Expert Witness Advice: How Do I Get Out of a Case?

“The attorney told me I would never have to testify. Now I found out it is going to trial! I don’t want to go.” Have you ever heard this complaint from an expert? Ever made that statement yourself as an expert?

I’m Pat Iyer and this is Iyer’s Insights, one of our twice weekly Legal Nurse Podcast shows.

Responsibilities of an Expert Witness

An expert enters into an agreement with an attorney when he or she agrees to review the case. The understanding is that if the expert has no conflict of interest and finds he or she can support the attorney’s side of the case, the expert agrees to be part of the case, including testifying if the case goes that far.

Conflict of Interest Check

If you are an expert or work in a legal nurse consulting practice or expert witness referral service, you should do a conflict of interest check as soon as you are approached about a case. This means your record keeping system must be up to date to show which cases you have been involved in.

The expert cannot accept a case that he or she has already reviewed for the opposing counsel. The expert also needs to be sure the defendant is not a current employer, or another facility that is part of the same chain as the employer’s facility.

For example, a healthcare conglomerate may own several hospitals in a state. The expert should not agree to serve as an expert involving another hospital within the same corporate structure.

At times, an expert finds out partway through reviewing a case that he or she knows one of the defendants.
You might have heard of the defendant but never met him. Or you may have gone to nursing school with the defendant. If you are the expert, the best way to handle this is to let the attorney know of the potential conflict and determine if it is a big enough issue to preclude you from going further with the case.

**Discovery Deadlines**

Each case is affected by discovery deadlines. The judge is typically the one who sets the deadlines with attorneys on both sides. The discovery period gives the attorneys the opportunity to seek information from each side, file motions, take depositions and get reports from their experts. (In some states, experts are neither named, deposed, nor prepare reports.) Once the discovery deadline has passed it is very difficult for an attorney to substitute one expert for another.

**Attorney Behavioral Issues**

Regardless of how much an attorney believes a case will settle before trial, attorneys are not gifted with a 100% accurate ability to foresee the future. Factors the attorney could not predict can derail the settlement discussions. While it is tempting to believe an attorney when she says the expert will never have to testify in court, “it ain’t over til it is over, and the deal is done.”

Let’s stop for a moment. This is Pat Iyer. There is a lot at stake in medical malpractice cases. You want to do your best. I put together a book specifically for LNCs who are expert witnesses or considering taking on this rewarding role. It is called *How to be a Successful Expert Witness.*

Use this book to read through, refer to, and consult to gain a greater understanding of the role of the expert witness. I urge you to approach being an expert on a case as a tremendous opportunity and a huge responsibility. Engage in your work with
professionalism and commitment. The attorney and his client are counting on you.

This book draws on my experiences both as an expert witness and one who has trained hundreds of experts – nurses, physicians, and a variety of healthcare professionals. Order your copy at http://LNC.tips/expertwitness and use the code listened to get a 25% discount on this book.

Now let’s return to the show.

**Withdrawal of an Expert Witness**

I’ve encountered expert witnesses who got into a case and then decided they wanted to withdraw. It is essential to understand when this is allowable.

Suppose you are a liability expert and get new information that changes your opinions so that you cannot proceed with the case. Have a frank discussion with your client to discuss the concerns. The sooner you recognize that you cannot support the attorney’s position, the better.

Let’s say all is going well. You can support the attorney’s position and then you have a tough deposition. I recall one expert who was decimated in her deposition. She called me as she was driving home and was crying so hard she could not see the road. I asked her to pull over and I literally talked to her so she could safely get home. The attorney was on the other line calling me about her and after hearing how upset she was, he decided to withdraw her from the case. “Nice lady”, he said, “but not cut out for this work.”

That’s an extreme example. Some expert depositions will go smoothly and others are very difficult. This comes with the territory of being an expert. The feelings an expert gets when going through a long arduous deposition is not grounds for withdrawing from a case.

How about you don’t like the attorney? You might say, “I don’t want to testify for him. He was not nice to me. He was gruff when we were finalizing the report.” You may feel like this, but this is not a sufficient reason to withdraw from a case. Get over it.
Attorneys are like everyone else who works in a high-pressure field. They can be very charming and they can be short tempered. Your job as an expert is to rise above your irritation with the attorney and to be a professional. Do your best to ignore your feelings and remember what is at stake.

What factors do allow an expert witness to withdraw from a case? There are a few.

- A life-threatening illness might be one.
- Another might be if you took a job at the defendant facility after you reviewed the case.
- The refusal of the attorney to pay the expert’s bills might be another, after all attempts are made to resolve the issue. (Few attorneys would risk losing an expert over a billing issue.)

However, without a legitimate reason, for example, a plaintiff expert witness who fails to appear in court may cause the judge to allow a defendant to be dropped out a suit.

**Expert Witness Advice: Possible Repercussions for the Expert Witness**

What are the repercussions for an expert if that happens? Legal remedies may vary from state to state and also based on the reactions of the attorney. You could face these consequences:

- Receive a subpoena to appear in court. If you live in the same state as the courthouse, the judge has the authority to demand that you appear in court. You cannot ignore a subpoena.
- The attorney could demand a refund of all the money he paid you to serve as his expert. That would actually be a mild consequence compared to the next consequence:
- You could be sued by the attorney for breach of contract. You agreed to serve as an expert. You did not fulfill your obligation. The attorney could demand money from you personally or your insurance carrier to cover the attorney’s loses.
- You could lose your expert witness practice. Attorneys talk to each other. When they are angry with an expert, they spread the word within their active network.
Suits against experts are rare; you don’t want to see your name associated with a Complaint. Having a professional malpractice policy with an expert witness rider is a good investment for peace of mind.

But the best safeguard is to be mindful of your obligations. Be professional, be prepared, arrange to get time off to go to court, and do the best possible job you can.

Remember that the lives of many people are affected by a suit: the facility’s staff, insurance carrier, defendants, their families, plaintiffs and their families, and attorneys and their staff.

You don’t see all those people when you enter the courtroom to testify, but all are affected by the outcome of a suit. Expert witnesses function in a serious important role within this complex and high stakes environment. Once you take on this role, be mindful of your responsibilities.

Be sure to get a copy of *How to be a Successful Expert Witness* – perfect for any LNC who is an expert or who is thinking of becoming one. Use the link http://LNC.tips/expertwitness and use the code listened to get a 25% discount.

You can receive the transcripts of our podcasts by signing up at http://LNC.tips/transcripts, and refer back to our audio shows or skip listening and read instead.

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