

**Medical-malpractice cases should focus on the facts, not the experts.**

**Don't let the defense make your experts the focus of the case. Make jurors first focus on the facts that are in dispute and then weigh experts' opinions.**

*BY BRUCE G. FAGEL*

Under the law in California and every other state, proof of liability for claims of negligence against a health-care provider requires expert testimony on both standard of care (negligence) and causation. While expert testimony is necessary to defeat a motion for summary judgment, many plaintiffs' attorneys mistakenly believe that expert testimony must be the driving force of the case, and in doing so, play into the defendant's game plan for defending the case. This mistaken focus on the medicine of the case is understandable since any attorney filing any medical-malpractice claim must rely on at least one medical expert to provide confirmation of the validity for a claim of negligence against a health-care provider.

However, from the moment a medical-malpractice claim is filed until the case goes to a jury at the end of trial, the defense will often ignore the facts of the case and focus only on the medicine and expert opinions. Because most defense attorneys are so adept at keeping the focus of almost any medical-malpractice case on the medicine and medical experts, jurors fail to find liability in the majority of medical-negligence cases that go to jury verdict. While medical experts are legally required in medical-malpractice cases, they should not be, and they do not need to be, the focus of the claim.

The role and purpose of medical experts is different at different stages of a medical-negligence claim. Prior to the filing of a claim, at least one medical expert should agree that there was substandard care, but a different expert may be needed on the issue of causation. While providing the medical records to an expert and then waiting for a decision on standard of care and causation is the easiest method for obtaining the required expert opinions, it is not always the best way. Often the opinion of the expert may be affected by the facts of the case, which may not be accurately or completely reflected in the medical records. A focused summary of the important facts of the case, prepared by the attorney, will assist any expert who is asked standard of care opinions. While any such document is discoverable at the time of the expert's deposition and many attorneys are reluctant to provide such direction to an expert, it is better to have a focused expert who relied on the plaintiff's version of the facts than an expert who thinks that their interpretation of the medical records is more important than the facts of the case.

The real purpose of a medical expert involves the issue of causation. But since many medical experts do not understand legal causation (which is often different than medical causation), it is important to provide some direction to the medical expert. With the exception of cancer cases, where there is an extensive body of medical literature on staging and survival statistics that

would form the basis of any expert opinion on causation, in many medical-negligence claims, causation is more logical than scientifically provable. In such cases, the defense will often try to prove that the injury occurred before the patient entered the hospital or that some other medical cause was more important than the cause from negligent care. In order to properly utilize medical experts prior to the filing of a claim, plaintiffs' attorneys must understand that causation in medicine can only compare one factor to a specific outcome, while in most medical-negligence cases, the injury or death is due to multiple factors, and the plaintiff need only prove that one factor was a substantial factor in causing the injury or death.

Once a complaint is filed, the case should focus on the discovery of facts that are in dispute. The defense will always try to establish the medical records as the basis for the facts of the case, and then use the "medicine" of the case to focus their experts. However, factual disputes create a problem for the defense since the defense experts may have to concede negligence if certain facts are correct. The best factual dispute is between the defendants, since that would make it more difficult to maintain a united defense. Such factual disputes are rarely evident in the medical records, since every health care provider is advised to never criticize another provider in the medical records.

Therefore, discovery depositions should concentrate on matters not in the medical records, especially conversations or the lack thereof. Finding factual disputes in a medical-malpractice case is more important than having "big name" medical experts. If the only factual dispute in the case is between the plaintiff and the defendants, the defense can often turn such experts into giving up the case by using the defendants' version of the facts.

But a factual dispute between defendants can negate the effectiveness of defense medical experts, and sometimes a defense expert will be forced to admit that there was negligent care although they will try to say that it was not causally related to the injury or death. However, once a defense expert is forced to admit negligence, he or she loses much effectiveness as an expert.

### **Hospital policies and procedures**

One area of pre-trial discovery that can create factual disputes which will negate the defense experts involves hospital policies and procedures. Any expert who reviews the medical records and forms opinions based on those records may be forced to contort the standard of care defense if the care was in violation of hospital policies. When an expert testifies that the care may have violated a specific hospital policy but still be within the standard of care, the jury will usually disregard that expert's opinion.

When the case progresses to expert depositions, the plaintiff's attorney needs to prepare a detailed factual summary to present as hypothetical questions to the defense expert, and that factual summary should emphasize the factual disputes in the case. Many experienced defense experts will anticipate being trapped with such hypothetical questions and will either refuse to admit that anything is below the standard of care, including direct violation of hospital policies, or will admit to negligence in some form but then deny any causal connection to the injury. Either response will allow the jury to focus on the facts of the case rather than the expert's contrived opinion.

## **The trial**

Trial is perhaps the most difficult time for a plaintiffs' attorney in dealing with experts in medical-malpractice cases. Starting with jury selection, the defense will emphasize that medicine is as much art as science, which implies that there is no scientific standard of care, just medical judgment. At the same time, the defense will emphasize the scientific literature (through their experts) that supports their theory on causation. From the outset of the trial, the jury needs to understand that medicine is very much science and that there are recognized standards of care, and that the facts of the case determine whether care is within such standards. With regard to causation, most jurors will draw their own logical conclusions about the relationship between negligent care and injury or death, since they will not be able to comprehend the often obtuse defense theories on causation. A plaintiff will never be able to succeed on the issue of causation without first showing more than sufficient evidence of negligence, which flows from the facts of the case, not the medicine.

For the presentation of evidence, most plaintiffs' attorneys use either the defendants or their experts to present the facts of the case. Few cases and fewer Plaintiffs are appropriate to present the facts to the jury. But in almost any medical malpractice case that involves either hospital negligence or physician negligence that occurred in a hospital setting, one often overlooked group of witnesses can be very effective at trial. These are charge nurses, supervisors, or even hospital administrators who are rarely involved in the actual case. These witnesses are in the best position to place care into context and will often be forced to admit that care did not comply with hospital policies. While such witnesses cannot provide causation testimony, their testimony on hospital policies and procedures in relation to the facts of the case will often trump medical expert testimony on the standard of care, in the eyes of the jurors. These witnesses should be deposed during discovery and then listed as non-retained experts so that their testimony can be presented at trial.

Unfortunately, the jury instructions play into the defense use of experts to defend their case. CACI 505 – Success not required, and CACI 506 – Alternative Methods of Care allow the defense to argue that nothing that the defendants did or did not do mattered much in relation to the outcome. But, in reality, these and other jury instructions simply allow a jury that has reached a conclusion to justify their decision if they find for the defense. Just as the unofficial standard on appeal involves some consideration about who should have won the case, the standard for the jury involves who they think should win, and then they fill in the details. In any case where the jury finds for the defense, the jury will agree with the defense experts on negligence and/or causation. But in any case where the jury finds for the plaintiff, the jury will find the plaintiff's experts more credible. In such a situation, the plaintiff's attorney need only explain why the jury instructions allow the jury to find for the plaintiff. In every medical malpractice case, the jury will try to determine the facts for themselves, and only then will they consider the expert testimony that coincides or agrees with their interpretation of the facts.

If the plaintiff's attorney can keep the case focused on the facts of the case, especially factual disputes, and allow the medicine to follow the facts rather than the other way around, then much of the defense mantra that "the medicine controls the case," can be blunted or even reversed. At trial, most jurors believe that paid experts will say anything because they are being paid for their

opinions, especially in cases where the experts' opinions are diametrically opposed to each other. It makes no sense to a juror or anyone that science can lead to two opposite opinions from the same facts. As the jury is told by the Court, the value of any expert's opinion depends on the facts upon which the opinion is based. If the plaintiff can control the facts of the case, the only expert opinion that will matter is the one that is based on the plaintiff's facts.

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