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MEDICAL MALPRACTICE NEWSLETTER

Fall 2014 Issue

Serving as an Expert Witness

Most healthcare providers have been or will be asked to serve as an expert witness in a healthcare liability action (i.e., medical malpractice lawsuit) at some point during their career. For those physicians and mid-level providers who have not been inclined to accept requests for so-called medico-legal services and for those who are just unfamiliar with the process, this article is meant to explain and provide answers to some frequently asked questions: Why are expert witnesses necessary? What is expected of them? What will their role be in a case where the plaintiff is alleging the defendant committed medical malpractice?

Generally stated, the law requires that a plaintiff prove medical malpractice through expert testimony. Tenn. Code Ann. § 29-26-115. The plaintiff must offer expert medical proof on the standard of care, a deviation from the standard of care, and a causal link between the alleged deviation and the alleged injury. Tenn. Code Ann. § 29-26-115(a)(1)-(3). In response, the defendant must present competent expert proof on all of three of these critical issues. Tenn. Code Ann. § 29-26-115(b). Thus, expert witnesses are necessary for a successful defense to a healthcare liability action.

A plaintiff's expert may have a different opinion as to the standard of care than a defendant's expert -- e.g., ABC antibiotic was vs. wasn't indicated based upon presentation. Or, the parties' experts may disagree as to a causation aspect of the case -- e.g., whether the proposed treatment would have made a difference in the outcome. It is for the jury to decide which parties' expert(s) to believe. In doing so, the jury considers the medicine as presented by the experts, as well as other issues tending towards the experts' credibility and biases.

For example, Tennessee's Court of Appeals recently addressed the discoverability of an expert witness's income from medico-legal services in Laseter v. Regan. In Laseter, the defendant requested the plaintiff's expert's income from serving as an expert witness. The plaintiff's expert had served in 179 cases, and in 96% of those cases, he offered testimony of behalf of the plaintiff. The defendant took the position that the expert's financial information was relevant to bias and credibility, and that plaintiff's expert was a "professional witness." The trial court ultimately excluded plaintiff's expert due to his failure to provide the requested financial information. The Court of Appeals determined it was proper for the trial court to exclude plaintiff's expert. Importantly, the Court limited its holding to the particular facts of the case and left future decisions to the trial court's broad discretion on discovery issues. Thus, expert witnesses are not required to produce their income from medico-legal services as a matter of course. Rather, the courts will consider this issue on a case-by-case basis.

Often times, the expert witness relationship begins with an informal phone call or letter from a party's attorney. The attorney will provide some basic facts of the case and inquire as to whether the healthcare provider will review the pertinent records. If the provider agrees to review the case, the attorney will send the provider the pertinent medical records, pleadings, and deposition testimony for review. The review will be followed by a telephone call or face-to-face consultation with a focus on the provider's opinions regarding the care at issue and any causation issues.

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At some point during the healthcare liability action, counsel for the parties will disclose to the other side the identity of their expert witnesses expected to be called at trial and their expert witnesses' opinions. Normally, each party will want to depose the other party's experts. If the case progresses to trial, an expert may be asked to appear live at trial and offer their testimony.

Of course, serving as a consultant and/or expert witness in a healthcare liability action requires a commitment of time and energy. But keep in mind that retained medical experts are entitled to a reasonable fee for their services (for review, consultation, depositions, and trial testimony). And good attorneys make every effort to schedule consultations, depositions, and trial testimony around the expert's schedule. Most cases advance in a cyclical nature, with brief moments of activity followed by periods of waiting. Reviewing a case may also give the expert new perspective on how to approach a certain type of patient or circumstance.

So, if not previously inclined to serve as an expert in a healthcare liability action or if you are on the receiving end of a request for medico-legal services for the first time, consider that your thoughts, opinions, and expert testimony may prove vital to the successful defense of a healthcare liability action.

Medical Malpractice News at Rainey ▪ Kizer ▪ Reviere & Bell PLC

Marty Phillips and Amanda Waddell successfully defended an emergency medicine physician in the Circuit Court of DeSoto County, Mississippi. The 79-year-old plaintiff presented to the emergency department complaining of a left hip dislocation following a partial hip replacement three weeks before. During the attempted reduction of the hip dislocation, the patient suffered a femoral fracture, a known risk of the reduction procedure. The plaintiff sued the physician claiming he used excessive force and improper technique. The physician contended the fracture was an unavoidable risk of the procedure. The jury heard testimony from two emergency medicine physician experts and an orthopedic surgery expert. Following deliberation, the jury returned a verdict in favor of the defendant physician.

Amanda Waddell and John Alexander successfully defended an emergency department physician in Shelby County, Tennessee. The 68-year-old plaintiff arrived at the emergency department complaining of severe tongue swelling. Although the physician responded promptly by administering antihistamines and two doses of steroids, the swelling worsened. To prevent airway collapse, the physician ordered epinephrine. The patient then suffered a coronary vasospasm, a known but rare side effect of the medication. During the trial, the jury heard testimony from three defense experts. After deliberating for approximately 30 minutes, the jury returned a unanimous verdict finding that the physician's administering the epinephrine did not violate the recognized standard of acceptable professional practice.