5 Tips for Med Mal Expert Testimony from a Hot Seat Veteran

By Matt Diaddigo, Senior Technology Advisor

As a presentation technology consultant, I have been sitting in the hot seat for almost 25 years. I average one trial a month with about 75% being medical malpractice (med mal) cases. I work with both plaintiff and defense counsel, and I often serve as a one-person focus group by providing a juror's perspective during witness prep and trial.

As such, I have seen the good, the bad, and the ugly from expert witnesses in med mal cases. Below are five key observations based on my courtroom experience.

1. Jurors assess expert credibility in their own way.

Certainly, the expert's credentials lend authority, but what else matters? Fellowship training? Board certification? An extensive CV? While these criteria are important, the credibility of a medical expert from a juror's perspective can be framed by one question: "Would I want to be treated by this person?" Your expert may be the world's leading authority on a particular subject, but if they are an ineffective communicator—or worse, speak condescendingly to the judge, counsel, or court reporter—they will quickly fail the previous test.

Consider this the trial version of bedside manner. If an expert lacks "courtside manner," jurors will be less receptive to their opinions. While subject matter knowledge qualifies a person to be an expert, intangible attributes such as empathy, kindness, respect, and even humor can determine whether jurors want to believe what an expert has to say. Knowledge and experience do carry equal weight with the jury; however, the witness's softer qualities may tip the scales in favor of credibility.

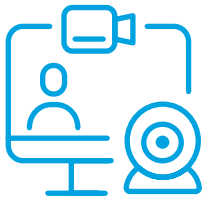
For example, say the plaintiff's expert is a Johns Hopkins-trained fellow with 25 years of distinguished clinical experience and several teaching awards. The defense expert, a Cleveland Clinic-trained fellow, has 30 years of experience and has written dozens of peer-reviewed articles and book chapters. With comparable credentials, the expert with the better courtside manner will carry the day.

2. Having an expert testify live in court is preferable, but there are alternatives.

Years of trial experience inform my opinion that face-to-face expert testimony contributes to higher credibility. When an expert is not in the same room as the jurors, their ability to take in visual cues is somewhat limited, and much of the expert's non-verbal communication gets lost.

Seemingly innocuous events like watching how the witness approaches the stand can be telling. Does the expert have an air of confidence? Are they overly confident? Once they take the stand, how do they interact with the jury? Do they look at the jurors or ignore them? Are they overly solicitous? How is their posture? Do they fidget? Are they wearing an expensive watch? Jurors observe these non-verbal details to evaluate an expert's credibility.

Ideally, every expert would testify live in the courtroom, but that is not always possible. Fortunately, technological advancements have made it practical and cost-effective to present expert trial testimony through live videoconferencing or pre-recorded video deposition.



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There are strategic benefits and considerations to each of these options. For example, having a video deposition available to play for the jury can provide some scheduling flexibility, and it reduces prep burden. However, if the expert testifies live via videoconference, that means opposing counsel will not have prerecorded testimony to review prior to trial. While each of these options has advantages and disadvantages, the quality and overall juror experience can be significantly influenced by the capability (or incapability) of a trial technician.

3. The best experts are good teachers.

I work on a lot of birth injury trials. These cases can be challenging because there is often a large amount of information to offer jurors. Before they can grasp and consider the evidence, jurors need to understand complex medical procedures and human anatomy.

The evidence itself is complicated as well. Medical records like nursing flow sheets or labor and delivery records can be hard for a layperson to digest. Imaging studies, including MRIs and ultrasounds, often need to be put in proper perspective and context to make sense to the jury. Fetal heart tracings are frequently the most critical evidence in a birth injury case; however, viewed in a vacuum, they are just squiggly lines on a grid.

Good experts can teach jurors—in simple terms—what they need to know and how the evidence supports their opinions. They use language that laypeople understand, instead of medical jargon and acronyms. They incorporate analogies to help jurors relate medical concepts to their own knowledge and experiences. They strike a balance between "just enough" and "too much" information. They make the subject interesting by providing personal anecdotes from their training and experience. They include demonstrative aids (more on this below).

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Circling back to fetal heart tracings, the interpretation of the evidence can be somewhat subjective, but there are objective criteria that are used to measure and quantify troubling findings such as late decelerations and/or fetal tachycardia. Skilled experts know how to explain these criteria in a way that makes sense to jurors.

4. The most effective support for medical experts comes from compelling visual aids.

A demonstrative exhibit can be instrumental in helping a jury comprehend expert testimony, especially when that testimony involves intricate subject matter. I know that many jurors are visual learners.[1] I have also noticed over the span of my career that attention spans are shrinking.[2] When jurors do not grasp what they are hearing, they tune out. Effective medical demonstratives explain the facts while engaging the jury—and the entertainment factor is often overlooked by attorneys.

For example, medical illustrations and/or imaging can depict human anatomy, while timelines are a great way to demonstrate a delay in diagnosis and/or treatment (or adherence to the standard of care). Timelines also help an expert stay consistent with the narrative that has been presented in the opening statement. Colorized film renderings, in which a medical illustrator starts with an X-ray (or CT/MRI slice) and illustrates the structures in color, can greatly help jurors understand perspective and appreciate the extent of an injury. Likewise, 3D animations are incredibly effective visual aids.

Video demonstratives also have a remarkable impact. Clips from a day-in-the-life video can help an expert discuss the extent of damages and add weight to the recommendations of a life care planner. Conversely, independent medical examination (IME) and surveillance video are devastatingly effective in proving that a plaintiff is exaggerating an injury.

In addition to making sure that your expert is familiar with any demonstrative exhibit you plan to, give them the assistive tools they need to testify effectively—such as a laser pointer, physical model, telestrator and stylus (a standard part of our med mal A/V trial setup), flip chart with markers, and/or foamboards. Ideally, have your expert oversee the demonstrative creation so they can testify that it was prepared at their direction. At the very least, to avoid admissibility issues, have them review and approve any demonstratives that will be used.

5. You cannot overprepare your expert for cross-examination.

Having seen hundreds of med mal experts cross-examined, I have observed a lot of time spent attacking the expert's credibility: questioning their financial motivation, trying to show that an expert has an agenda to protect their peers, insinuating a cozy (and lucrative) relationship between a lawyer and expert who have a history of working together, etc. I honestly do not know how effective this is. Except for extreme matters, these tangential issues do not relate to the substance of the case. A successful cross-examination is usually focused and efficient, involving only relevant facts and an attorney who is in great command of them (along with the supporting evidence).

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I have also witnessed quite a few cross-examinations go south because counsel tries to overdo it. They spend too much time and energy on a minor issue, or they go too long overall, so any points they may have scored are lost because the jurors have already tuned out. Sometimes they even try to argue medicine within an expert's area of specialization. I have heard many med mal lawyers say that when it comes to experts, you should argue the facts, not the medicine.

Furthermore, I have seen some very effective crosses in which counsel use prior testimony and/or reports to impeach an expert. There is nothing worse for an attorney than finding out that your expert has expressed a conflicting opinion in a prior case. In the same vein, medical experts have been crossed on licensing issues—some real and some not (i.e., clerical errors). No one wants to discover these issues in open court. If I were a trial lawyer, I would assume that an ambitious young associate on the other side is scraping the internet for anything they can use to discredit opposing experts, and I would do the same.

Finally, in terms of handling cross-examination, the best experts are in control. They are prepared. They usually have some experience testifying (but not always). Most importantly, they convey a sincere understanding, appreciation, and respect for the opposing party while still maintaining the opinion that the medical provider did or did not act reasonably.

About the Author

Matt Diaddigo is a Senior Technology Advisor with IMS Legal Strategies. As a seasoned trial consultant with expertise in video production and graphic design, he helps the nation's leading law firms and attorneys use technology to make a memorable impression on decision-makers. Matt's unique experiences and perspective give clients a competitive edge in high-stakes situations. He thrives on the challenge of each new case and loves to work with top litigators to help them succeed.

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