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Integrity, compassion & education

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BOARD CERTIFIED EMERGENCY PHYSICIAN & EXPERT WITNESS

Thank for tuning in to The KMG Blog. In these short essays, I will be sharing pearls and nuances from my last 15 years being a busy expert witness (“EW”). The aim is to help educate both attorneys, and physicians, in a very niche area of overlap that exists between our professions. I felt this necessary because I have seen a huge amount of variance in practice on both sides, some of which is more/less effective than others. Today’s first topic, after a brief introduction naturally, is entitled *Choosing an Ethical Expert Witness*. The reason for this title—and the blog in general—is because the law and justice at large benefits greatly from the coordinated efforts of our professional integrity and our duties to advocate on behalf of our clients/patients. The law suffers when we do not deliver our highest standards as professionals, and I have seen a wide variety of non-uniform approaches to expert selection, utilization, coaching, opinion writing and testimony at deposition and trial. Some of which is unethical at best and profit-driven only at worst. It is critical for attorneys to understand how to best use experts, and how to vet experts from the start and to realize that forming a relationship with a top expert can yield fruit for many years.

A. Introduction:

By way of introduction, I am a Medical Doctor and an Attending Board Certified Emergency Medicine specialist with 22 years of experience in multiple states and at multiple hospitals/clinical settings with a broad range of acuity and volume. This broad experience gives me a solid handle on emergency care, inpatient hospitalist medicine, and clinic medicine especially with regards to emergencies such as sepsis, stroke, heart attack and almost every form of trauma. I have active and unrestricted Colorado and Kentucky medical licenses and multi-state DEA certificates. I have never personally been named in a lawsuit, somehow beating the odds for a veteran, 50 year old, battle hardened ER doc.

I received my Medical Degree in 2003 from Tulane University School of Medicine with honors. I served my Internship and Residency at Akron General Medical Center in Akron, OH. I have been Board Certified in Emergency Medicine since 2008. I have worked in a teaching capacity, including the oversight and supervision of medical residents at several points in my career. I also served on UHealth’s Peer Review Board in Fort Collins, CO at Poudre Valley Hospital where I was responsible for reviewing and discussing cases and

outcomes with other multi-specialty physicians. We routinely discussed prospective Standard of Care and Professional Expectations.

I have received many professional awards including the Provost's Scholarship to attend Tulane Medical School, Cum Laude at the University of Miami as well as several Honors fraternities including Alpha Lambda Delta. I have also co-authored medical research papers early in my career. For the last 15 years, I have opined on hundreds of matters and have written opinions for both defense and plaintiff. I have testified at many depositions and trials in multiple states and have an active roster of interesting cases I am currently working on. I have received literal *high-fives* after case-ending depositions, made a whole courtroom laugh (including the judge) and have been retained by more than one opposing counsel's deposing team for future matters—the highest form of flattery an EW can attain.

Through the years, I have felt it important to be balanced and look at matters for both sides—blindly when possible. I have turned down opportunities to opine for *both* sides as well. I also do *pro bono* work, especially for *pro se* litigants if their position has merit and frequently to plaintiff's clients when I cannot be supportive and they still need closure and compassion.

B. Experience:

Although at this point, most of my clients are returning attorneys and their partners at several large law firms, I do often take on new clients and cases from time to time. Most attorneys seem to have some experience working with experts, and experts, just like attorneys, have many different approaches to their practice. One thing that I have noticed is a general lack of true vetting by the attorneys that I have been fortunate enough to work with. Attorneys will typically ask me for a review and a *prima facie* opinion. I am not sure if any attorney has ever reached out to my references or performed more than a brief google search about me, or even asked about how my credibility could be challenged. I did have one attorney once ask me for redacted opinions/reports to review so that they could see my writing style and thought process. I thought this was wise.

I have also had the opportunity to see numerous of my colleagues in medicine opine and testify about the same matters that I was looking at. Some experts seem to develop illogical lines of reasoning that are easily deconstructed, some only work for plaintiff for high dollars as “professional experts,” and some experts provide just a very mundane and basic analysis that has little *meat* behind it.

I have also seen and read incredible experts; clear-headed thinkers who have impressed me with their perspicacity and fund of knowledge. Some experts are aces at deposition, some are super likable and relatable with the jury (and opposing counsel attorneys even). Choosing the right expert can help you understand the matter from an experts perspective and can help you avoid wasting resources on matters that don't pass muster. An expert who you can trust is an absolute necessity to a successful litigant.

C. Choosing an Expert Witness:

Because of this wide array of abilities and attributes, and because a good and ethical expert can serve the court and the interest of justice, it is critical for attorneys to be able to both *choose* and *utilize* their experts in the most efficient and productive ways. Here are some pearls that attorneys, both young and old, can benefit from when selecting the right expert for their case:

1. Interview your expert - All experts should be ready to have a 15-20 minute off-the-clock conversation about their general approach and work flow. If possible, ask for a blind review (the expert usually does not know if you are plaintiff or defense until you declare). Ask the witness if they've been sued, and ask if they have ever been reprimanded. Ask how their credibility might be attacked, and how they will respond in deposition or trial? Importantly, ask *why* they do EW work. Ask what percent of their income is derived from such work. There are no hard-set right or wrong answers here, it is more about *how they answer*, and how *you* feel about their answer. Trust your gut. Are they relatable? Are they likable? If you were on the jury, would you *trust this expert*? There are many directions you can go here, but I would also ask a prospective expert how they would define *Standard of Care*. They better nail this one on the spot, and it better comport with standard definitions and be easy to understand as a concept. *These* questions will help you discern top experts and raise red flags early. Don't trust, verify.
2. Ask for redacted work product and ask about current cases they are working on. A good expert is generally experienced and has learned how the legal system works. If your case is important, it is best not to use an inexperienced expert; let other attorneys *train* EWs. Does this expert's written opinions flow clearly and logically? Are they concise and persuasive? Are they stoic and mechanical? If you were sitting on the jury and you *read* their expert report, would you generally follow it? Would you be bored out of your mind? An expert should be happy to share prior redacted work product with prospective attorney clients.

3. Ask for a Fee Schedule, Testimony History and CV. Ask for 2-3 prior attorney references or ask for testimonials about the expert. Call these references; ask them how punctual the expert was, how they performed in deposition and trial, what was the attorney's overall "grade" for the expert. Obviously, you want an A+ expert, and these top experts are generally highly ethical. The reason for this is that experts who do not have strong integrity and can support any opinion often end up being torn apart by excellent opposing counsel EWs and by logic itself. It is absolutely essential to choose an ethical expert who is effective at communicating and experienced in both medicine (with at least 10 years of full-time work in their field) and the legal process).
4. Ask your expert how they would approach the matter for the other side (obviously, do this over the the phone or in person). Again, listen to *how* the expert deals with these sorts of questions. Does the expert know if *loss of chance doctrine* is considered in your state? Are they familiar with general formats of opinions? For example, if you want an affidavit vs. a declaration vs. a medical report. The EW should be familiar with these formats and need little to no instruction.
5. Ask your expert if the matter is *black or white* or if there is *wiggle room or a grey zone*. This is very important for understanding the medical care and how standard it was or wasn't. We can always think about *reasonableness* in what I like to refer to as "*a hundred doctor*" problem: If given the same set of variables, practice environment, training, etc. prospectively, how many physicians would have approached the care in the same way? If it is zero, you have a black or white case on your hands, if 25 out of 100 physicians might have practiced the exact same way, then you have a "reasonableness of care" and a grey zone. I typically illustrate this dynamic with my attorney clients to help them see if there was a breech in the standard of care. Your expert should be able to answer this in broad strokes and explain persuasively why and how they came to that conclusion.
6. Avoid experts that only work for one side. I have encountered several 99% plaintiff experts that will take just about any case, hold or manufacture non-logical opinions that are easily refuted, and are slippery under deposition. Only doing work for one side consistently shows a clear bias and can become a massive Achille's Heel for your case.
7. **When you find a good expert, keep them.** Use them in your firm if possible and use them as consultants and strategists. Use them to help develop deposition questions: "Doctor, what questions would you think to ask in this upcoming deposition?" I have frequently helped attorneys find lines of

reasoning that they might not have considered vis-à-vis medical decision making or prospective treatment and documentation. Most of my work at this point is with the same attorneys that run cases by me regularly. In medicine, we like to say ***the enemy of good is better***. If you find a great expert, utilize them and their intellect.

D. Final Thoughts:

In future KMG blog posts, we can discuss how to best utilize your expert strategically after you have chosen them—for much more than a written opinions and testifying. We can also discuss coaching your expert, how to best depose different types of experts, what experts need the most to be as effective and efficient as possible, and how to make sure your expert understands how *law differs from medicine* and why understanding these crucial differences can truly help your position.

At the end of the day, garbage in, garbage out. If your case matters to you and your firm, invest the time to find a solid gold expert and always choose an ethical and experienced expert who is relatable, knowledgeable and hopefully unflappable under testimony in deposition and in the courtroom.

I wish you much success in your professional careers, and I can always be a resource for my colleagues in Medicine and Law. We became professionals to fundamentally help people, and it is a great honor and privilege to have worked so closely with some of the best and brightest attorneys (and physicians) that society has created to help promote and enforce the greater good.

In health and happiness,

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