

Circuit Court V. Federal Court

Expert Selection, Preparation, and Care



Karl J. Protil

Aside from case selection, the next most important controllable aspect of your case is the selection, preparation, and care of your expert. The purpose of this article is to discuss the multifaceted aspects of not only selecting an appropriate expert, but also what you do after the selection process. This article will examine the legal requirements of expert selection in both Maryland Circuit and Federal Courts, and the practical aspects of choosing your expert.

Circuit Court Rules

Because a mountain of books have been written on selection of experts and there are as many recommendations on how to choose as there are books, the easiest topic to examine are the Circuit Court rules which govern experts. To sum it up, there are very few rules which regulate or limit your ability to hire an expert of your choice. The jury instruction states:

"An expert is a witness who has special training or experience in a given field. You should give expert testimony the weight and value you believe it should have. You are not required to accept any expert's opinion. You should consider an expert's opinion together with all the other evidence."

As long as your expert can show they have special training and experience in a given field, they may testify and your case should get to the jury. As many of you know, it is not that simple and there are many potential pitfalls along the way. The instruction is only a starting point because, as a practical matter, almost any expert should be able to show that they have the requisite training, experience, and background to give standard of care or practice opinions against the defendant if you have done any screening at all. What the jury instruction does not say, but what you should add to it, is one very important qualification for your expert: the ability to communicate. Even if your expert is the most knowledgeable in the world, yet cannot communicate effectively, you have chosen poorly.

Health Claims

Experts in medical malpractice cases have to meet additional foundational requirements because you must file your case first with the Health Claims Alternative Dispute Resolution Office (HCADRO) prior to filing in Circuit Court. One of the requirements in HCADRO is that you file a Certificate of Merit and Report from your expert. Courts and Judicial Proceedings §3-2A-02 sets forth the statutory requirements for your certifying expert. In HCADRO, should the respondent/defendant be board certified, your expert must be in the same or related field and also be board-certified.

In addition, the certifying expert must have clinical experience, provide consultation relating to that clinical practice, or have taught medicine in the defendant's specialty or related specialty within five (5) years of the date of the negligent act. *See* Courts and Judicial Proceedings §3-2A-02(c). While the requirements of the Certificate of Merit and Report are well beyond the scope of this article, your certifying expert must meet the specifics of the statute as a prerequisite to having met the jurisdictional requirements of HCADRO and having filed a proper report.

You now have the sum total of all the Circuit Court and HCADRO rules governing experts.

Federal Court Rules



The same rules cited above apply to experts in Federal Court. In Federal Court, however, your expert must provide a written report and list their deposition and trial testimony during the previous four (4) years. Keep this in mind when you choose an expert as many do not keep such a list and may be reluctant or unable to put one together. Because Federal Court judges are more likely to entertain Frye-Reed challenges to the experts' opinions because of their perceived role as a gatekeeper, make sure those opinions are supported accordingly with proper foundations.

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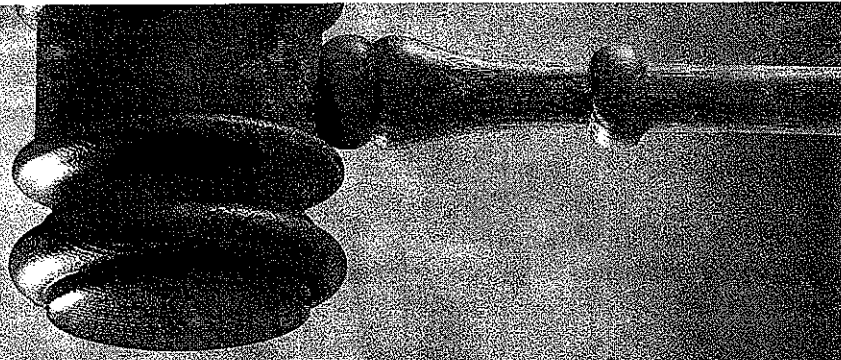
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Before proceeding in Federal Court, you should review Federal Rule of Evidence 702, 703, 704, and 705. Pay close attention to Federal Rule of Civil Procedure (FRCP) 26(a) (2) as it controls disclosure of expert testimony and the contents of their written report.

Common Sense Rules for Selection, Preparation, and Care of Your Expert

Selecting your expert based on a host of common sense rules will insure that your case is successful. Below are some of the rules that I follow whenever I engage an expert:

1. Interview the expert, review their C.V., do a Google search, and ask the appropriate screening questions. Experts are busy people. Be prepared to give them a 30-second overview of your case. Identify yourself and tell them that you represent the patient. Believe it or not, many experts will not want to help you and it's better to find that out right away. Here are the questions I ask:
 - Ask if they know the defendant?
 - Ask if they perform the procedure which is the basis of the lawsuit? How long? How many? Has what happened here ever happened to you?
 - Ask for their prior testimony as an expert. See who it has been for – plaintiff or defendant?
 - Ask for their fee schedule.
 - Ask if they belong to any expert witness services?
 - Tell them where the case is taking place. Would it be a problem traveling there for trial in the event it

gets that far?

- Ask if they have ever written on the topic? If so, read *all* of those articles before you engage them.
- Try to find out what they think of your case based on your 30-second summary. Get them to explain their reasons to you.
- Be a name dropper. Talk about other attorneys in the field to see if the expert knows them. Talk about other experts in their field to see if they have any thoughts on that person.
- Ask if they have ever been sued? Try to get their philosophy about lawsuits. Most will tell you without asking.
- Ask if they have ever failed to qualify as an expert?
- See if there is anything in their background that you should know about, such as suspensions, loss of privileges, or censures?
- See if they are they relocating or traveling anytime soon?
- Ask if there is anything they would like to know about you or your firm?

The purpose of the interview is to get honest answers to the questions, but also to evaluate the expert. Think of it as a mini-deposition and listen carefully to their answers. If the expert gets into their philosophy about lawsuits, listen to what they tell you. It will give you great insight into problems that may develop later in the event you engage the witness. If they believe the frivolous

lawsuit fairytale, then that expert is more likely to collapse under pressure at deposition or talk themselves out of the case even after agreeing to support you. If the expert talks about being hesitant to travel during the interview process, they are less likely to show up for trial. If the expert charges a flat fee for their deposition, anticipate a fight with defense counsel and a hostile judge in the event that issue gets litigated. While the interview is extremely important, it can be done in 5-10 minutes as long as you are prepared.

If you decide to engage the expert, always offer to send a retainer and get their tax i.d. number or social security number to show you are serious about engaging them. At the end of the call, always thank the expert for taking your call and for taking the time to speak with you. The interview is a two-way street and, just as you are evaluating them, they are deciding whether they want to work for you. Let them know how serious you are and make them want to work for you.

2. Many experts are very busy people and they have gatekeepers who can be very difficult to get around. By gatekeeper, I mean a secretary or administrative assistant who manages the expert's calendar. When you make the initial call, ask who is designated to handle medical-legal matters within the office. When you speak with the gatekeeper, identify who you are and which party you represent. Be prepared to give that person your best 2 or 3 sentence summary of your case. Those 2 or 3 sentences should be designed to have that person say "That

shouldn't have happened." If you are able to engender that feeling, you will likely move to the front of the line as that gatekeeper will be in a position to advocate for your case.

If the assistant tells you that the expert you are calling does not testify, ask if anyone in the office does. If so, ask the assistant's opinion of whether or not that person is a good teacher and whether they come across well. I am able to get this information almost every time I ask. The assistants likely have strong opinions that they are never asked to express, and many seem to find it liberating to be asked their opinions.

3. Experts are not like life rafts. In other words, don't cling to one just because they support your case. If it is a good case, you will find others, so if your expert becomes difficult, drop them and move on. You will be glad that you did so.
4. As the plaintiff, you have the advantage of selecting your experts before the defendant. Choose wisely and prepare your experts long before your designation is due. Do not put your expert under short deadlines. They may comply, but the product you get may be lacking. Give your experts your deadlines long before they arrive as they will appreciate the courtesy and will be a better advocate for your case. There is really no excuse to arrive at the eve of a deadline and put your expert under the gun.
5. Just as Noah did, try to have two experts in most fields. There is solace in having two different experts because they will come to the case with a different perspective and background. In addition, at trial you double the chance that the jury will like and understand your case.

After you conduct your research on the defendant and his background, try to get one expert who has a background and practice similar to the defendant's. I like my second expert to come from a university or large hospital. This way, your second expert is likely to be a teacher and should be able to communicate effectively.

6. Choose a good teacher over a more highly qualified expert who only speaks to show how smart he is. This may be the most important consideration in selecting an expert. Remember that your audience is the jury and the expert must be able to teach and speak in understandable terms. Look for an expert who can use real life examples that ordinary people will understand. When you interview the expert, listen to see if they speak to you in understandable common sense language. If they do, you likely have a good expert who can explain your case to the jury. Remember that the expert is there to communicate your case to the jury in language the jury can understand. If they are unable to do this, look for an expert who can.
7. When you send material to your expert, it should be organized, paginated, and easy to use. Send a copy of your complaint and other pleadings, if appropriate, so they will better understand your case, as well as the defense. Make sure the expert understands the definition of legal terms such as standard of care and knows the standard for competent opinions in the jurisdiction where your case is

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filed. I recommend that you show your expert applicable jury instructions so there is no misunderstanding. If you need a report, tell the expert early. Let them know what material is discoverable and what they will be called upon to produce as that may impact what material goes into their file.

When you get additional records, supplement the expert's file and make sure to send all depositions to the expert as well. When in doubt, be overly inclusive so the expert cannot be accused of failing to review material. If you send records that will have little or no bearing on the expert's opinions, call the expert and tell them what you are sending so they do not waste time and money reviewing those records.

8. Once you have hired the expert and they have agreed to support the case, take care of them. Ask them to send their bill and pay it in a timely fashion. Give them plenty of notice for their deposition and trial and send them the deposition notice well before the deposition is to take place. If they charge a flat fee for their deposition and require prepayment, pay it. You should have determined this during the interview and it should be no surprise. If you have an expert who charges a flat fee for their deposition, get an agreement up front with opposing counsel that both parties will pay no more than \$500 an hour. Pay the expert and have opposing counsel send the agreed upon hourly rate reimbursement directly to you. Experts hate to chase attorneys for money and the easier you make this aspect of the case, the more they will appreciate you. The more they appreciate you, the harder they will work for your client.
9. When the case has concluded, send the expert a thank you letter letting them know the case has concluded. Inform them that the records can be destroyed. After all, if you have done things right, the expert will have worked very hard on the case and they have a real desire to see the result of their hard work.

The guidance set forth will not guarantee success, but it should help you to select effective experts and make the presentation of your client's case much easier. It will foster a bond between you and the expert and make them want to help you in the future. It will make them a more effective witness and they will feel like an integral part of the team. After all, life is a two-way street. If you treat others with respect and importance, they will likely do the same to you and that will insure your client's success. □

Biography

Karl J. Protil's practice consists of personal injury litigation, with an emphasis on medical malpractice and claims against the federal government. He has extensive experience before federal courts through the United States and in state trial courts in Maryland, Virginia and the District of Columbia. He is particularly active in cases involving brain damage to infants during birth. Prior to joining *Shulman, Rogers, Gandal, Pordy & Ecker, P.A.*, Mr. Protil spent six years in the Army Judge Advocate General's Corps and a year with Medical Mutual Liability Insurance Society of Maryland.

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