not pass

muster under *Daubert*. Have your experts send you the peer-reviewed literature or studies (and do some research yourself) that can demonstrate the scientific or technical bases of support for your experts' opinions and show that the opinions are sound and accepted in that expert's professional community. These studies will weigh heavily on a judge's determination as to whether to admit your expert's testimony. Proper planning and wise choices as to experts you select will decrease the likelihood that your experts will be subject to a *Daubert* challenge by the other side and increase your chance of winning your case.

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