

The "Expert For Sale"

An Actual Client Call

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The following is a true account of an actual call made by a prospective client (as always, names and details are omitted in order to protect the identity and confidentiality of the caller!):

I received a call from a gentleman that wanted to pursue a malpractice case against a hospital in central Texas.

“Can you tell me what happened?” I asked.

He explained that he went into the hospital’s emergency room on a particularly hot summer day, because he felt woozy, light-headed, and dehydrated. He was describing what might have been the classic symptoms of heat sickness, or possibly heat stroke.

After he was admitted into a room and his vital signs were checked, he complained that he was left alone in the room and that no one attended to him for close to half an hour. The next thing he knew, he fell asleep.

When he woke up, he was attended by a nurse, and then discharged from the hospital. But, he complained, ever since that day he had been having trouble with fogginess in his head, disorientation, and short-term memory lapses. He believed strongly that he should not have been left alone in his room in the hospital, otherwise he would not have ‘blacked out’ and would not be suffering his current symptoms.

“Did you go to see another doctor for these symptoms?” I asked.

“Yes,” he replied.

“Did that doctor diagnose the cause of your symptoms?”

“Well, he’s a psychologist. He’s a friend of mine.”

I was puzzled. “Okay, you have a friend who’s a psychologist. But have you gone to any doctor to diagnose your current symptoms?”

“No, but my friend is willing to testify about it.”

I began to see where this was going. “You mean, your friend can testify that because you were left alone, you blacked out, and that’s what is causing your symptoms?”

“Yeah,” the man eagerly replied. “He can say whatever you want him to say!”

I promptly terminated that call and, it goes without saying, did not take the case. While this is the kind of story that is fun to tell, some serious words do need to be said about the idea of using a testifying expert who will “say whatever you want him to say.”

There are some types of cases that require expert testimony in order for the plaintiff to meet his burden of proof on the issues of liability and damages. In such cases, without an expert, the plaintiff’s testimony alone is not sufficient evidence to put these issues in front of a jury.

For example, in medical malpractice cases, the testimony of a medical expert is required in order to establish that the defendant doctor’s medical care fell below the accepted standard within that particular specialty, and that it was that below-standard care that proximately caused the plaintiff’s injuries and damages.¹ Only expert testimony can establish malpractice in these types of cases; Texas law explicitly states that a jury finding of malpractice cannot be made based simply on the fact that there was a bad medical outcome.²

Also, in product liability cases, where the plaintiff has been injured by a defective product and is seeking recovery from the product manufacturer or seller, expert testimony is required on certain issues. For instance, if the plaintiff intends to prove that the product was defectively designed, he must establish by expert testimony that there was a “safer alternative design” for the product, which means the expert must provide credible testimony that meets a rigorous two-part test under Texas law.³

A witness must meet high standards in order to qualify as an expert before the court.⁴ As you can imagine, experts are people who have specialized education and training, and have become very distinguished in their fields. Naturally, because of their credentials and their importance in these types of cases, experts tend to charge a premium for their time in reviewing cases, preparing reports, and testifying at deposition or trial.

The crucial point to remember is that a good plaintiff’s attorney is paying the expert for the expert’s time spent in preparing and delivering the opinion. The attorney is not paying for the opinion itself. The expert who will testify to any opinion you need for the “right price” may be a common character in movies and sitcoms, but has little basis in the reality of legal practice.

Such an “expert’s” credibility would be easily undermined by any capable defense attorney who could cross-examine the expert on the specific technical or scientific support for the opinions being given. The defense attorney could also obtain transcripts of other trials in which that expert has testified. When the expert’s credibility is destroyed because of obvious bias, particular professional affiliations, or especially previous inconsistent testimony, the only person the jury can punish is the plaintiff — with a zero verdict!

Finding and retaining a qualified, credible expert witness who can review all the evidence in the case, and render a solid opinion backed by the relevant science in the field, is a very careful and crucial process in these types of cases. An experienced and capable attorney will know how to engage in that process.

Conclusion: the “expert” who will say anything for the right price will end up costing you in far more ways than just his bill!

Any questions or comments about this article?
Have a case related to this topic that you’d like to discuss?
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REFERENCES:

¹ Texas Civil Practice & Remedies Code Sec. 74.351.

² Texas Civil Practice & Remedies Code Sec. 74.303(e)(2) specifically requires that a jury in a medical malpractice case be given the following instruction, in part: "A finding of negligence may not be based solely on evidence of a bad result to the claimant in question...."

³ Texas Civil Practice & Remedies Code Sec. 82.005(b) requires that in order to prove there was a "safer alternative design" for a product, an expert must show that (1) an alternative design would have either prevented or substantially reduced the risk of harm to the plaintiff, without making the product substantially unusable, and (2) the alternative design was both technologically and economically capable of being produced at the time, given the state of existing technology and science in that particular field.

⁴ Texas Rules of Evidence 702 through 705.