

Medical Negligence Defense

What's been missing?

BY LEE T. NORDAN, MD



Several months ago, I participated in *Cataract & Refractive Surgery Today's* roundtable discussion on medical negligence as it pertains to ophthalmology. The staff assembled an impressive group of experts for the event, ably chaired by Stephen Slade, MD, and published in February 2007.¹

One of the most important and interesting aspects of the proceedings for me was the strength and openness displayed by several of the participants who described in detail the trials and tribulations of defending a lawsuit, especially with such onerous sums of money in question. As I reviewed the transcript for a final check of my remarks, I realized something was missing in the defense of these fine doctors.

When asked about the expert witnesses for the defense, all of the doctors said they were satisfied with the performance and testimony of these individuals, whom the physicians had chosen. The verdicts in these cases, however, went against the surgeons. I think what is missing here is an awareness by the defendants and their defense expert witnesses of the adversarial system of justice practiced in the US. It demands that the information offered to the jury by the plaintiff's expert witness not only be rebuffed but discredited. Doing so entails casting doubt on the qualifications of the plaintiff's expert, a practicing physician, so that the jury will not believe his testimony. The process is not about rage or histrionics. Neither is it a scientific or surgical discussion. Rather, the point is to convince the jury that the defending surgeon made the best decisions he could under the circumstances and that the plaintiff's concept of practicing medicine is not realistic.

WHO IS THE PLAINTIFF'S EXPERT?

Does the plaintiff's expert perform a significant number of surgeries in the area under consideration, and can he prove it to the jury? Has he published relevant material? Does he often testify in medical negligence law-

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suits, and does he generally side with the plaintiff? Why does he testify? All of this information is necessary to understanding who the plaintiff's expert is.

Additional important questions are as follows. Is the plaintiff's expert dealing with theory or the care of patients in the real world? Is he jealous of the defendant's success as a surgeon? Has the plaintiff's expert experienced surgical complications, and, if so, what was their nature? No expert operates without any complications ever. If he has encountered problems, why didn't he do things differently at the time of surgery in order to avoid the same complication as your surgeon? Did he consider himself guilty of negligence when the complication occurred?

HARDBALL

My experience as a defense witness is fairly extensive, including four federal trials that concerned patent infringement as well as issues of medical negligence. I have learned that doctors talk science, and the jury neither cares nor understands. Jurors care about the *human* side of the equation. Does the defendant look at them when responding to a question, or is the robot on the stand most likely guilty of not trying his best for the patient? Surgeons must learn to function within our legal system.

I know all of the defense's expert witnesses in the high-profile cases described in *CRSToday's* recent roundtable discussion, and I respect all of them tremendously as individuals and ophthalmologists. They are willing to attack a plaintiff's expert on intellectual

grounds, and they rarely lose such arguments. They are so decent, however, that perhaps they are not willing to demolish the credibility of a plaintiff's expert witness, because they view that action as a type of personal attack.

The plaintiff has an emotional story, the plaintiff's attorney skillfully plays hardball, and the plaintiff's expert seems to be sanctified. In contrast, the surgeon talks about science, and his attempt to defend himself appears self-serving. I therefore believe that the defense's expert witness must not only nullify any scientific arguments by the plaintiff's expert but also discredit him and his testimony in the eyes of the jury. Fight back!

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CONCLUSION

If a plaintiff's expert witness is willing to tell the defendant that he is incompetent, then the latter should be ready to do likewise. As I see it, the plaintiff's expert witnesses currently defend themselves over some scientific issues for a few hours and leave the courtroom without heartburn. It is the responsibility of the defense's expert witnesses to turn up the heat. Otherwise, refractive surgeons will continue to lose many medical negligence cases that, perhaps, could have been successfully defended. ■

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1. Slade SG, Krafczek A, Brint SF, et al. Lawyers, guns, money, & medicine. *Cataract & Refractive Surgery Today*. 2007 February;7:2(suppl). Available at: http://www.crstoday.com/PDF%20Articles/0207/0207_supp_legal.pdf. Accessed March 12, 2007.

WHAT DO YOU THINK?

What do you consider to be the major issues facing refractive surgeons today? Is there a topic that you would like to broach for discussion? Share your suggestions and feedback with Lee T. Nordan, MD, at the e-mail address listed at the end of his article.