Working as an Expert Witness

What to do when an attorney calls.

BY C. GREGORY TIEMEIER, ESQ

A former client who became my treating ophthalmologist was doing my semiannual eye examination. At the slit lamp, he commented on a long-past trial in which I had represented him and my cross-examination of the plaintiff's expert witness.

"I'd like to see how you'd do cross-examining me sometime," he said. "I think I'd hold up pretty good."

I agreed, because I knew him to be an excellent witness—charismatic, knowledgeable, and fast on his feet. The opportunity arose sooner than I had imagined, and we found ourselves in the courtroom as adversaries over his standard-of-care criticisms of my client in a LASIK malpractice case. He was excellent on the direct examination by the plaintiff's attorney, as I thought he would be, but he did worse on cross-examination than he had anticipated. My client won the case. At my next eye examination, we discussed what he had done right, what he had done wrong, and how he could do better the next time. Some of that conversation, and more, is reflected here.

SHOULD I ACCEPT THE REQUEST TO EVALUATE A CASE?

As a physician, it benefits you to experience the medicolegal arena first as an expert, not as a defendant. The encounter is educational, both legally and medically, and it gives you a familiarity with the legal system that may be advantageous if you are sued in the future. One emergency department doctor commented to me that, a month after reviewing a pulmonary embolus case with an unusual presentation of signs and symptoms, he encountered the same constellation in a young female patient. He said, unequivocally, that the only reason she was alive was his review of the prior case. I was not surprised, because the cases that make it to litigation are often "outliers," so they offer an education to the expert he or she might not otherwise get.

"As a physician, it benefits you to experience the medicolegal arena first as an expert, not as a defendant."

Many physicians feel uncomfortable accepting an invitation to review a malpractice case for a plaintiff, because they view doing so as a betrayal of their colleagues. Part of this feeling may stem from the incorrect assumption that their job is to support the case of the person retaining them. It is not. An expert's job is to give an impartial opinion of the propriety or impropriety of the defendant's care, whether the expert is working for the injured plaintiff or the defendant doctor. A plaintiff does not benefit from a "helpful" expert who is destroyed at trial because his or her opinions are not supported by evidence-based medicine. Many states have a "loser pays" rule, so the losing party pays the winning party's trial expenses, which routinely exceed $40,000 in malpractice cases.

Reviewing cases for plaintiffs actually helps the medical community, because the attorney and injured client receive an unbiased opinion from a real practitioner, not a "hired gun" who will criticize anything for a price. Most reputable plaintiff's attorneys prefer a frank assessment of their cases, not an enthusiastic cheerleader who will lead them down a blind alley. These attorneys do not get paid unless they win. One witness I ran into many times repeatedly testified (unsuccessfully) that simultaneous bilateral refractive surgery was not within the standard of care, because it was not what

> "Your evaluation should be impartial and based on evidence. It should not be an effort to reform the malpractice system by defending bad care."

he did. After one deposition, we had a frank discussion that started with his saying, "You really made me look bad in there." I pointed out that his practice, while reasonable, was a minority position and that, when testifying about the standard of care, he needed to consider what other doctors were doing, not just his own practice. His is a common mistake. Think about what is discussed at meetings, on listservs, and at journal clubs, not just your own approach.

Doctors also need an accurate evaluation of their cases when they are sued. I once called a practitioner to review a case for my doctor client and was informed, "I don't do that kind of work." Two months later, I got a new case in which that demurring doctor was now a defendant. I resisted the urge to say that I hoped other doctors were not as reluctant to get involved as he had been.

Again, your evaluation should be impartial and based on evidence. It should not be an effort to reform the malpractice system by defending bad care.

EVALUATING THE MEDICAL RECORDS

To avoid the bias of hindsight, for the initial review of records in failure-to-diagnose cases, I only send the part of the chart leading up to the diagnosis, not the diagnosis itself. As an expert, you can ensure that your approach is unbiased by asking the attorney not to tell you the outcome of the case (or, if possible, whom they represent) and initially to send only the records of the care you are evaluating. Additional records discussing the outcome may be sent later so that you can evaluate causation.

Review all relevant portions of the chart before providing final opinions or testifying. Attorneys will sometimes economize by giving you only limited records. You will be the one defending your position at deposition or trial, however, so make sure you have the information you need. Ask the attorney about subsequent examinations, consultation reports, and records of therapy so you have the whole picture.

Also consider the state of knowledge at the time the care was rendered. In 2002, there was almost nothing in the ophthalmic literature regarding ectasia after LASIK surgery. In April 2005, three of the five keynote speakers at the American Society of Cataract and Refractive Surgery's annual meeting in Washington, DC, addressed the topic. Such is the rapid evolution of medical knowledge. Numerous lawsuits arose from ectasia, and I routinely had to remind reviewing experts to base their evaluations on what they knew when the care was rendered, not their current knowledge. Applying hindsight may make you feel smarter, but it is not fair to the defendant.

MISCELLANEOUS OBSERVATIONS

Your notes, marginalia, and communications with the attorney are usually produced to the opposing side. Do not play devil's advocate or use strong, unprofessional language in your evaluation of the case unless you feel comfortable telling six people in court why the opposing expert is an "imbecile."

Do not write a report unless asked to do so by the attorney retaining you. The effort is time consuming and expensive, and it may be unnecessary. Moreover, an uninformed comment in writing may expose a weakness in your understanding of the case, a problem that could be avoided by first discussing the issue with counsel.

Communicate with the attorney. Ask questions. Clarify vague areas. Find out if deposition testimony addressed issues that are not in the records. What did the plaintiff and defendant say in their depositions? The defendant might have a reasonable explanation for his or her actions that you did not consider. The plaintiff might have additional data that the doctor's chart does not reveal. "Don't ask, don't tell" is not an appropriate policy for medicolegal review.

Finally, stay true to your opinions. Unless the attorney provides previously unknown or overlooked data or analysis, do not fall into the trap of modifying your opinions to be "helpful." Cross-examination in deposition or trial will likely root out your real opinions. Never compromise your integrity. ■

C. Gregory Tiemeier, Esq, is a shareholder in and president of Tiemeier & Stich in Denver. Mr. Tiemeier may be reached at (303) 531-0022; gtiemeier@tslawpc.com.

CONTACT US

Send us your thoughts via e-mail to letters@bmctoday.com.