# THE SELECTION, CARE AND FEEDING OF EXPERT WITNESSES

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## INTRODUCTION

Who do we try cases for? We try our cases for the jury. At the end of the trial, it doesn't matter what the judge, opposing counsel, opposing party or our client think about how we tried the case. At the end of the trial, the only thing that matters is the jury's verdict. We must therefore keep the jury in mind as we select, care for and present our expert witnesses.

The trial lawyer must be the thirteenth juror. The trial lawyer must crawl inside the jury box and ask: What are the jurors thinking about the expert? What are their concerns? What are their expectations? How can we, as litigators, use the jury's concerns and expectations to present expert testimony that is persuasive to them? What are the questions on the minds of the jurors that must be answered?

### A. Jurors concerns about experts:

1. This is going to be over my head, complicated and confusing. I am afraid I will not understand anything this medical expert says.

2. Is this person really an expert?

3. This expert is so educated, he is probably going to be condescending and talk down to us.

4. The expert has bias. He is being paid a lot of money to testify.

5. This is going to be boring.

### B. Whose expert will the jury believe?

In our everyday lives, we are bombarded daily with "experts" who have opposing views, opinions and conclusions. Experts have differing views on the cause of the oil crisis. The meteorologists on Channel 7 may have a different forecast than the meteorologist on Channel 11. How do we in our everyday lives decide which expert opinion to believe? We pick one side or the other and one opinion over the other on three primary factors:

1. Expertise - We look at the expert's training, education and experience.

2. Trustworthiness - We tend to believe the expert who tells the truth based upon consideration of all of the information available. We tend to believe the expert who considered and then carefully and methodically ruled out other explanations. We tend to not trust and therefore not believe experts who have an agenda or a bias.

3. Likability - As with all other witnesses, jurors tend to believe those who are likable. Likable witnesses come from the same locality, are physically attractive, have dynamic personalities, are interesting to listen to and have strong communication skills.

Who were your favorite teachers in high school? They were the ones who made the subject fun to learn, easy to understand and interesting. You started algebra or chemistry or biology class thinking that there was no way you could ever comprehend, learn and understand the subject. The teacher met each and every one of your concerns and you mastered the subject. This great teacher:

A. Made things simple by avoiding too much detail and used logic, clear organization and non-technical language.

B. She demonstrated early on that she actually knew what she was talking about.

C. He talked like a normal human being.

D. They were fair minded and reached conclusions based on good, solid information and objective analyses.

E. They were not boring.

When selecting the expert, the trial lawyer must make certain the expert will satisfy each of the juror's concerns and expectations. How successful we are in accomplishing our ultimate goal begins with the selection, care and feeding of the expert witness.

## I. WHAT KIND OF EXPERTS ARE NEEDED?

### A. Liability

Plaintiffs always require testimony from a medical expert on standard of care and causation. Medical experts are needed for Chapter 74 reports and without expert witness testimony in a medical malpractice case, it is very unlikely that your case will get to a jury. The question is what type of expert is needed and how many experts are required.

In my opinion, the best scenario is one expert who is qualified to give opinions on both standard of care and causation.

### B. Qualification of Experts

#### 1. Who Qualifies as an Expert

Civil Practice and Remedies Code Section 74.351(r)(5)(a) defines an "expert" to mean "with respect to a person giving opinion testimony regarding whether a physician departed from accepted standards of care, an expert qualified to testify under the requirements of Section 74.401."

Section 74.401(a) provides that "[i]n a suit involving a healthcare liability claim against a physician for injury to or death of a patient, a person may qualify as an expert witness on the issue of whether the physician departed from accepted standards of medical care only if the person is a physician who:

**(a) is practicing medicine at the time such testimony is given or was practicing medicine at the time the claim arose;**

**(b) has knowledge of accepted standards of medical care for the diagnosis, care, or treatment of the *illness, injury, or condition involved in the claim*; and**

**(c) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care.**"

The definition of and qualifications of an "expert" witness in a suit against a physician are identical in all respects to former Article 4590i, Section 14.01(a). The test to determine whether a medical expert is qualified to render opinions is "rooted in the expert's training, experience and knowledge of the standards applicable to the *illness, injury or condition involved in the claim.*"[1] An expert witness has never been disqualified solely on the basis that the expert does not have a practice identical to the defendant. Experts have been disqualified because they failed to *say* they were an expert who possessed knowledge of the subject.

While the proponent of expert testimony has the burden to show that the expert possesses special knowledge as to the very matter on which the expert proposes to give an opinion, what is required is simply that the offering party establish that the expert has "knowledge, skill, experience, training or education *regarding the specific issue before the Court* which would qualify the expert to give an opinion *on that particular subject*."[2] In

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[1] *Blan v. Ali*, 7 S.W.3d 741, 746 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (emphasis added) (referencing Tex.Rev.Civ.Stat.Ann.art.4590(i), Section 14.01(a)).

[2] *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1995); *Ponder v. Texarkana Memorial Hosp.*, 840 S.W.2d 476, 477-78 (Tex. App.–Houston [14th Dist.] 1991, writ denied) (non-physician

addition, when a party can show that **a subject is substantially developed in more than one field**, testimony can come from a qualified expert in any of those fields.[3]

### 2. To Be Qualified, the Expert Does Not Need to Be a Specialist or Be of "The Same School of Practice" as the Defendant-Physician

The physician serving as the expert witness need *not* be a specialist in the particular branch of the profession for which the testimony is offered.[4] For example, an orthopedic surgeon can testify as to the standard of care for a radiologist because **the two professions work closely together, and their specialties are intertwined.**[5] Likewise, a general surgeon is qualified to testify regarding the standard of care for post-operative procedures performed by a gynecologist because **post-operative procedures are common to both fields.**[6] Because the determination of an expert's qualifications under both Rule 702 and section 14.01(a) is based on knowledge, training, or experience, it is incumbent upon the plaintiff in a medical malpractice case to present expert testimony of a medical doctor with knowledge of the specific issue which would qualify him or her to give an opinion on that subject.[7]

Additionally, the courts have held that a medical witness who is not of the same school or practice may be qualified to testify if **he or she has practical knowledge of what is usually and customarily done** by other practitioners under circumstances similar to those that confronted the defendant charged with malpractice.[8] The Texas Supreme Court has made it clear that if **a subject of inquiry is substantially developed in more than one field**, a qualified expert in *any* of those fields may testify.[9] Likewise, the courts have held that if **the subject matter is common to and equally recognized and developed in all fields of practice**, any physician familiar with the subject may testify as to the standard of care.[10]

### 3. How an Expert Qualifies

Civil Practice and Remedies Code Section 74.401 and 74.402 state that a person may qualify as an expert witness if, among other things, the person:

> (2) has knowledge of accepted standards of care for...the diagnosis, care or treatment **of the illness,**

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with a doctorate in neuroscience who conducts research on the causes of neurological injuries and teaches neurophysiology, neuroanatomy and neurochemistry to M.D.'s and Ph.D.'s may qualify as a medical expert on the cause of brain damage); *Bilderback v. Priestley*, 709 S.W.2d 736, 741 (Tex. App.–San Antonio 1986, writ ref'd, n.r.e.) (in a trial against a medical doctor who prescribed physical therapy, a non-physician professor of biophysics who taught physical therapy students to testify about "the mechanics, forces and effects of weights used in administering physical therapy").

[3] *Porter v. Puryear*, 153 Tex. 82, 262 S.W.2d 933, 936 (1953). *See also Hersch v. Hendley*, 626 S.W.2d 151, 154 - 55 (Tex. App.–Fort Worth, 1981, no writ) (Orthopedic surgeon could testify in suit against podiatrist on the standard of care for podiatric surgery since it **"was common throughout the medical profession.")**

[4] *See Hernandez v. Altenberg,* 904 S.W.2d 734, 738 (Tex. App.–San Antonio 1995, writ denied); *Simpson v. Glenn,* 537 S.W.2d 114, 116 (Tex. Civ. App.–Amarillo 1976, writ ref'd n.r.e.).

[5] *See Silvas v. Ghiatas,* 954 S.W.2d 50, 54 (Tex. App.–San Antonio 1997, writ denied).

[6] *See Simpson,* 537 S.W.2d at 116–18.

[7] *See Broders v. Heise,* 924 S.W.2d 148, 152 (Tex.1996).

[8] *See Marling v. Maillard,* 826 S.W.2d 735, 740 (Tex. App.–Houston [14th Dist.] 1992, no writ) (citing *Bilderback v. Priestley,* 709 S.W.2d 736, 740 (Tex. App.–San Antonio 1986, writ ref'd n.r.e.)

[9] *See Broders,* 924 S.W.2d at 152.

[10] *See Garza v. Keillor,* 623 S.W.2d 669, 671 (Tex. Civ. App.–Houston [14th Dist.] 1981, writ ref'd n.r.e.) (infection process); *Hersh,* 626 S.W.2d at 154 (taking a medical history, discharging a patient); *Sears v. Cooper,* 574 S.W.2d 612, 615 (Tex. Civ. App.–Houston [14th Dist.] 1978, writ ref'd n.r.e.) (use of a diuretic).

**injury or condition involved in the claim.**

As seen in the cases cited in II above, it is the "illness, injury or condition involved in the claim" and not the specialty or sub-specialty of the defendant that is the relevant inquiry.

Civil Practice and Remedies Code Section 74.403 concerns qualifications of expert witnesses on causation in healthcare liability claims and requires that the expert be a physician and "otherwise qualified to render opinions on that causal relationship under the Texas Rules of Evidence."

Texas Rule of Evidence 702 provides:

> "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, *a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.*"

A physician who is not of the same school of medicine may be competent if he has practical knowledge of what is usually and customarily done by a practitioner under circumstances similar to those confronting the defendant. See *Ehrlich v. Miles,* 144 S.W.3d 620, 625 (Tex. App.-Fort Worth 2004, pet. denied). Acquisition of this "practical knowledge of what is usually and customarily done by a practitioner under circumstances similar to those confronting the defendant" is not restricted to the expert's medical education and residency.

In *Estorque v. Schafer* 2009 WL 2972892 (Tex. App.-Fort Worth 2009, no pet. h.) the plaintiffs' expert report was challenged on the basis that the expert, a family practitioner, did not have sufficient qualifications in the specialties of nephrology, urology and gynecology to render opinions on the causal relationship between the physician's failure to refer and the resulting kidney disorders and gynecological cysts.

In his report, Dr. Miller stated that he **acquired** his "education, knowledge, training and experience" on the condition involved in the claim through:

A. **Attending classes** that taught the evaluation, treatment, diagnosis and care of patients with the same or similar conditions as the plaintiff;

B. **Acquired knowledge** about the plaintiff's condition **through practical experience**, medical conferences, technical works published in textbooks and journals, consultations with other physicians, communications with hospital nurses, staff and residence, lectures personally given;

C. **Lectures** personally given in conferences, participation in hospitals committees; and

D. **Observation** of nurses and supervising residents that care for and treat patients with the same or similar medical conditions as plaintiff.

The court distinguished *Collini v. Pustejovsky*, 280 S.W.3d 456 (Tex. App.-Fort Worth 2009 no pet.) where the expert was found not qualified to give an opinion on causation when the expert did not state any experience or training regarding prescribing Regalin or diagnosing tardive dyskinesia to support statements about the physician's course of treatment.

In *Leland v. Brandal*, 217 S.W.3d 60 (Tex. App.-San Antonio 2006), *aff'd* 257 S.W.3d 204 (Tex. 2008) the San Antonio Court of Appeals determined that Dr. Gray, an anesthesiologist, was not qualified to provide expert testimony on the causal relationship between the cessation of Plavix

and aspirin and Brandal's ischemic stroke. Following remand, the trial court granted a 30 day extension during which the Brandal's served Dr. Gray's supplemental expert report.

Following denial of his second motion to dismiss based on the supplemental report, the San Antonio Court of Appeals found Dr. Gray qualified. *Leland v. Brandal*, __S.W.3d __ (Tex. App.-San Antonio 2009, no pet. h.). In his supplemental report, **Dr. Gray detailed how he had "acquired knowledge of the causal relationship between cessation of Plavix and aspirin and ischemic stroke**, specifically from seminar training in the areas of hematology, pharmacology and physiology. Dr. Gray noted that:

A. He had **attended many seminars** since entering the practice of medicine that focused specifically on how anticoagulant therapies like Plavix and aspirin are processed by the body, how they affect the body immediately before, during and after surgery and how the body responds when those drugs are discontinued.

B. Dr. Gray noted that he "stays abreast of developments in the field **by reading a number of medical journals** that involve the field of anesthesiology and reads "articles describing how anticoagulant therapies like Plavix and aspirin are processed by the body and how they affect the body immediately before, during and after surgery and how the body responds when the drugs are discontinued."

C. Dr. Gray stated that as a clinical professor of anesthesiology, **he is responsible for teaching residents** "about the effects of anticoagulant and antithrombotic therapies of Plavix and aspirin on blood before, during and after surgery."

D. Dr. Gray explained that in his **"consultation with these patients, their surgeons and their primary care physicians**, he has learned about how Plavix and aspirin work, and how the body and specifically, the blood, reacts when these drugs are discontinued."

The Court of Appeals held that Dr. Gray's statements in his supplemental report regarding his knowledge, skill, experience, training and education were sufficient to enable the trial court to conclude that he was qualified to offer an opinion on causation. The Court of Appeals specifically pointed to statements by Dr. Gray that he had "acquired knowledge about the effects of Plavix and aspirin" through practical experience, attending classes, through technical works published in journal, consultations with other physicians and by teaching medical residents about the risks associated with discontinuing Plavix/aspirin therapy prior to surgery. The court concluded that Dr. Gray's supplemental report demonstrated his qualifications to opine on the specific issue before the trial court and provided a fair summary of his opinion on the issue of causation. The trial court therefore did not abuse its discretion when it denied Leland's motion to dismiss.

## C. Damages

### 1. Earning Capacity

Plaintiff lawyers must always remember that the proper inquiry is not loss of wages; the proper inquiry *is loss of earning capacity*. The proper submission of this issue will always be loss of wage earning capacity in the past and loss of wage earning capacity in the future. An individual's capacity to earn is most often more than what that individual will actually earn. For a general discussion, you are referred to *Southwestern Bell Tel. Co. v. Wilson*, 768 SW2d

755, 763 (Tex. App.-Corpus Christi 1988, writ denied) and *Wichita County v. Hart* 892 SW2d 912, 924-925 (Tex. App.-Austin 1994) reversed on other grounds, 917 SW2d 779 (Tex. 1996).

The client should testify about their educational background, vocational background, physical abilities and emotional health, both prior to and after the injury. Depending upon the facts and specifics of the case, potential experts on loss of earning capacity may include the following:

A. Treating Physician or Physicians can testify concerning physical limitations and make a list of the limitations the physician would impose.

B. Physical Therapists are in a better position than physicians to explain physical limitations in the context of activities of daily living. Physical therapists are qualified to testify about the practical effects of injury on an individual's personal, as well as professional life. *Garlington v. National Union Fire Insurance Co.* 697 SW2d 778 (Tex. App.-Beaumont 1985, writ ref'd)

C. Psychologists/Psychiatrists may be able to articulate how stressors and depression caused by injury impact work performance.

D. Pharmacists may testify about the effects of the medication the patient must take.

E. Vocational experts will personally interview the patient and perform a vocational evaluation and assessment. The vocational expert may be able to testify concerning the percentage of vocational impairment, the extent and duration of the vocational impairment and the employment market.

F. Economists to calculate and testify to the present value of the plaintiffs loss of earning capacity as well as the amount of money required to fund the life care plan.

**2. Life Care Planner**

Plaintiffs who have suffered a serious, disabling and permanent injuries should have a life care plan. The life care plan expert may be an individual certified as a rehabilitation counselor or disability management specialist with experience in developing life care plans. The International Commission on Health Care Certification - www.ichcc.org has a listing of 62 individuals in Texas who are certified life care planners.

## II. LOCATING EXPERTS

As discussed in the beginning of this paper, the success of the case will depend upon which medical expert the jury will believe. The medical expert must be someone who the jury believes has expertise, is trustworthy and likable. As you comb through the various sources, focus on these three extremely important characteristics.

A. Subsequent treating physicians. Most often, subsequent treating physicians are reluctant to serve as expert witnesses and many plaintiff lawyers can tell horror stories of how subsequent treaters who agreed to testify were threatened by their own insurance companies. Nevertheless, it is essential that the plaintiff's attorney determine early on the opinions of the subsequent treater. I highly recommend that this conference be held before the notice of healthcare liability claim is sent. It is very likely that the subsequent treater will be deposed as some point in time. The plaintiff's attorney must know what those opinions are going to be before the claim is filed.

B. Expert witness locator services. While these services can potentially make locating experts relatively easy, be mindful that any expert witness acquired through a service will face a full frontal attack on their credibility.

C. Personal referrals. Trusted colleagues on both sides of the bar can be valuable resources for locating experts. Find out who your colleagues have used as well as the names of experts who have been on the opposing side. When a friend of mine who is a defense lawyer tells me of a plaintiff's expert who "kicked my butt" I get a little excited. If a subsequent treater or potential expert declines, be sure to ask for personal recommendations and referrals to his or her colleagues.

D. Databases, verdict reporting services, reported appellate decisions and deposition banks are excellent sources for locating experts.

E. Published literature. This is an excellent source for experts because a medical doctor who has been published in the peer reviewed literature on the very issue involved in the case will be immediately recognized by the jury as possessing unqualified expertise. (Assuming of course that what the expert wrote supports your theory of the case!) Non-peer reviewed/secondary literature such as e-medicine, www.uptodate.com (subscription required), etc.

F. Medical schools. I especially enjoy retaining medical experts from the medical school or residency program attended by the defendant physician.

## III. CONSULTING V. TESTIFYING EXPERTS

The plaintiff's attorney must be the most knowledgeable "medical expert" involved in the case. The plaintiff's attorney must know the anatomy and physiology, the medical principles involved in the particular case, know the relevance and importance of procedures and tests performed, the terminology and how the treatment or lack of treatment caused the injury or death. The plaintiff's lawyer must learn how to "think like a doctor." The plaintiff's attorney must also have a thorough knowledge of what is contained in the medical record including the meaning of each entry and term. Consulting only experts can be invaluable in this regard.

Consultants retained early in a case can assist in the evaluation of the case, the identification of medical issues and retrieval of medical literature. Plaintiff's lawyers who do not have a lot of experience in handling medical malpractice cases will benefit greatly by hiring at least a nurse consultant to evaluate a potential claim, advise on the chances of success, estimating the cost of prosecution and spot defenses to the claim. They may also assist in the preparation of discovery plans, review of materials and be helpful during the deposition of the defendant and the defendant's experts.

Remember that there are two types of consulting experts. Consulting-only experts are those hired as a trial consultant only, are not expected to testify, who have no first hand factual knowledge about the case and no second hand factual information except for knowledge acquired through the consultation and whose work product, opinions, or mental impressions have not been reviewed by the testifying expert. T.R.C.P. 192.3(e), 192.7(d). A consulting-plus expert is a consulting expert who lost his or her status as a non-discoverable expert because the consulting expert's work was reviewed by a testifying expert or becomes a fact witness. T.R.C.P. 192.3(c), (e).

A testifying expert is an expert who may be called to testify as an expert witness at trial. T.R.C.P. 192.7(c). Testifying experts may be retained or non-retained and different discovery rules apply depending on whether the expert is retained.

A retained testifying expert is an expert who is retained by, employed by, or otherwise subject to the control of the party. A non-retained expert is an expert who is not retained by, employed by, or otherwise subject to the party's control. Although there is no case law directly on point, treating physicians are seldom under a party's control and are often hostile to being called as a witness. They are probably therefore not "retained testifying experts."

## IV. DIGGING FOR DIRT

Lawyers on both sides know that juries do not believe experts who have an agenda, a bias or a difficulty in telling the truth. It is essential that you dig for dirt on the defendant healthcare provider, the defendant's experts and your own experts as well.

A. Prior Inconsistent Statements.

1. Previous testimony. Both plaintiff and defense lawyers have access to deposition databanks. All available depositions should be reviewed prior to retaining your testifying expert and prior to deposing the defendant healthcare provider and the defendant's experts. Send emails to colleagues to find additional depositions and information concerning all of the experts and defendant healthcare providers.

2. Publications. Obtain a list of all published articles by all of the experts and read them all. A listing of publications may be obtained from the expert's curriculum vitae or by searching their name on PubMed, NIH Library online and other resources.

3. Websites. Locate and print every page of the expert's website. If there is a "links" button on the expert's website, download the relevant links and publications. If the doctor intended his own patients to rely on the information found through links on his or her website, he or she will be hard pressed to tell the jury that the information on the links is unreliable or false.

4. Professional societies, associations and certifying bodies.

5. Texas Board of Medical Examiners' website.

6. Texas Board of Nurse Examiners' website.

B. Investigate the defendant healthcare providers and expert witnesses personal life as well as their professional life. Doctors are human. Their personal lives are entwined with all of the sticky and gooey things of life that all people may experience from time to time. Just like lawyers, substance abuse is rampant in the medical profession as well. Some sources of personal dirt:

1. General

- Google
- Local news archives
- Driver license/auto registration
- People searches

2. Courthouse

- Criminal records
- Assumed name records
- Civil records (prior lawsuits, pleadings, etc.)
- Bankruptcy
- Divorces - you might be surprised what an ex-spouse will tell you!
- Ex-employees, competitors and even the florist/liquor store near the office might have goodies to share.

## V. EXPERT COMPENSATION

Discuss the fee and expense arrangement at the very beginning. Most experts will provide a listing of their fees and expenses. The important thing is to make an agreement as to the fee and expense schedule and stick to it. Disagreements with your experts on payment of fees and expenses is not ever helpful. Prompt payment of invoices will eliminate conflicts. Sometimes experts will agree to work on a flat fee basis for either the entire case or specific work. These arrangement avoid the "surprise invoice" when you receive a bill for 20 hours of review of records and depositions when you expected the task would have been accomplished in 5 hours. Flat fee agreements also allow you to better budget the case expenses.

Be mindful of the potential impact of compensation on the jury. One of the concerns that the jurors may have is the amount of money being paid to the expert and how it might affect the expert's objectivity. Never make payment of expert fees contingent on the outcome.

## VI. WHAT TO SEND AND WHAT NOT TO SEND THE EXPERT

A. Medical Records. A complete and unaltered set of all relevant medical records must be sent to the expert. When the records are received in your office, review the originals for completeness and determine whether the records were produced in a logical order. For example, hospital records should be organized so that all physician orders, progress notes, nursing notes, etc. are together in chronological order. The original records are then copied and Bates-stamped. I like to copy records at 93% of the original so that when they are 3-hole punched, you don't put a hole in information. The Bates stamped copy is then scanned so that extra copies with Bates numbers can be printed in the future. A copy of the Bates-stamped records are then placed into 3-ring binder notebooks with tabs for each individual healthcare provider and subtabs for various parts of the chart. For example, H&P, discharge summary, progress notes, orders, etc. Duplicate notebooks are sent to the expert. I have found this method to be extremely useful because:

1. Well organized notebooks make it easier and faster for experts to locate information contained in the charts and;

2. When reviewing the case with the expert, the attorney and the expert can easily go to the same page.

B. Chronologies. We prepare chronologies from all of the medical records for each case. The chronologies are prepared in four columns:

1. Date/Time

2. Provider's name

3. Statements contained in the record verbatim with the page number referenced

4. Attorney notes and comments.

A copy of this chronology (with the attorney notes and comments redacted) can be sent to the expert for his or her use in locating information in the chart. The chronology will have to be produced in discovery responses. This same chronology may be marked as a trial exhibit and offered into evidence at the beginning of the case under Texas Rule of Evidence 1006.

C. Depositions. I believe in sending all deposition transcripts of witnesses whose testimony is relevant to the testimony of the expert. I do not routinely send, for example, depositions of damages witnesses only to experts who testify on liability issues only.

## VII. PREPARING THE EXPERT FOR DEPOSITION AND TRIAL TESTIMONY

Expert witnesses have the same fears as lay witnesses. They are afraid that they will screw up. They are afraid that they will not be able to get their point across. They are afraid that they will be destroyed on cross examination. Recognize that fear is natural and healthy. Thorough preparation of the witness will reduce the level of fear to a manageable level, thereby enabling the witness to be more persuasive to the jury. Here is a checklist of topics to cover:

### A. Effectiveness of Communication: Common Problems

#### 1. Credibility and Likability

- Likeable appearance
- Eye contact
- Excessive gestures
- Extreme change in pitch or rate of speaking
- Body language

#### 2. Defensive/argumentative

- Witness wants to argue the case
- Witness anticipates where opposing counsel is going with a line of questioning
- Witness wants to explain every answer rather than simply answer the question.
- Witness wants to control the situation by trying to "explain" their answer. The witness can maintain control more readily by simply answering the question.

#### 3. Nervousness

- Everybody is nervous.
- In the eye of the jury or opposing counsel however it is difficult to tell the difference between nervousness, stage fright and deception.

#### 4. Shyness

- Similar to nervousness.
- Bowed head
- Eyes fixed on the floor
- Hands nervously clutched in a lap

- Soft voice
- Very brief answers.
- These communicate deception as well as shyness to both the jury and opposing counsel.

**5. Poor listening**

- Causes of poor listening:
  - Stage fright
  - More interested in telling your story rather than answering questions.
  - What it communicates to the jury:
    - Avoidance of the question/issue-jury wonders "Why does this witness not want to talk about this? There must be something bad here."
    - Will get you in trouble with the judge for being "non-responsive."

**6. Too talkative**

- A single sentence question fills up a page of transcript.
- This makes opposing counsel very happy.
- Witnesses become too talkative because they think that an expansive answer will cause the opposing counsel to agree and simply stop asking questions. The opposite will happen.

**7. Boring**

- Jurors who will not listen will not be persuaded.
- Witnesses who are interesting and lively have a lasting positive impact on a jury.
- Boring witnesses are ineffective and detract from the rest of the trial.
- See channels of communication below on how to avoid being boring.

**B. Channels of Communication**

There are three channels of communication when two people are having a face-to-face communication: examples, personal one-on-one, witness and jury, witness and opposing counsel.

**1. Visual/Nonverbal/Body Language**

- Facial expressions
- Body language
- Posture
- Movement
- Lack of movement
- Clothes
- Can't you always tell what somebody is feeling or what their opinions and thoughts are simply by looking at them?

**2. Paralinguistic/Nonverbal/Sound**

- Volume of speech
- Rate of speech
- Frequency of pauses

- Patterns of speech

- Somebody who stutters or has a difficult time searching for the word. Somebody who speaks very slowly and deliberatively or someone who speaks rapid fire. Someone who yells-someone who whispers. All of these communicate a message.

**3. Words/Verbal**

- Message: the message that the listener receives is based 50 % on the visual/nonverbal/body language part of communication, 40 % on the paralinguistic cues through the speaking voice and about 10 % actually comes from their actual words spoken.

**C. Expert Witnesses:**

1. Have a thorough appreciation and understanding of the records and documentation-look at the record to find the answer. Don't guess.

2. Do not express opinions beyond your training, education and expertise.

3. Be familiar with literature.

4. Understand the difference between scientific and legal approaches to proof**:**

   - Medicine-looks for scientific certainty.
   - Law-deals with medical probability.

**5. Standard of care**

- Medical experts sometimes believe "standard of care" means:

  - What the majority of physicians would do.

  - Standard of care is what "good, safe practice requires."

  - It is not a "poll taking" standard.

  - It is what a "reasonable and prudent" physician who is practicing good safe medicine would do under the same or similar circumstances.

- Definition of negligence.

- Definition of ordinary care.

- Definition of proximate cause.

- Definition of preponderance of the evidence.

**6. Qualifications**

- Practical and clinical experience with this particular issue or procedure or disease.

  - Patients who were of similar sex, age and underlying medical condition.

  - Special training.

  - Research participated in.

  - Articles authored.

  - Consultation s requested by other doctors.

**7. The expert's assignment:**

- Nature and scope of assignment:

review the materials provided, help the parties and the jury understand medical/nursing issues and offer opinion to the parties and the jury.

- Although counsel discussed generally the facts and the nature of the issues on first contact, no opinions were formulated until after review of the record. "The opinions are mine."

- The report:

  - Draft was prepared and sent to counsel to see if the issues were sufficiently addressed and all issues requested to be addressed were addressed.

  - The report is a fair summary of the opinions held in this case:

    - If asked about other matters not contained in the report would be willing to offer those opinions to either side if I felt I was qualified and had sufficient information.

**8. Basis of opinion**:

- General: the records, material and depositions reviewed. Experience and training in this area. Literature- provide literature to counsel in advance of deposition. Be aware of literature that is not supportive of your opinion. You may be cross-examined on literature that you consider to be "authoritative." Distinguish between "authoritative" literature and reference material and guidelines.

- Opinions are based on the specific facts and circumstances of ***this particular case.*** Caution: defense lawyer may ask a question as follows:

Question: Would you agree in general that not every patient who has chest pain needs to be admitted to rule out myocardial infarction?

Question: Would you agree with me that not every patient who has a morphine pump is required to have a pulse oximeter.

- Potential responses:

I generally agree that not every patient who has chest pain needs to be admitted to rule out myocardial infarction, however every patient who presents with chest pain that is new in onset, brought on by stress or exercise and relieved by rest must be admitted to rule out myocardial infarction because a single EKG or a single cardiac enzyme will not rule out a life-threatening condition.

I don't know about "most patients" but patients receiving this amount of opiate who exhibit signs and symptoms of opiate toxicity are at an increased risk for respiratory suppression and unless the nurse can be at the bedside observing the patient each and every moment then good safe nursing practice looking out for the best interest for the patient's safety requires a pulse oximeter.

**9. Would you defer to _____? If Dr.**

**_____ said _____ would you disagree?**

- Defense lawyers trying to get you to agree with the opposing view of another doctor who may very well be a treating physician.

- Whether you would defer to someone else or agree or disagree with someone else depends on what they say and what the basis of their opinion is.

- You would not blindly agree with the unknown opinion of another.

- You would not blindly agree with an opinion that someone else supposedly holds without knowing the full basis for that opinion.

**10. Two opinions can be right.**

Isn't it possible that another reasonable and prudent registered nurse/medical doctor could disagree with what you are saying? If another expert in this case offers a different opinion are you saying that they are wrong and you are right?

- Yes.

**11. Opinion on the "rare event" possibility:**

Is it true that _____ can also cause _____.

Rarely. It has been reported but the chances of it occurring remind me of the scene in *Dumb and Dumber* when Jim Carrey asks the girl "What are the chances we will end up together at the end of the evening?" and she says "One in a million." *and he says "...so there's a chance."*